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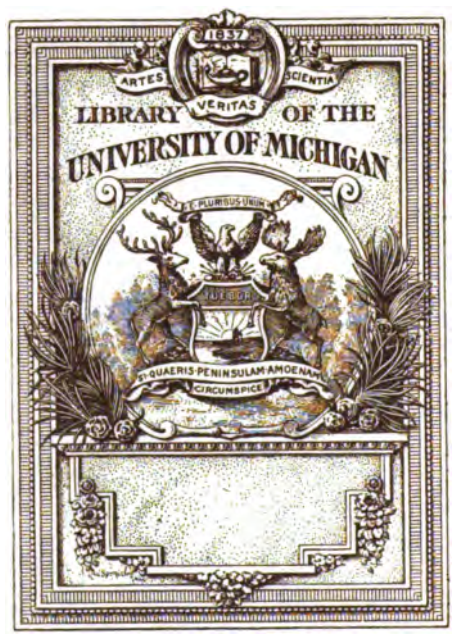
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U. S. Supreme court

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

1801-1808

1, 2, 3, 4 Cranch,

BOOK 2,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LLD.

WITH

"NOTES ON U. S. REPORTS"

BY

WALTER MALINS ROSE.

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PREFACE TO SECOND EDITION.

THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.

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OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN AUGUST AND DECEMBER TERMS, 1801,

AND

FEBRUARY TERM, 1803.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. 1.

BY WILLIAM CRANCH,

Assistant Judge of the Circuit Court of the District of Columbia.

SECOND EDITION.

REVISED AND CORRECTED BY THE AUTHOR.

VOL I.

PREFACE.

MUCH of that *uncertainty of the law*, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.

Many of the causes, which are the subject of litigation in our courts, arise upon circumstances peculiar to our situation and laws, and little information can be derived from English authorities to lead to a correct decision.

Uniformity, in such cases, cannot be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment cannot be maintained if its adjudications are suffered to be forgotten. It is therefore much to be regretted that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.

One of the effects, expected from the establishment of a national judiciary, was the uniformity of judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, cannot need an apology; and perhaps none can be given for the inadequate manner in which that attempt has been executed. It has been the endeavor of the Reporter to give a faithful summary of the arguments of counsel. To do them complete justice he acknowledges himself incompetent. In no instance, perhaps, has he given the words in which the ideas were conveyed, as his attention was almost entirely occupied in collecting the point of the argument. He may have omitted ideas deemed important, and added others supposed to be impertinent; but in no case has he intentionally diminished the weight of the argument. It may possibly be alleged that he has introduced into the reports of some of the cases more of the *record* than was necessary. If he has erred in this, he has been led into the error by observing that many of the cases in the books are rendered useless by the want of a sufficient statement of the case as it appeared upon the record; and he imagined it would be a less fault to insert too much, than to omit anything material.

He has been relieved from much anxiety, as well as responsibility, by the practice which the Court has adopted of reducing their opinion to writing, in all cases of difficulty or importance; and he tenders his tribute of acknowledgment for the readiness with which he was permitted to take copies of those opinions.

He is indebted to Mr. Caldwell, for his notes of the cases which were decided prior to February term, 1803, without the assistance of which he would have been unable to report them, as his own notes of those cases, not having been taken with that view, were very imperfect.

He also feels his obligation to those gentlemen of the bar, whose politeness has prompted a ready communication of their notes, which have enabled him more correctly to report their arguments.

Should an apology be deemed necessary for the liberty he has taken in his notes to some of the cases reported, that apology exists in a wish candidly to investigate the truth. In doing this in a respectful manner, he does not feel conscious of giving cause of offence to liberal and candid minds.

If the fate of the present volume should not prove him totally inadequate to the task he has undertaken, it is his intention to report the cases of succeeding terms.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

I.—1790, FEBRUARY 3.

ORDERED, That John Tucker, Esq., of Boston, be the clerk of this court.

That he reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counselor in this court, while he shall continue to be clerk of the same.

II. —1790, FEBRUARY 5.

ORDERED, That (until further orders) it shall be requisite to the admission of attorneys, or counselors, to practice in this court, that they shall have been such for three years past in the Supreme Courts of the state to which they respectively belong, and that their private and professional character shall appear to be fair.

III.—1790, FEBRUARY 5.

ORDERED, That counselors shall not practice as attorneys, nor attorneys as counselors, in this court.

IV.—1790, FEBRUARY 5.

ORDERED, That they shall respectively take the following oath, viz., "I , do solemnly swear, that I will demean myself (as an attorney or counselor) of the court, uprightly, and according to law, and that I will support the constitution of the United States."

V.—1790, FEBRUARY 5.

ORDERED, That (unless and until it shall otherwise be provided by law) all process of this court shall be in the name of the President of the United States.

VI.—1791, FEBRUARY 7.

ORDERED, That the counselors and attorneys, admitted to practice in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on that subject, made February term, 1790, viz. "I , do solemnly swear (or affirm as the case may be) that I will demean myself, as an attorney, or counselor of this court, uprightly, and according to law, and that I will support the constitution of the United States."

VII.—1791, AUGUST 8.

The Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII.—1795, FEBRUARY 4.

The Court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case from the counsel on each side of a cause.

IX.—1795, FEBRUARY 17.

The Court declared that all evidence on motions for a discharge upon bail must be by way of deposition, and not viva voce.

X.—1796, AUGUST 12.

ORDERED, That process of subpœna issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed ex parte.

XI.—1797, FEBRUARY 13.

IT IS ORDERED, by the Court, that the clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII.—1797, AUGUST 7.

IT IS ORDERED, by the Court, that no record of the court be suffered by the clerk to be taken out of his office but by the consent of the court; otherwise to be responsible for it.

XIII.—1800, AUGUST 15.

In the case of Course v. Stead's Executors.

ORDERED, That the plaintiff in error be at liberty to show to the satisfaction of this court, that the matter in dispute exceeds the sum or value of 2,000 dollars, exclusive of costs; this to be made appear by affidavit, on days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

XIV.—1801, AUGUST 12.

ORDERED, That counselors may be admitted as attorneys in this court on taking the usual oath.

XV.—1801, DECEMBER 9.

IT IS ORDERED, That in every cause where the defendant in error fails to appear, the plaintiff may proceed ex parte.

XVI.—1803, FEBRUARY TERM.

IT IS ORDERED, That where the writ of error issues within 30 days before the meeting of the court, the defendant in error is at liberty to enter his appearance and proceed to trial; otherwise the cause must be continued.

XVII.—1803, FEBRUARY TERM.

In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

XVIII.—1803, FEBRUARY TERM.

In such cases where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

FROM THE TIME OF ITS FIRST ESTABLISHMENT, WITH THE DATES OF THEIR COMMISSIONS.

JOHN JAY, *Chief Justice,*	26 September,	1789.
WILLIAM CUSHING, *Associate Justice,*	27 September,	1789.
JAMES WILLSON, " "	29 September,	1789.
JOHN BLAIR, " "	30 September,	1789.
JAMES IREDELL, " "	10 February,	1790.
THOMAS JOHNSON, " "	7 November,	1791.
WILLIAM PATERSON, " "	4 March,	1793.
JOHN RUTLEDGE, *Chief Justice,*	1 July,	1795.
SAMUEL CHASE, *Associate Justice,*	7 January,	1796.
OLIVER ELLSWORTH, *Chief Justice,*	4 March,	1796.
BUSHROD WASHINGTON, *Associate Justice,*	20 December,	1798.
ALFRED MOORE, *Associate Justice,*	10 December,	1799.
JOHN MARSHALL, *Chief Justice,*	31 January,	1801.
WILLIAM JOHNSON, *Associate Justice,*	March,	1804.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE,

The Honorable WILLIAM CUSHING,
The Honorable WILLIAM PATERSON,
The Honorable SAMUEL CHASE,
The Honorable BUSHROD WASHINGTON, AND
The Honorable ALFRED MOORE,
} ASSOCIATE JUSTICES.

LEVI LINCOLN, ESQUIRE, ATTORNEY GENERAL.

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Supreme Court of the United States.

1*] *August, 1801.

SILAS TALBOT v. HANS FRED. SEEMAN.

Salvage allowed to a United States ship of war, for the recapture of a Hamburgh vessel out of the hands of the French, (France and Hamburgh being neutral to each other,) on the ground that she was in danger of condemnation under the French decree of 18th January, 1798. The United States and France, in the year 1799, were in a state of partial war.

To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.

Probable cause is sufficient to render the recapture lawful.

Where the amount of salvage is not regulated by positive law, it must be determined by the principles of general law. Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof.

Municipal laws of foreign countries are generally to be proved as facts.

THIS was a writ of error to reverse a decree of the circuit court, which reversed the decree of the district court of New York, so far as it allowed salvage to the recaptors of the ship Amelia and her cargo.

The libel in the district court was filed November 5th, 1799, by Captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the Constitution, against the ship Amelia, her tackle, furniture and cargo; and sets forth,

1. That in pursuance of instructions from the President of the United States, he subdued, seized, &c. on the high seas, the said ship Amelia and cargo, &c. and brought her into the port of New York.

2. That at the time of capture she was armed with eight carriage guns, and was under the command of citoyen Etienne Prevost, a French officer of marine, and had on board, besides the commander, eleven French mariners. That the libellant has been informed that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called La Diligente, commanded by L. J. Dubois, who took out of her the captain and crew of the Amelia, with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for adjudication, as a good and lawful prize; and 2*] that she remained in the *full and peaceable possession of the French from the time of her capture, for the space of ten days, whereby, the libellant is advised, that, as well by the law of nations, as by the particular laws of France, the said ship became, and was to be considered as a French ship.

Whereupon he prays usual process, &c. and condemnation; or, in case restoration should be decreed, that it may be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman, in behalf of Messrs. Chapeau Rouge & Co. of Hamburgh, owners of the ship Amelia and her cargo, stated, that the said ship, commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February, 1798, from Hamburgh on a voyage to the East Indies, where she arrived safe; that in April, 1799, she left Calcutta bound to Hamburgh; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge & Co. citizens of Hamburgh, and if restored she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel commanded by citizen Dubois, who took out the master and thirteen of her crew and all her papers, leaving on board the claimant, who was mate of the Amelia, the doctor, and five other men. That the French commander put on board twelve hands, and ordered her to St. Domingo, and parted from her on the fifth day after her capture. That on the 15th of September, the Amelia, while in possession of the French, was captured, without any resistance on her part, by the said ship of war the Constitution, and brought into New York. That the Amelia had eight carriage guns, it being usual for all vessels in the trade she was carrying on to be armed, even in times of general peace. That there being peace between France and Hamburgh at the time of the first capture, and also between the United States and Hamburgh, and between the United States and France, the possession of the Amelia by the French, in the manner and for the time stated in the said libel, could neither by the law of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship Amelia and her cargo, or make the same liable *to condemnation in a French court of ad- [*3 miralty; that the same could not, therefore, be considered as French property; wherefore, he prays restoration in like plight as at the time of capture by the ship Constitution, with costs and charges.

On the 16th of December, 1799, the district judge, by consent of parties, made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund in case the court should so decree; and that the clerk should retain the

Note.—*What is salvage; who is a salvor; rates of salvage*—see note, 8 L. ed. U. S. 846.

other half in his hands, together with all costs and charges, &c.

Afterwards, on the 25th of February, 1800, the judge of the district court made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship Constitution, to be distributed according to the act of congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the Amelia, or their agent.

From this decree the claimant appealed to the circuit court.

At the circuit court for the district of New York, in April, 1800, before Judge Washington and the district judge, the cause was argued by B. Livingston and Burr, for the appellant, and Harison and Hamilton, for the respondent; and, on the 9th of April, 1800, the circuit court made the following decree, viz.:

"That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales to Silas Talbot, commander, &c. and to the officers and crew of the said ship Constitution, is erroneous, and so far forth be reversed without costs; that is to say, the court considering the admission 4*] on *the part of the respondent; that the papers brought here by Jacob Frederic Engelbrecht, master of the said ship Amelia, prove her and her cargo to be Hamburgh property, and also considering that as the nation to which the owners of the said ship and cargo belong is in amity with the French republic, the said ship and cargo could not, consistently with the laws of nations, be condemned by the French as a lawful prize, and that therefore no service was rendered by the United States ship of war the Constitution, or by the commander, officers or crew thereof, by the recapture aforesaid.

"Whereupon it is ordered, adjudged and decreed by the court, and it is hereby ordered, adjudged and decreed by the authority of the same, that the former part of the decree of the district court, by which a moiety of the proceeds is allowed to the commander, officers and crew aforesaid, be and the same is hereby reversed.

"And the court further considering all the circumstances of the present case arising from the capture and recapture stated in the libel and claim and answer, and that by the sale of the said ship Amelia and her cargo, made with the express consent of the appellant, the costs and charges in this cause have nearly all accrued, and that therefore the expenses should be defrayed out of the proceeds; thereupon, it is hereby further ordered, adjudged and decreed by the court, that so much of the said decree of the said district court as relates to the payment, by the clerk, to the several officers of the court, and to the proctors of the libellant and claimant in this cause, of their taxed costs and charges, out of the other moiety of the said proceeds, and also of the residue of the said last-mentioned moiety, after deducting the costs and charges aforesaid, to the owner or owners of the said ship Amelia and her cargo, or to their legal representatives, be, and the same is hereby affirmed."

To reverse this decree the libellant sued out a writ of error to the Supreme Court, and, by consent of parties, the following statement of facts was annexed to the record which came up.

*"The ship Amelia sailed from Calcutta, [*5 in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufactory of that country, consisting of cotton, sugars, and dry goods in bales, and was bound to Hamburgh.

"On the 6th of September, in the same year, she was captured, while in the pursuit of her said voyage, by the French national corvette La Diligente, L. J. Dubois, commander, who took out her captain and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war.

"On the 15th of the same month of September, the United States ship of war the Constitution, commanded by Silas Talbot, Esq. the libellant, fell in with and recaptured the Amelia, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette.

"At the time of the recapture, the Amelia had eight iron cannon mounted, and eight wooden guns, with which she left Calcutta, as before stated.

"From such of the ship's papers as were found on board, and the testimony in the cause, the ship Amelia and her cargo appear to have been the property of Chapeau Rouge, a citizen of Hamburgh, residing and carrying on commerce in that place.

"It is conceded that the republic of France and the city of Hamburgh are not in a state of hostility to each other; and that Hamburgh is to be considered as neutral between the present belligerent powers.

"The Amelia and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return."

*The cause now came on to be argued at [*6 August term, 1801, by Bayard and Ingersoll, for the libellant, and Dallas, Mason and Levy, for the claimant.

For the libellant three points were made.

1. That at the time, and under the circumstances, the ship Amelia was liable to capture by the law, and instructions, to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States.

2. That Captain Talbot, by this capture, saved the ship Amelia from condemnation in a French court of admiralty.

3. That for this service, upon abstracted principles of equity and justice, according to the law of nations, and the acts of congress, the recaptors are entitled to a compensation for salvage.

1. Had Captain Talbot a right to seize the Amelia, and bring her into port for adjudication?

The acts of congress on this subject ought all

to be considered together and in one view. This is the general rule of construction where several acts are made in *pari materia*. Plowd. 206. 1 Atk. 457, 458.

The first act authorizing captures of French vessels, is that of 28th May, 1798. (Laws of United States, vol. 4, p. 120.) The preamble recites, that "whereas armed vessels sailing under authority, or pretence of authority, from the republic of France, have committed depredations on the commerce of the United States," &c., therefore it is enacted, that the president be authorized to instruct and direct the commanders of the armed vessels of the United States, "to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof; and also to retake any ship 7*] or vessel of *any citizen or citizens of the United States, which may have been captured by any such armed vessel."

The Amelia was "an armed vessel sailing under authority from the republic of France," and if she had committed, or had been found hovering on the coast for the purpose of committing depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of congress. This act is entitled "An act more effectually to protect the commerce and coasts of the United States;" and by it the objects of capture are limited to "armed vessels sailing under authority, or pretense of authority, from the republic of France, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations," &c. It was soon perceived that a right of capture, so limited, would not afford, what the act contemplated, an effectual protection to the commerce of the United States. Congress, therefore, on the 9th July, 1798, at the same session, passed the "act further to protect the commerce of the United States," (Laws United States, vol. 4, p. 163,) and thereby took off the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any "armed French vessel on the high seas," and if the Amelia was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of Captain Talbot to take her and bring her into port. Another act was passed at the same session, on the 25th June, 1798, (Laws United States, vol. 4, p. 148,) entitled "An act to authorize the defence of the merchant vessels of the United States against French depredations," which, as it constitutes a part of that system of defence and opposition which the legislature had in view, ought to be taken into consideration. It enacts, that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted "by the commander or crew of any armed vessel sailing under French colours, or acting, or pretending to act, by, or under the authority of the French republic;" and in case of attack may repel the same, and subdue and capture the vessel. The court, *in construing any one of these laws, will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature. It is evident by the title of the act of July 9, 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of congress, by the act of July 9, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of congress rose with that of the people. It cannot be supposed that having in May used the expression, "armed vessels sailing under authority, or pretense of authority, from the republic of France," and in June the expression, "any armed vessel sailing under French colours, or acting, or pretending to act, by, or under the authority of the French republic," they meant to restrict the cases of capture, in July, when they used the words "any armed French vessel." On the contrary, the confidence in the national opinion was increased, and further measures of defence were adopted, intending not to recede from anything done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. "Armed vessels sailing under authority, or pretense of authority of France," and "armed vessels sailing under French colours, or acting, or pretending to act, under the authority of the French republic," and "armed French vessels," must be understood to be the same. [*8

If there is a difference no reason can be given for it. A vessel, in the circumstances of the Amelia, was as capable of annoying our commerce as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which congress had authorized. Congress have the power of declaring war. They may declare a general war, or a partial war. So it may be a general maritime war, or a partial maritime war.

*This court, in the case of Bass and Tingey, have decided that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the Amelia is a *casus belli;* whether she was an object of that limited war. The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if congress had authorized the capture of all French vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose the Amelia had captured an American, by what nation would the capture be made? by Hamburgh, or by France? There can be no doubt but the injury would be attrib- [*9

uted to France. She was under French colours, armed, and to every intent an object of the partial war which existed; and, if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps it may be said that this proves too much, and that, if true, the Amelia must be condemned as prize. This would be true if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration. It is only necessary now to show that the capture was so far a lawful act as to be capable of supporting a claim of salvage. At first view she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least for further examination. He had probable cause, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of congress.[1]

10*] *The act of July gives no new authority to recapture American vessels; it only gives to private armed vessels the same right which the act of May gives to the public armed vessels, to make captures and recaptures. But the act of May only authorizes the recapture of American vessels, "which may have been captured by any such armed vessel," *i. e.* by armed vessels sailing under authority from the republic of France, and which shall have committed, or be found hovering on the coasts for the purpose of committing, depredations on our commerce." Yet the instructions from the president were to recapture all American vessels. These instructions show the opinion of the executive upon the construction of the acts of congress, and for that purpose they were offered to be read.

The counsel for the claimant objected to their being read, because they were not in the record.

The counsel for the libellant contended they had a right to read them as matter of opinion, but did not offer them as matter of fact.[2] The Court refused to hear them.

2. The second point is, that a service was rendered to the owners of the Amelia, by the 11*] recapture, inasmuch *as she was thereby saved from condemnation in a French court of admiralty.

To support this position, the counsel for the libellant relied on the general system of violation of neutral rights adopted by France.

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the recapture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts of the captors, recover damages and costs for the illegal capture and detention.

The principle upon which the circuit court decided is not denied; but it is contended that a service was rendered by the recapture. To show this, the counsel for the libellant offered to read the message from the president to both houses of congress, of the 4th May, 1798, containing the communications from our envoys extraordinary at Paris to the department of state, and sundry arrets and decrees of the government of France, in violation of neutral rights, and of the law of nations; and particularly the decree of the counsel of five hundred of 29th Nivose, an 6, (Jan. 18, 1798), which declares, "that the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise the production of England, or of her possessions, shall be declared good prize, whoever the owner of these goods or merchandize may be."

The counsel for the claimant objected to the reading of those dispatches, because they were matter of fact. No new fact can be shown on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the act of congress, vol. 1, p. 60, 61, a state of the case must come up with the record; and is conclusive on this court. 3 Dal. 321. *Wiscart v. Dauchy.* Ib. p. 327. Ellsworth, Chief Justice, said, a writ of error removes only matter of law. Arrets and decrees of foreign governments are matters of fact, and must be proved as such, and the court cannot notice them unless shown in the *pleadings, ad- [*12 mitted or proved. 1 P. Wms. 429, 431. *Freemoult v. Dedire.* Doug. 557. *Bernardi v. Motteux.* The same case in the 2d edition, p. 575–579. In that case the court could not take notice of the arret of July, 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 Bl. Com. 405, (Williams's edit. 407.) 8 Term Rep. 438,

1.—*Bayard.* "What authority is there for American armed vessels to recapture British vessels taken by the French?"

CHASE, *J.* "Is there any case where it has been decided in our courts that such a recapture was lawful?"

"It has been so decided in the English courts."

The counsel on both sides admitted that no such case had occurred in this country.

2.—CHASE, *J.* I am against reading the instructions, because I am agains bringing the executive into court on any occasion It has been decided, as I think, in this court, that instructions should not be read.

I think it was in a case of instructions to the collectors. It was opposed by Judge Iredell, and the opposition acquiesced in by the court.

PATERSON, *J.* The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

MARSHALL, *Ch. J.* I have no objection to hearing them, but they will have no influence on my opinion.

MOORE, *J.* Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard. May I be permitted to read them as a part of my speech?

THE COURT: We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard. I acquiesce in the opinion of the court. My reasons for wishing to read them, were because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinion of the executive before they would decide contrary to it.

434, 566. If it is matter of law, it is not such law as is binding upon this court, and, therefore, they cannot officially take notice of it. Foreign laws must be proved as facts. 3 Wooddeson, 306. 2 Eq. Cas. Abr. 289, 476. 2 Salk. 561, *Way v. Yally*. 6 Mod. 195, *same case*. Cowp. 174, 175, *Mostyn v. Fabrigas*. The law must be given in evidence. Bos. & Pull. 171, 175, 138. 8 Term Rep. 566. Facts cannot be adduced to contradict the record. 8 Term Rep. 438. In 2 Rob. 126, (American edit.) *The Providentia*, Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it.

In 1 Rob. 57, *The Santa Cruz*, Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the counsel for the libellant, that this case differs from evidence offered to a jury. In chancery, if evidence is not legal, the chancellor will hear it, but will give it no weight. The pamphlet containing the dispatches is offered to be read, not to show what are the municipal laws of France, but what is the law of nations in France; to show how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi v. Motteux*, Doug. 560 or 581. This court is now to decide by the law of nations, not by mu- 13*] nicipal regulations. *All the cases cited against us are cases in common law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shown in evidence. 1 Rob. English edit. 341; American edit. 287. *The Maria;* and 1 Rob. English edit. 368; American edit. 304, same case.

The object in reading these dispatches is to show that the law of nations was not respected in France; that the construction of their courts of admiralty was such that their decisions could not conform to the law of nations; that the law of nations has been so modified in France that there was no certainty of indemnity for neutrals, and that by the decrees and arrets of that government, the Amelia would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to congress, and published, in conformity to an act of congress, (vol. 4, p. 239,) for the information of the citizens of the United States. This act of congress has made them proper evidence before this court; who are, therefore, bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In 1 Rob. American edit. 288, (*The Maria*), this very decree is cited; and it is immaterial to us whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the claimant it was replied:

That this decree is not an act of congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted that in equity, on an appeal to the house of lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that *court was [*14 bound to notice. In the cases cited by the opposite counsel, the arrets were read by consent. A common law court is as much bound as a court of admiralty to take notice of the law of nations, on a question where that law applies; and the rules by which common law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty.

The Court suffered the dispatches and decrees of France to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the libellant proceeded in the argument on the second point.

The decree of the 18th of January, 1798, was not repealed till the 14th of December, 1799, and, consequently, was in full force at the time of the capture on the 6th of September, 1799. The facts stated in the Appendix to volume 2 of Robinson's Reports, show that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct that Sir William Scott makes it the ground of his decision in various cases.

It is not necessary to show that the Amelia would certainly have been condemned. To entitle to salvage it is only necessary to show that she was in a better condition by the recapture. Her cargo was the production of the possessions of England, and, therefore, by the decree of the 18th January, 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged, by Sir William Scott, a good ground for salvage. 1 Rob. 232, (*The Two Friends.*) 2 Rob. 246, (*The War Onskan.*)

3. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of congress of the 2d of March, 1799, entitled "An act for the government of the navy of the United States," § 7, vol. 4, p. 472, by *which it is enacted, "that for the ships [*15 or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c., and if after ninety-six hours, one half; all of which is to be paid without any deduction whatsoever."

In the case of Bass and Tingey, it was decided by this court that France was to be considered as an enemy. The case of the Amelia comes within the very words of this act of congress. She is a ship belonging to citizens of a nation in amity with the United States, retaken from the enemy after a possession of ninety-six hours.

By the act of congress of 25th June, 1798, vol. 4, p. 149, 150, property of American citizens, recaptured by armed merchant vessels, is to be restored on the payment of not less than one-eighth, and not more than one-half for salvage. And by the act of the 3d March, 1800, not less than one-sixth is allowed on recapture by a private armed vessel, and one-eighth by a public ship of war.

If, then, the recapture of this vessel was a lawful act, and if service was rendered thereby to the owners, the recaptors are entitled to salvage, and the rate of that salvage is, by the act of congress, fixed at one-half of the value of the ship and cargo.

On the part of the claimant it was said, that if France and America were at peace, the recapture was not authorized by the law of nations. The claim of salvage must rest on two grounds.

1. A right to interfere.

2. A benefit conferred on the owners.

1. It is admitted that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may be the motive or intent of such possession. 2 16*] Wooddeson *424. The belligerent has a lawful right to search merchant vessels, and this right cannot be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. Vattel, b. 3, c. 7, § 114, p. 507. 1 Rob. 304, (*The Maria.*)

The act of the recaptors, then, being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis.* But if France has waged so general a war on neutral property, has not England done the same?

We find in their courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations and to decree the restitution; 1 Rob. 84, 85, (*The Betsey;*) 7 Term Rep. 695, *Geyer v. Aguilar;* but when salvage is to be given to British recaptors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. 1 Rob. 232, (*The Two Friends.*) 2 Rob. 246, (*The War Onskan.*)

But it is contended that the courts of France would have decided according to the decree of the 18th January, 1798, and not according to the law of nations. This is not to be presumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected; and even then individuals cannot act. The injury must be redressed by the government in the way of negotiation of war. What was the conduct of our government in such a case? It first chose to negotiate, and then to prepare for war. At the time the negotiation was begun, all the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility; but no citizen could *go one step beyond what was authorized. [*17 The liability of the Amelia to condemnation in a French court of admiralty created no right in Captain Talbot to capture her, even if that condemnation was certain. But the facts of this case do not warrant such a conclusion. The facts stated are, that "the ship Amelia sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufactory of that country." What country? Bengal; but Bengal is not stated to be one of the possessions of England. Not long since the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true that the libel speaks of Calcutta as being an English port in the East Indies, but it does not follow that the whole country of Bengal has been subjected to the British power. Besides, it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence it does not appear that the Amelia was liable to condemnation under the decree of the 18th January, 1798, and we cannot presume that she would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service the greater ought to be the salvage. But if the construction, given by the opposite counsel, to the act of 2d March, 1799, be correct, then the same salvage is due for the recapture of a clear neutral as of a belligerent. And yet in common wars no salvage at all is due for the recapture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the *chan- [*18 ces of acquittal or indemnification. We have no right to legislate upon the property of a foreign independent nation, and to say that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. Vattel, b. 2, c. 1, s. 7, p. 123. If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. 2 Rob. 23, 24. (*The Vryheid.*) In order to ground a claim of salvage, the danger of the property must have been not hypothetical, but absolute; not distant and uncertain, but immediate and imminent: the act of saving must have been done with that sole intent, and must have been attended with labor, loss, expense or hazard to the salvor. The Amelia was taken by Captain Talbot and libelled as a French vessel; his object was not to save a neutral, but to capture a belligerent. Under such a mistake he

might have a right to examine her further, but the moment she proved to be neutral property he ought to have released her. His mistake can be no ground for a claim of salvage. It is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In Beawes' Lex Mer. vol. 1, p. 158, it is said that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral? By the state of the case this vessel was neutral as to all the belligerent powers. If the captain had applied for her, she must have been given up, upon the authority of the case of *Glass* and *Gibbs*, 3 Dal. 6, without any compensation for recapture. Among the cases cited, the only one against us is 2 Rob. 246, (*The War Onskan.*) In that case Sir William Scott says, that "lately" it has been the practice of his court to give salvage on recapture of neutral property out of the hands of the French; but that such is not the modern practice of the law of nations; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him; inasmuch as 19*] that same enemy would be *compelled by the tribunal of his own country, after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that very probably, had that case been decided in the next term, it would have been decided differently. No judge has the right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the lower courts; it should, therefore, be put upon such a footing as to make it clear and plain to all the judges of the inferior courts. This decision of Sir William Scott is a creature of his own, which he himself promises to change when the situation of affairs will allow.

Sir William Scott gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case the statement of facts excludes the idea of hostility between France and Hamburgh. The law of nations gave no right to recapture. The authority under the acts of Congress must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts, have a right to alter them.

So far as war is not authorized by congress there is peace. It was not contemplated by any act of congress that our vessels should capture Hamburgh vessels. The mischief to be remedied by the act of May was, that the small armed vessels of France were hovering on our coasts and taking our vessels almost in our ports. The act of congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering for the purpose of taking, our vessels. This act, therefore, does not authorize the capture of a Hamburgh vessel. There is no law which authorizes a capture for two purposes, viz., to be condemned as a French vessel, or to be subjected to salvage as a neutral. The Amelia was not navigating under the authority, or pretended authority, of France. She was engaged in a lawful trade. But if the French took possession of her under suspicion of unlawful trade, that gave us no *authority to [*20 take her from the possession of France, the property, under the law of nations, not being changed. The taking being unlawful can support no claim of salvage.

The act of July, 1798, authorizes only the capture of armed French vessels, and confines the cases of recapture to the ships or goods of citizens or residents of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, Captain Talbot ought to have dismissed her; the detention afterwards was unlawful, and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then France has a claim for indemnity; but as she has made no claim we must presume the vessel would have been restored by her to the owners.

The act of congress of March 2, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not, therefore, intend to give salvage on the recapture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given this war, for the first time, only on account of the conduct of France toward neutrals, and will cease when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy," in the 7th section of that act, means the enemy of us and our ally whose vessel is recaptured by our armed vessels, and not our enemy who is the friend of our ally. If, then, this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of congress. Not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit*. To support this, there must be,

*1. A lawful consideration; and, [*21
2. A contract express or implied.

To make the consideration lawful, it must be permitted by law; *a fortiori*, it must not be contrary to law.

It is not authorized by our law to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country.

It is not alleged that there was any express contract; and a contract cannot be implied, because the intent with which she was taken, viz.,

to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised on the retaining her, because that was a state of duress, which cannot be made the ground of a reward.

But if this case is to be considered upon a *quantum meruit*, then the amount of salvage must depend upon the danger and the exertion. 1 Rob. 151, (*The St. Bernardo,*) and 1 Rob. 240, (*The Two Friends.*) It is said that in cases of unauthorized capture or recapture, the property goes to the crown; 2 Rob. 45, (*The Princessa;*) and it is sometimes referred to the court to fix the reward of the captors. It follows, then, that the property goes to the government, and they alone can fix the reward. But our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth 94,000 dollars, the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward.

The decree of France might be only *in terrorem*, and so no danger. If the Amelia was not liable to condemnation in the French courts, then no service was rendered, and, consequently, no salvage ought to be allowed.

22*] *But if she was liable to condemnation, then the recapture is a violation of the rights of France.

If France violates the laws of nations, it is no justification of a violation of them on our part. An illegal power to take, given by France to her cruisers, does not authorize us to retake.

In the case of *Bass v. Tingey*, Feb. term, 1800, in the Supreme Court of the United States, the reasoning of the court seems to admit that the act of 2d March, 1799, will not apply, in the present state of hostilities, to recaptures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful recapture of a neutral from the hand of a belligerent.

Judge Moore, in delivering his opinion in that case says, "It is, however, more particularly urged that the word 'enemy' cannot be applied to the French; because the section, in which it is used, is confined to such a state of war as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of 'enemies.' It is for the honour and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and, surely, congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

"Nor does it follow that the act of March, 1799, is to have no operation, because all the cases in which it *might operate, are not [*23 in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war it might also be applied to the case of recaptured property belonging to a nation in amity with the United States."

And in the same case, Judge Washington observed, "that hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission." And again he says, "It has likewise been said that the 7th section of the act of March, 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to recapture friendly vessels from the French, and this argument was strongly and forcibly pressed.

"But because every case provided for by this law was not then existing, it does not follow that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law embracing a variety of subjects; not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might, then, very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends; and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act.

"The opinion which I delivered at New York, in *Talbot v. Seeman*, was, that although an American vessel could not justify the taking of a neutral vessel from the French, because neither the sort of war that subsisted, *nor the special commission under which [*24 the American acted, authorized the proceeding; yet that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by congress. And on both points my opinion remains unshaken; or, rather, has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree."[1]

Similar sentiments were also expressed by Judge Chase and Judge Paterson, in the same case. From these opinions it seems clearly to result that the act of March 2, 1799, cannot be the rule of salvage in this case.

On the part of the libellant, it was stated, in reply, as to the admissibility of the dispatches from the American envoys, and the French

1.—This case of *Talbot* v. *Seeman*, was argued once before, in this court, at Philadelphia.

arret of 18th January, 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1 Dal. 364. Loft. 631. Doug. 619, 622, 649, 650, 554. The opposite counsel have cited and relied on *Robinson's Reports* to show what was the ancient law of France, and surely we have as good a right to cite the same book to show what is the present law of France. In 1 Rob. 288, (*The Maria,*) this arret of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to show that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it.

The case in *P. Williams* refers to a municipal law which had no connection with the law of nations. The same observation applies to the cases from 6 Mod. and 2 Salk. No case can be produced where a law of a foreign country, authenticated as this is by an act of the legislature of our country, has been refused to be considered by a court.

25*] *As to the objection that the cargo does not appear to be the production of England, or her possessions, because there is no evidence that the whole of the province of Bengal has been subjected to the dominion of England; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta, in Bengal, loaded with a cargo of the product and manufactory of that country. It being admitted that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shown in evidence, that the cargo was the product of an English possession.

It is said that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world. Congress have expressly declared it in the preambles of their acts. The whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange if this court, sitting here as a court of the law of nations to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted that salvage is not due for the recapture of a neutral from a belligerent, and for this reason that by the law of nations the neutral would be restored by the captor with damages and costs. But *cessante ratione, cessat lex.* And it follows by powerful inference, that if the captor would not have restored the neutral with damages and costs, salvage ought to be allowed. To bring the Amelia within this inference, it is only necessary to show that she would not have been restored with damages and costs. If the court should take into consideration the arret of the 18th of January, 1798, and the fact that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to the owners. Is no salvage due for so certain and so signal a benefit?

*It is said that unless salvage is ex- [*26 pressly given by the act of congress, it can only be claimed upon a contract, either express or implied. This is not the case. The claim of salvage upon recapture never is supposed to arise *ex contractu.* It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labour or hazard of the recaptor, nor by his intention to confer a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. Wooddeson, 423. In 1 Rob. 234, 235, (*The Two Friends,*) the rule of salvage on rescue is said to be *quantum meruit.* And in the same case, p. 232, Sir W. Scott says, "it has been slightly questioned in the act of court, (which contains the exposition of facts given by both parties,) whether there was such a state of hostilities between America and France as to raise a title of salvage for American goods retaken from the French. But this point has not been pursued in argument; and indeed I should wonder if it had, after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say whether America is at war with France, or not; but the conduct of France towards America has been such *de facto,* as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers by force of arms."

In the case of *Bass* and *Tingey*, the question was not argued, whether salvage could be claimed upon the recapture of a neutral, on the ground of benefit rendered; and, therefore, the opinion of the court in that case does not militate with our claim.

August 11. MARSHALL, *Ch. J.*, delivered the opinion of the court.

This is a writ of error to a decree of the circuit court for the district of New York, by which the decree of the district court of that state, restoring the ship Amelia to her owner on the payment of one half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

*The facts agreed by the parties, and [*27 the pleadings in the cause, present the following case:

The ship Amelia sailed from Calcutta, in Bengal, in April, 1799, loaded with a cargo of the product and manufactory of that country, and was bound to Hamburgh. On the 6th September, she was captured by the French national corvette La Diligente, commanded by L. J. Dubois, who took out the captain, part of the crew, and most of the papers of the Amelia, and, putting a prize-master and French sailors on board her, ordered her to St. Domingo, to be judged according to the laws of war.

On the 15th of September, she was recaptured by Captain Talbot, commander of the Constitution, who ordered her into New York for adjudication.

At the time of the recapture, the Amelia had eight iron cannon, and eight wooden guns, with which she left Calcutta. From the ship's pa-

pers, and other testimony, it appeared that she was the property of Chapeau Rouge, a citizen and merchant of Hamburgh; and it was conceded by the counsel below, that France and Hamburgh were not in a state of hostility with each other, and that Hamburgh was to be considered as neutral between the present belligerent powers.

The district court of New York, before whom the cause first came, decreed one half of the gross amount of the ship and cargo as salvage to the recaptors. The circuit court of New York reversed this decree, from which reversal, the recaptors appealed to this court.

The Amelia was libelled as a French vessel, and the libellant prays that she may be condemned as prize; or, if restored to any person entitled to her as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederick Seeman, discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of the facts, and to be decided by the court, are,

28*] *Is Captain Talbot, the plaintiff in error, entitled to any, and if to any, to what salvage in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it.

It is demandable of right for vessels saved from pirates, or from the enemy.

In order, however, to support the demand, two circumstances must concur.

1. The taking must be lawful.

2. There must be a meritorious service rendered to the recaptured.

1. The taking must be lawful; for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a recapture, therefore, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the recaptor are not the same, because no right can accrue from an act in itself unlawful.

In order, then, to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture.

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inqury. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

29*] *To determine the real situation of America in regard to France, the acts of congress are to be inspected.

The first act on this subject passed on the 28th of May, 1798, and is entitled "An act more effectually to protect the commerce and coasts of the United States."

This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority, or pretence of authority, of the republic of France, which shall have committed depredations on vessels belonging to the citizens of the United States, or which shall be found hovering on the coasts for the purpose of committing such depredations. It also authorizes the recapture of vessels belonging to the citizens of the United States.

On the 25th of June, 1798, an act was passed "to authorize the defence of the merchant vessels of the United States against French depredations."

This act empowers merchant vessels, owned wholly by citizens of the United States, to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colours, or acting, or pretending to act, by or under the authority of the French republic; and to capture any such vessel. This act also authorizes the recapture of merchant vessels belonging to the citizens of the United States. By the 2d section, such armed vessel is to be brought in and condemned for the use of the owners and captors.

By the same section, recaptured vessels belonging to the citizens of the United States, are to be restored, they paying for salvage not less than one-eighth, nor more than one-half the true value of such vessel and cargo.

On the 28th of June, an act passed "in addition to the act more effectually to protect the commerce and coasts of the United States."

This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation the goods of any citizen or person *resi- [*30 dent within the United States, which shall have been before taken by the crew of such captured vessel.

The second section provides that whenever any vessel or goods, the property of any citizen of the United States or person resident therein, shall be recaptured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of July another law was enacted, "further to protect the commerce of the United States."

This act authorizes the public armed vessels of the United States to take any armed French vessel found on the high seas. It also directs such armed vessel, with her apparel, guns, &c., and the goods and effects found on board, being French property to be condemned as forfeited.

The same power of capture is extended to private armed vessels.

The 6th section provides, that the vessel or goods of any citizen of the United States, or person residing therein, shall be restored, on paying for salvage not less than one-eighth, nor more than one-half, of the value of such recapture, without any deduction.

The 7th section of the act for the government of the navy, passed the 2d of March, 1799, enacts, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage," and if

they have remained above ninety-six hours in possession of the enemy, one-half is to be allowed.

On the 3d of March, 1800, congress passed "An act providing for salvage in cases of recapture."

This law regulates the salvage to be paid "when any vessels or goods, which shall be taken as a prize as aforesaid, shall appear to have before belonged to any person or persons 31*] *permanently resident within the territory, and under the protection, of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretense of authority, from any prince, government, or state, against which the United States have authorized, or shall authorize, defense or reprisals."

These are the laws of the United States, which define their situation in regard to France, and which regulate salvage to accrue on recaptures made in consequence of that situation.

A neutral armed vessel which has been captured, and which is commanded and manned by Frenchmen, whether found cruising on the high seas, or sailing directly for a French port, does not come within the description of those which the laws authorize an American ship of war to capture, unless she be considered *quoad hoc* as a French vessel.

Very little doubt can be entertained but that a vessel thus circumstanced, encountering an American unarmed merchantman, or one which should be armed, but of inferior force, would as readily capture such merchantman as if she had sailed immediately from the ports of France. One direct and declared object of the war, then, which was the protection of the American commerce, would as certainly require the capture of such a vessel as of others more determinately specified. But the rights of a neutral vessel, which the government of the United States cannot be considered as having disregarded, here intervene; and the vessel certainly is not, correctly speaking, a French vessel.

If the Amelia was not, on the 15th of September, 1799, a French vessel within the description of the act of congress, could her capture be lawful?

It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe the vessel met 32*] with at sea is in the condition of one *liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts.

The Amelia was an armed vessel commanded and manned by Frenchmen. It does not appear that there was evidence on board to ascertain her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication.

The recapture, then, was lawful.

But it has been insisted that this recapture was only lawful in consequence of the doubtful character of the Amelia, and that no right of salvage can accrue from an act which was founded in mistake, and which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case.

The opinion of the court is, that had the character of the Amelia been completely ascertained by Captain Talbot, yet as she was an armed vessel under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief. To have taken out the arms, or the crew, was as little authorized by the construction of the act of congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practiced in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed so as to become a French vessel, and yet it would probably have been a great departure from the real intent of congress, to have permitted such vessel to cruise unmolested. An armed ship under these circumstances might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorize the capture of such vessel so commencing hostilities, by a private armed ship, but not one belonging to the public. To suppose that a capture would in one case be lawful, and in the other unlawful; or to suppose that even in the limited state of hostilities in which we were placed, two *vessels armed and manned [*33 by the enemy, and equally cruising on American commerce, might the one be lawfully captured, while the other, though an actual assailant, could not; or if captured, that the act could only be justified from the probable cause of capture furnished by appearances, would be to attribute a capriciousness to our legislation on the subject of war, which can only be proper when inevitable.

There must, then, be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise.

This was obviously the sense of congress.

If by the laws of congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed, was such as to authorize recaptures generally from the enemy; if one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain what might before have been doubtful.

Upon a critical investigation of the acts of congress it will appear, that the right of recapture is expressly given in no single instance, but that of a vessel or goods belonging to a citizen of the United States.

It will also appear that the quantum of salvage is regulated, as if the right to it existed previous to the regulation.

Although no right of recapture is given in terms for the vessels and goods belonging to persons residing within the United States not being citizens, yet an act, passed so early as the 28th of June, 1798, declares, that vessels and goods of this description, when recaptured, shall be restored on paying salvage; thereby plainly indicating that such recapture was sufficiently warranted by law to be the foundation of a claim for salvage.

If the recapture of vessels of one description, not expressly authorized by the very terms of

34*] the act of congress *be yet a rightful act, recognized by congress, as the foundation for a claim to salvage, which claim congress proceeds to regulate, then it would seem that other recaptures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by congress, such claim must be determined by the principles of general law.

In this situation remained the recaptured vessels of any other power also at war with France, until the act of the 2d of March, 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given, in terms, to recapture such vessels. But their recapture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably recaptured. On the idea that the recapture was lawful, and that it was a foundation on which the right to salvage could stand, the legislature, in March, 1799, declare what the amount of that salvage should be.

The expression of this act is by no means explicit. If it extends to neutrals, then it governs in this case; if otherwise, the law respecting them continued still longer on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March, 1799. Thus it continued until the 3d of March, 1800, when the legislature regulated the salvage to be paid by neutrals, recaptured from a power against which the United States have authorized defense or reprisals.

This act having passed subsequent to the recapture of the Amelia, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like manner with the laws already commented on, the system which congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed, and which it was deemed necessary to continue, till the negotiation then pending should have a pacific termination. Accordingly, there is no expression in the act extending 35*] *the power of recapture, or giving it in the case of neutrals. This power is supposed to exist as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.

In case of a recapture subsequent to the act, no doubt could be entertained but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea that the right of recapture was extended by it, or did not exist before.

It must then have existed from the passage of the laws, which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice that the first regulation of the right of salvage in the case of a recapture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defense determined on by congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the court that a legislative act founded on a mistaken opinion of what was law, does not change the actual state of the law as to pre-existing cases.

This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system, as explanatory of other parts of the same system; and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage by one of the counsel for the defendant in error, unconnected with the acts of congress, and which it is proper here to notice.

He states that to give title to salvage, the means used must not only have produced the benefit, but must have *been used with [*36 that sole view. For this he cites Beawes' Lex Mer. 158.

The principle is applied by Beawes to the single case of a vessel saved at sea by throwing overboard a part of her cargo. In that case the principle is unquestionably correct, and in the case of a recapture it is as unquestionably incorrect. The recaptor is seldom actuated by the sole view of saving the vessel, and in no case of the sort has the inquiry ever been made.

It is, then, the opinion of the court, on a consideration of the acts of congress, and of the circumstances of the case, that the recapture of the Amelia was lawful; and that, if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.

It becomes then necessary to inquire,

2d. Whether there has been such a meritorious service rendered to the recaptured as entitles the recaptor to salvage.

The Amelia was a neutral ship, captured by a French cruiser, and recaptured while on her way to a French port, to be adjudged according to the laws of war.

It is stated to be the settled doctrine of the law of nations, that a neutral vessel captured by a belligerent is to be discharged without paying salvage: and for this several authorities have been quoted, and many more might certainly be cited. That such has been a general rule is not to be questioned. As little is it to be questioned that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of the *War Onskan* cited from Robinson's Reports, to be founded on this plain principle, "that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him, inasmuch as that the same enemy would be compelled, by the tribunals of his own country, after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention." It is not unfrequent to consider and speak of a *regular practice [*37 under a rule, as itself forming a rule. A regular course of decisions on the text of the law, constitutes a rule of construction by which that text is to be applied to all similar cases: but alter the text, and the rule no longer governs. So in the case of salvage. The general principle

is, that salvage is only payable where a meritorious service has been rendered. In the application of this principle, it has been decided that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not, therefore, to pay salvage.

The principle is that without benefit, salvage is not payable: and it is merely a consequence from this principle, which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture? In such a course of things the state of a neutral is completely changed. So far from being safe, he is in as much danger of condemnation as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply. Only those rules are applicable, which regulate a situation of actual danger. This is not, as it has been termed, a change of principle; but a preservation of principle by a practical application of it according to the original substantial good sense of the rule.

It becomes, then, necessary to inquire whether the laws of France were such as to have rendered the condemnation of the Amelia so extremely probable, as to create a case of such real danger, that her recapture by Captain Talbot must be considered as a meritorious service entitling him to salvage.

To prove this the counsel for the plaintiff in error has offered several decrees of the French government, and especially one of the 18th of January, 1798.

Objections have been made to the reading of these decrees as being the laws of a foreign nation, and therefore facts, which, like other facts, 38*] ought to have been *proved, and to have formed a part of the case stated for the consideration of the court.

That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted, (and such seems to have been the general practice,) in which the marine ordinances of a foreign nation are read as law without being proved as facts. It has been said that this is done by consent: that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet this decree having been promulgated in the United States as the law of France, by the joint act of that department which is intrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts.

It is therefore the opinion of the court that the decree should be read as an authenticated copy of a public law of France interesting to all nations.

The decree ordains, that "the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded in whole or in part with merchandise, the production of England or her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be.

*This decree subjects to condemna- [*39 tion in the courts of France a neutral vessel laden, in whole or in part, with articles the growth of England or any of its possessions. A neutral thus circumstanced cannot be considered as in a state of safety. His recaptor cannot be said to have rendered him no service. It cannot reasonably be contended that he would have been discharged in the ports of the belligerent, with costs and damages.

Let us, then, inquire, whether this was the situation of the Amelia. The first fact states her to have sailed from Calcutta, in Bengal, in April, 1799, laden with a cargo of the product and manufacture of that country. Here it is contended that the whole of Bengal may possibly not be in possession of the English, and therefore it does not appear that the cargo was within the description of the decree. But to this it has been answered, that in inquiring whether the Amelia was in danger or not, this court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt that the cargo, without inquiring into the precise situation of the British power in every part of Bengal, being prima facie of the product and manufacture of a possession of England, would have been so considered, unless the contrary could have been plainly shown.

The next fact relied on by the defendant in error is, that the Amelia was sent to be adjudged according to the laws of war, and from thence it is inferred that she could not have been judged according to the decree of the 18th of January.

It is to be remembered that these are the orders of the captor, and without a question, in the language of a French cruiser, a law of his own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the Amelia, with her cargo, to have belonged to a citizen of Hamburgh, which city was not in a state of hostility with the Republic of France, but was to be considered as neutral between the then belligerent powers.

*It has been contended that these facts [*40 not only do not show the recaptured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her.

The whole statement taken together amounts to nothing more than that Hamburgh was a neutral city; and it is precisely against neu-

trals that the decree is in terms directed. To prove, therefore, that the Amelia was a neutral vessel is to prove her within the very words of the decree, and, consequently, to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice.

It has been contended that this decree might have been merely *in terrorem;* that it might never have been executed; and that, being in opposition to the law of nations, the court ought to presume it never would have been executed.

But the court cannot presume the laws of any country to have been enacted *in terrorem;* nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct.

These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had 41*] placed the Amelia; nor *is France in any manner to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the recapture, which was authorized by the state of hostility then subsisting between the two nations. From that time it has been a question only between the Amelia and the recaptor, with which France has nothing to do.

It is true that a violation of the law of nations by one power does not justify its violation by another; but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate, to France against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities. This was not violating the law of nations, but conforming to it. In the course of these limited hostilities the Amelia has been recaptured, and the inquiry now is, not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case. This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on the seas, and it has been urged that the course of the latter has been still more injurious than that of the former. That is a consideration not to be taken up in this cause. Animadversions on either, in the present case, would be considered as extremely unbecoming the judges of this court, who have only to inquire what was the real danger in which the laws of one of the countries places the Amelia, and from which she has been freed by her recapture.

It has been contended that an illegal commission to take, given by France, cannot authorize our vessels to retake; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburgh, who might have objected to the condition of the service.

But it is not the authority given by the French government to capture neutrals, which is legalizing the recapture made by Captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The recapture having been made lawfully, then the right to salvage, on general principles, depends *on the service[*42 rendered. We cannot presume this service to have been unacceptable to the Hamburgher, because it has bettered his condition; but a recapture must always be made without consulting the recaptured. The act is one of the incidents of war, and is in itself only offensive as against the enemy. The subsequent fate of the recaptured depends on the service he has received, and on other circumstances.

To give a right to salvage, it is said there must be a contract either express or implied.

Had Hamburgh been in a state to declare war with France, the recaptured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law, in that state of things imply it? Clearly from the benefit received, and the risk incurred. If in the actual state of things there was also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain.

That a mere speculative danger will not be sufficient to entitle a person to salvage is unquestionably true. But that the danger must be such, that escape from it by other means was inevitable, cannot be admitted.

In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew, or by a sudden tempest. A ship on the rocks might possibly be got off by the aid of wind and tides without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged.

It cannot, therefore, be necessary that the loss should be inevitably certain; but it is necessary that the danger should be *real and [*43 imminent. It is believed to have been so in this case. The captured vessel was of such description that the law by which she was to be tried, condemned her as good prize to the captor. Her danger, then, was real and imminent. The service rendered her was an essential service, and the court is therefore of opinion that the recaptor is entitled to salvage.

The next object of inquiry is, what salvage ought to be allowed? The captors claim one half the gross value of the ship and cargo. To

support his claim they rely on the "act for the government of the navy of the United States," passed the 2d of March, 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, retaken from the enemy.

It has been contended that the case before the court is in the very words of the act. That the owner of the Amelia is a citizen of a state in amity with the United States, retaken from the enemy. That the description would have been more limited had the intention of the act been to restrain its application to a recaptured vessel belonging to a nation engaged with the United States against the same enemy.

The words of the act would certainly admit of this construction.

Against it it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a recaptured neutral, and a recaptured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

This argument, in the opinion of the court, derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of things, and 44*] *calculated to expire with them, but is a regulation applying to present and future times.

Whenever the danger resulting to captured neutrals from the laws of France should cease, then, according to the principles laid down in this decree, the liability of recaptured neutrals to the payment of salvage would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by treaty. Yet, if this law applies to the case, salvage from a recaptured neutral would still be demandable.

This act, then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be retaken in order to come within the provisions of the act. The expression used is the enemy. A vessel retaken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the court is to decide, on a just estimate of the danger from which the recaptured was saved, and of the risk attending the retaking of the vessel, what is a reasonable salvage. Considering the circumstances, and considering also what rule has been adopted in other courts of admiralty, one sixth appears to be a reasonable allowance.

It is therefore the opinion of the court, that the decree of the circuit court, held for the district of New York, was correct in reversing the decree of the district court, but not correct in decreeing the restoration of the Amelia without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the *Amelia without salvage is [*45 ordered, ought to be reversed, and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one sixth part of the net value, after deducting therefrom the charges which have been incurred.

GEORGE WILSON

v.

RICHARD MASON, Devisee of GEORGE MASON.

AND

RICHARD MASON, Devisee of GEORGE MASON,

v.

GEORGE WILSON.

Waste and unappropriated lands in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries.

A writ of error upon a caveat lies from the district court of Kentucky district, to the supreme court of the United States.

Notice of an illegal act will not make it valid.

A survey in Kentucky not founded on an entry, is a void act, and constitutes no title whatever; and land so surveyed remains vacant, and liable to be appropriated by any person holding a land warrant.

THESE were writs of error to the district court of the United States, for the district of Kentucky, upon cross caveats for the same tract of land.

The caveat of *Wilson v. Mason* originated in the supreme court for the district of Kentucky, in 1785, while Kentucky was a part of the commonwealth of Virginia, and the record States, "that heretofore, viz. at a supreme court for the district of Kentucky, held at Danville, in the said district, in the month of March, 1785, came George Wilson and caused a certain caveat to be entered against George Mason, which is in the following words, viz.: "Let no grant issue to George Mason, of Fairfax county, for 8,300 acres of land, in Jefferson county, surveyed on the south side of Panther creek, adjoining another survey of the said Mason's, of 8,400 acres, on the upper side; because the said George Mason has surveyed the same contrary to his location, for which cause, and also on account of the vagueness of the entry, George Wilson claims the same, or so much thereof, as interferes with his entry made on treasury warrants for 40,926 acres, specially made on the 9th day of April, 1784. Entered 25th March, 1785."

"Whereupon, at October term, 1785, a summons issued, commanding the sheriff at Fairfax county to summon George Mason to appear at

the next March term, to show cause why the 46*] 8,300 acres should not be *granted to George Wilson, or so much as interferes with his entry for 40,926 acres, made on the 9th of April, 1784."

Afterwards, and after Kentucky became a separate state, at a court held for the district of Bairdstown, in September, 1797, "to which court this suit had been removed, and the said George Mason having departed this life, the said suit was ordered to be revived in the name of Richard Mason, the devisee of George Mason, deceased, who was devisee of George Mason, deceased." Richard Mason then removed the cause from the state court to the district court of the United States, for the district of Kentucky, and it was agreed by the parties, "that the judgment in this caveat, (*Wilson v. Mason,*) if for the plaintiff, should be entered up as a judgment for the defendant in the caveat *Mason v. Wilson;* and if for the defendant, as a judgment for the plaintiff in the said caveat *Mason v. Wilson,* which suits are cross caveats between the parties for the same land." "And thereupon came a jury, &c. who, being elected, tried, and sworn well and truly to inquire into such facts as may be material in this cause, and not agreed to by the parties," found the special verdict hereinafter stated.

The cross caveat of *Richard Mason v. Wilson* was filed on the 13th of March, 1799, and seems to be in the nature of a plea or answer, to the claim of Wilson. It is in the following form, viz., "Let no grant issue to George Wilson, or his assignees, on the said Wilson's survey of 30,000 acres of land lying in Jefferson county (now Nelson county) on the south side of Panther creek, a branch of Green river, made by virtue of an entry dated April the 9th, 1784, for 40,926 acres, upon the five following land office treasury warrants, No. 17,639, 19,143, 19,-614, 19,616 and 12,795. Richard Mason, infant heir and devisee of George Mason, jun. who was heir and devisee of George Mason, Esq. late of Fairfax county, Virginia, a citizen of the commonwealth of Virginia, by Cuthbert Banks, his next friend, enters a caveat against the same for the following causes:

"Because the said survey includes a tract of 8,300 acres which had been before located and 47*] *entered by the said George Mason in the year 1780, and which tract had been actually surveyed for him the said George Mason, and the certificate of survey thereof, dated October 2d, 1783, returned to the county surveyor's office long before the said George Wilson made his said entry; and because the said entry, made by the said George Wilson, on which his said survey is founded, was illegal and fraudulent, the said George Wilson having knowingly and wilfully located his said entry upon lands which had been actually before appropriated and surveyed for others, as appears by the words of the said Wilson's own entry, which begins at the upper and northeast corner of the said George Mason's 8,400 acre survey, on the bank of Panther creek, upon which survey of 8,400 acres, the adjacent survey made for George Mason of 8,300 acres, made about the same time, binds, and runs thence south 10 deg. east, (being the course to a single degree of the dividing line between the said Mason's two tracts of 8,400 and 8,300 acres passing the said Mason's southeast corner 2,600 poles north, 80 deg. east(which is the course to a single degree of the back line of George Mason's said survey of his tract of 8,-300 acres) 3,200 poles, and off at right angles northwardly to the bank of Panther creek, and down the same, according to the meanders thereof, to the beginning; whereby it includes the whole of Richard Mason's said tract of 8,300 acres, as devisee as aforesaid of George Mason, as well as some other lands which have been previously located and surveyed for other people; which above mentioned courses could not have been inserted in Wilson's entry, in the manner they are, without his having been acquainted with the said surveys, made by George Mason before mentioned; the plats and certificates of which were, at the time of Wilson's said entry, in the county surveyor's office; and from which it is evident Wilson gained the information by which he made his special entry." The original caveat of *George Mason v. Wilson,* was entered May 6th, 1785.

Mason's entries, in the book of entries, were as follows, viz.:

"1780, April 29th, George Mason enters 8,-400 acres of land, to begin on Panther creek, on the east side *thereof, opposite to a beech [*48 on the west side, about four miles above the mouth of west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8,-300 acres to begin at the upper corner of his 8,400 acre entry, and to run up the creek, on the east side, and back for quantity."

"1780, October 27th, George Mason desires to make his entry of 8,400 acres more special on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

The tract of 8,400 acres was surveyed on 27th September, 1783, beginning four miles above the mouth of Panther creek, where it empties into Green river, and not four miles above the mouth of the west fork of Panther creek, as mentioned in his first entry. The mouth of Panther creek being more than twelve miles below the mouth of the west fork.

The tract of 8,300 acres was surveyed on the 2d of October, 1783, adjoining to the survey of 8,400 acres, below the mouth of the west fork, and not above, as it would have been if surveyed according to the entry of the 29th April, 1780.

George Wilson's entry is as follows, viz.:

"1784, April 9th, George Wilson enters 40,-926 acres upon five treasury warrants, No. 17,-639, 19,143, 19,614, 19,616, 12,795, on the south side of Panther creek, a branch of Green river, beginning at the upper and northeast corner of George Mason's 8,400 acre survey on the bank of Panther creek, which survey begins perhaps, about three miles from the mouth of the said creek and 320 poles upon a direct line above the mouth, of the first fork of the said creek from the mouth, thence running south 10 deg. east, passing the said Mason's southeast corner, 2,600 poles; thence north 80 deg. east 3,200 poles; thence off at right angles, northwardly, *to the bank of Panther creek, and down [*49 the same with the several meanders thereof, to the place of beginning."

Upon four of those warrants, 30,000 acres were surveyed for Wilson on the 2d June, 1784,

and located so as to comprehend the whole of Mason's survey of 8,300 acres.

The following facts were agreed to by the counsel for both parties, viz.:

"1. We admit that Panther creek has been known and called by that name, Panther creek, generally, since the beginning of the year 1780, and is truly represented on the plat returned in this cause, and also the forks thereof.

"2. That at the distance of twelve and one quarter miles and thirty-six poles, on a direct line from its mouth, the said creek divides itself into two forks, viz., the fork marked on the plat returned in this cause, as the west fork of said creek; and the other, the fork marked on the plat, Panther creek; and that from the size and natural descriptions of these forks, they would be remarked and called such by strangers who should explore the waters of that creek.

"3. That the said forks were generally known, and called the forks of Panther creek, from the beginning of the year 1780; and that they were notorious as such, to all who had acquaintance with the waters in that part of the country.

"4. That in the winter before the said entries were made for said defendant, the said agent Hancock Lee, went down on Panther creek, and explored the country thereabouts; and encamped thereabouts four or five weeks for that purpose; and there were several others in company with him, who all went on the business of viewing the land in that quarter.

"5. That James Hord was the surveyor who surveyed the said entries in September and October, 1783.

50*] *"6. That Hubbard Taylor was the special attorney of the defendant Mason, for the purpose of making his surveys on Panther creek, among which was the one now in controversy, and previous to making said surveys, the said Taylor made out a plat of Panther creek, up to the forks thereof by actual survey, for the purpose of satisfying himself how the survey of the said defendant ought to be made; which plat he delivered to the said Hord, when he went to make the surveys of the said lands, for his instruction; and by the said plat the said Hord was instructed to make the surveys of the said defendant as they are now surveyed. The entries, alluded to in the 4th fact, are those found by the jury to have been made for the defendant, by Hancock Lee, at the same time with that of the land in controversy."

The verdict of the jury was as follows, viz.:

"We of the jury do find the facts following for the plaintiff, excluding those agreed to by the attorneys:

"1. That the said Hancock Lee at the time he made the said entry for the said Mason, did also make the several other entries for him.

"2. That the plats and certificates of survey lay three weeks in the office before they were recorded.

"3. That at the time of making out and recording the plats of said surveys, William Mason was agent to the said George Mason, and came to this country for the express purpose of attending to his land business; and had power and instructions to resurvey any of the said Mason's entries, which he should find to have been erroneously surveyed, or interfering with better claims.

"4. That it was a general practice in the offices of surveyors, when a survey was found to have been made erroneously, to make the same over again at the request of the parties concerned; and the said practice prevailed also in cases of surveys recorded.

"5. That when William Mason came to the surveyor's office to take out the plats in this case, and also those in *the other cases [*51 in which George Mason was concerned, the surveyor told him that the entries of the said George, the defendant, had been surveyed wrong; and took a pen and paper and explained to him the calls of the entries, and by comparing them with the surveys, showed him that they were erroneous; and offered to send a deputy with him, without further or additional expense, to make the surveys aright, with which proposal the said William seemed pleased, and proceeded no further in the business at that time; but went away, and after some days came back to the said office, and told the surveyor, that the entries of said Mason were so made that they would clash with each other, if surveyed otherwise than they then were; and he did not see that the surveys could be amended; whereupon he took out the plats and certificates of survey to return them to the register's office, and actually did so; which transaction happened at the office of the surveyor about the 12th of September, 1784.

"6. That the lands, generally, over all the state of Kentucky, except the land reserved by law for entries, are involved in disputes, by different entries, and surveys having been made for the same tracts.

"7. That it was usual for the surveyors to survey entries agreeable to the directions of the proprietors, or their agents, when such directions were given.

"8. That a law, passed by the assembly of Kentucky in 1792, prohibited any further entry of land with the surveyors, and that ever since that time no land could be appropriated by virtue of land warrants.

"9. That the practice of entering for land was a general strife for the best legal entry.

"10. That George Mason's entry of 8,400 acres, made the 17th day of October, 1780, is surveyed on Panther creek, and a large branch thereof; and not on either of the main forks of said creek, as appears by the plat; and that the survey of 8,300 acres, being the land in controversy, adjoining the last mentioned survey, above, on said creek, and described in the plat in this cause by the *letters and figures [*52 A. E. F. 8, is claimed, by the defendant Mason, as a survey made by the said Mason, on an entry of his, dated the 29th day of April, 1780, for 8,300 acres of land; is on said creek and a branch thereof, and not on either of the main forks, as appears by the plat.

"11. That the place designated, in the corrected plat, by the letter A. on the south side of Panther creek, is the place called for by the plaintiff, as the beginning corner of his entry of 40,926 acres, and described agreeable to the plat.

"12. That it was a practice, in the office of William May, surveyor of Jefferson, with whom the defendant Mason's entries were made, and by whose deputy surveyor, James Hord, the defendant's surveys were made, to alter surveys

discovered to be erroneous or wrong, after they were recorded, and survey them aright, without further or additional expense to the owners of such entries, and to proceed on the plats of the amended surveys, as the proper plats of the legal survey.

"13. That the said Hord, when on his way to make said surveys, called on said surveyor of Jefferson for copies of the defendant's entries, and on seeing them was struck with the variance between the calls of the entries and his instructions, in point of location, and on that account did not return the plats of the said surveys, until he had seen Hubbard Taylor, and showed them to him, and represented his opinion of such variance; but, on their being shown to the said Taylor, he directed said surveys to be returned as they were then made.

"14. That the said Hord was fully informed of the forks of Panther creek, when he was making said defendant's surveys, and saw the same, and about the same time at which he made the defendant's said surveys, and before he returned from doing the same.

(Signed) DANIEL WEISIGER, *foreman*."

"We of the jury do find the following facts for the defendant Mason:

53*] *"1. That the entry made in the name of George Wilson, April 9th, 1784, of 40,926 acres, on the south side of Panther creek, claiming under which the said Wilson entered this caveat, although made in his name, was made for the benefit of Christopher Greenup and John Handley, as well as for his benefit, and that the said Greenup and Handley were, at the time of making the entry, and long since, partners with him in the same.

"2. That John Handley, then a deputy surveyor of the county, made the said entry of 40,926 acres, for himself and the other partners; and before he made the same, had obtained information of the surveys made for George Mason, on his entries of 8,300, and 8,400 acres, on the south side of Panther creek, from the surveys then in the office of the surveyor.

"3. That the said George Wilson, Christopher Greenup, and John Handley, had before, and at the time the said entry of 40,926 acres was made, notice of the place where, and the manner in which, the surveys had been made for George Mason, on his entries of 8,300 acres, and 8,400 acres, on the south side of Panther creek.

"4. That John Handley, before the said entry of 40,926 acres was made, had notice that the land, now in dispute in this caveat, had been included in Mason's survey, on his entry of 8,300 acres.

"5. That the surveys, made for the said Mason, on his entries of 8,400, and 8,300 acres, on the south side of Panther creek, were returned to the office of the surveyor of the county, in the course of the fall, 1783.

(Signed) "DANIEL WEISIGER, *foreman*."

The judgment of the district court of the United States, for the district of Kentucky, at June term, 1800, in the caveat of *Wilson v. Mason*, was, "That the defendant hath the better right to the land in controversy; it is therefore ordered that the caveat be dismissed, and that the defendant recover against the plaintiff his costs in this behalf expended."

*In the caveat of *Mason v. Wilson*, the [*54 judgment was, "That the plaintiff recover against the defendant so much of the land in controversy as is included within the survey of 8,300 acres, made by George Mason, on his entry of 8,300 acres entered March (*qu.* April) the 29th, 1780, and designated in the corrected plat returned in the said other caveat, by the letters D. E. F. 8, and also his costs by him about his suit in this behalf expended."

After these judgments were entered, Wilson, by his counsel, moved the court for a citation on a writ of error to the supreme court of the United States, to which Mason, by his counsel, objected, alleging that by the acts of assembly of Virginia, under which the plaintiff Wilson claims, it is provided that no appeal or writ of error shall be allowed on a judgment entered on a caveat, and that, therefore, in this case, the plaintiff was precluded from claiming the benefit of a writ of error. But the court overruled this objection, and granted the citation; to which opinion the defendant excepted.[1]

1.—The following is the opinion of Judge Innes, who tried the cause in the district court; and which is alluded to in the subsequent arguments of counsel. After stating the facts of the case, he proceeds: 'The novelty of this case, the number of facts submitted and found by the jury, as well as the ingenious manner in which it was argued by the counsel of both plaintiff and defendant, have attracted my particular attention, and induced me to weigh the subject deliberately; the result of my deliberations will appear from the following opinion:

'The first question which presents itself in this cause is, whether Mason has surveyed 8,300 acres of land contrary to his entry made the 29th of April, 1780.

'The alteration of Mason on the 27th day of October, 1780, to the entry of 8,400 acres, dated the 29th day of April preceding, is considered as a withdrawing of, and a total abandonment of the first entry; the first entry calling to lie about four miles above the mouth of the west fork, the second four miles from the mouth of the main creek.

'The survey therefor, of the 8,300 acres is made contrary to the entry, as it adjoins the tract of 8,400, which is made in conformity to the new entry.

'This decision, that the land in question is surveyed contrary to entry, brings me to the principal question in this cause; will Mason's survey for 8,300 acres of land, made contrary to his entry, secure the land to him against the claim of Wilson, founded on a special entry, subsequent to the recording of Mason's survey, Wilson having, before he made his entry, notice of the place where, and manner in which, Mason had surveyed, and of the survey being recorded?

'The parties to this suit are both considered as purchasers of the commonwealth; Chancery revision of the laws, p. 95, 96, s. 3; the surveyor of the county, as her ministerial agent; who is authorized to receive warrants for land, make entries, survey the same, receive the surveys when made, record the plat and certificate within three months after it is returned to his office; provided, upon examination, he finds it truly made, and legally proportioned as to length and breadth.

'I will here take notice of two arguments urged by the plaintiff's counsel, viz., that the word 'truly,' used in the law, when speaking of the duties of the surveyor, referred to a power over the entry; that it was his duty to see that the entry and survey agreed.

'This would be a dangerous construction of the law as it would authorise the surveyor to determine the rights of claimants, and to judge in his own cause where a survey should be made that interfered with a claim of his. I conceive him ministerial, except in two cases; he is to examine the plat that it is truly made: *i. e.* to see that the courses of the survey are truly laid down, and that it contains its complement of acres. It is to

55*] *This cause was argued at last term by Daveiss and C. Lee, for the plaintiff in error, and Jones and Mason, for defendant

56*] *Daveiss, for plaintiff in error.

As the counsel for the defendant in error have objected to our right of appeal in this cause, I shall at first confine myself to that point; because, if the court should agree 57*] *with them in opinion on that question, much time will be saved and much useless discussion prevented. It is contended that by the laws of Virginia, upon which the title to the land in dispute depends, and which give the 58*] remedy *by caveat, no appeal or writ of error will lie. The land law of Virginia, as it is called, viz., the act of May, 1779, (Chancery Revision of the Laws of Virginia p. 94.) entitled, "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," which directs the manner of proceeding upon caveats, enacts, that "the court" (that is, the general court) "shall proceed to determine the right of the cause in a summary way, without pleadings in writing; impaneling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed."

This law, it is said, was in force at the time of the separation of Kentucky from Virginia; and that by the act of assembly of Virginia of December, 1789, Rev. Code, p. 56, s. 7, which prescribes the terms upon which Kentucky might become an independent state after the 1st of November, 1791, it is provided that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure, under the laws of the proposed state, "and shall be determined by the laws now existing in this state."

59*] *But we shall contend,

1st. That the jurisdiction and powers of this court do not depend upon the laws of Virginia, but upon the constitution of the United States, and the acts of congress.

2d. That the laws of particular states lose their force when they contravene the acts of congress.

3d. That by the law of Virginia a right of appeal is allowed upon a caveat.

1st. By the constitution of the United States, art. 3, s. 2, "the judicial power shall extend" "to controversies between citizens of different states," and in all cases, except where a public minister, or a state, shall be a party, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." Congress have not excepted the present case; it therefore follows, that by the constitution of the United States, this court has appellate jurisdiction of the cause.

2d. By the constitution of the United States, art. 6, "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, "any thing in the constitution or laws of any state to the contrary notwithstanding." By the 10th section of the judiciary act of 1789, the district court of Kentucky has jurisdiction of all cases by that act made originally cognizable by the circuit courts, and it is enacted, that "writs of error and appeals shall lie, from decisions therein, to the Supreme Court in the same causes, as from a circuit court to the Supreme Court, and under the same regulations." This cause having been removed, by the defendant Mason from the state court, into the district court of the United States for the district of Kentucky, under the 12th section of the judiciary act of 1789, is to "proceed in the same manner as if it had been brought there by original process." And by the 22d section, "final judgments and decrees in civil actions in a circuit court, brought there by original process, or removed there from courts of the several states," *where the matter [*60 in dispute exceeds 2,000 dollars, may be re-examined and reversed or affirmed in the Supreme Court.

A cause may be removed into a circuit court from a supreme court of a state, from which,

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this part of his duty that the word truly refers. Again, he is to examine the legal proportion of the plat. In these two cases he acts judicially; and it is right he should be vested with such a power; because, as he acts generally by deputy, it enables him to correct the work of his deputy, and also to prevent improper combinations between the employer and deputy.

'The second argument alluded to is this; that neither the entry book, or book for entering surveys, are record books; and that legislative interference was necessary to constitute them such. Ch. Rev. 96, 220. They are books directed to be procured by law. The surveyor is a sworn officer, commissioned agreeably to law. Copies of entries and copies of surveys, attested by him, are good evidence in a court of justice. I therefore consider every entry, and every survey, entered in these books as being of record, and equally valid with those which are usually styled records.

'Mason, a purchaser of the commonwealth, having surveyed contrary to his entry, returns the survey to the surveyor's office, where it is examined and recorded before the claim of any other person appears to the land. Can the commonwealth destroy Mason's survey and refuse her grant to the land?

'The law has pointed out no mode by which the commonwealth can set aside Mason's survey for her own benefit neither was such a provision necessary; because he had paid the purchase money, for so many acres of unappropriated land. It was vacant; and so soon as his survey was recorded, his warrant was carried into full execution, and the entry of 8,300 acres became vacant, and reverted to the commonwealth, there being no warrant in the surveyor's office to cover it, the warrant being returned to the owner with the plat and certificate of survey. Or, being recorded, it is the same thing in effect, as it can never be again acted upon, being executed by actual survey. Ch. Rev. s. 3, p. 95, 96. Any practice to the contrary I deem illegal, and contrary to law.

'From this statement of facts I determine Mason's right to be good against the commonwealth.

'As the commonwealth can take no advantage of Mason's surveying contrary to entry, shall Wilson, by his subsequent special entry, when he had full and perfect knowledge of the place where Mason's survey was made, and of its being recorded?

'There are only two ways of destroying a man's right to a tract of land. By caveat after survey and before the title is complete; or, by a suit in chancery after the grant has issued.

'In the present case Wilson has chosen to enter a caveat to prevent the emanation of a grant to Mason: alleging that Mason has surveyed contrary to entry, and that it is vague, for which reasons he claims the land by virtue of a special entry.

'There are four causes stated in the land law which authorize the entering of a caveat. 1. Fall-

by the laws of the state, no appeal or writ of error would lie; and if the principle contended for by the opposite counsel is correct, it would equally prevent this court from taking cognizance of a writ of error in that case as in this.

Besides, the question, whether a writ of error or appeal will, or will not, lie upon a caveat, does not affect the title to the land; and the act of assembly of Virginia, of December, 1789, was only intended to protect the rights to land in Kentucky acquired under the laws of Virginia. It says, "the rights and interests of lands shall be determined by the laws now existing," and does not say that Kentucky may not give a further remedy.

3d. A right of appeal upon a caveat did exist in Virginia at the time of passing the act of assembly of December, 1789, c. 53, respecting Kentucky. By the act of the Virginia assembly, October, 1788, c. 67, s. 11 and 12, the cognizance of caveats was given to the district courts, and by the 16th section of the same act an appeal is allowed as of right in all cases.

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ing to register the plat and certificate of survey within twelve months after making the survey; 2. If the breadth of the plat be not one third of its length; 3. If any person shall obtain a survey of land to which another hath by law a better right, the person having such better right may in like manner enter a caveat, &c. 4. If the plaintiff in a caveat recover judgment and fails to deliver the same, &c. into the land office within six months after judgment, it shall be lawful for any person to enter a caveat, &c. The two first and fourth causes are penalties which any person may take advantage of, and do not apply to the present case. The third requires an existing right in the caveator or at or before the time the survey caveated is recorded.

'From an attentive consideration of this passage in the law, it conveys to me this idea: 'Shall obtain a survey of lands,' means subsequent to the passing of the law, and after the survey is recorded; and not from the making, because the survey is not complete until it is recorded; neither could he 'obtain' it till the surveyor has performed that part of his duty, after which it is to be delivered to the proprietor with the warrant. Previous to the recording I consider the survey to be under the direction of the owner, and that he may make any alteration he pleases in it, but not after; although a different practice has prevailed, and which upon inquiry will be found to be contrary to law.

'It is important to this cause to consider another, passage in the same sentence of the law; 'to which another hath by law a better right.' The word hath is in the present tense, and refers to the time of obtaining the survey. If my construction relative to the word *obtain* be right, the claim of the caveator must exist before or at the time of recording the survey. I am confirmed in the propriety of this interpretation of the law, for the following reasons. If a deputy surveyor makes a survey, the principal ought not to sign it till it is recorded; then the signature makes it ready to be delivered. If made by the principal, he will not deliver it before it is recorded. The survey cannot be considered as complete till all the requisites of the law be performed; the party is then entitled to it. Neither will the register of the land office receive it without that formality. Without these requisites it is of no more value than waste paper; it cannot therefore be said to be *'obtained,'* without their being performed.

'The two first and fourth causes which *justify* the entering a caveat, I have already said do not apply to the present case.

'It remains to be considered whether Wilson has pursued the statute so as to bring his case within the third cause: Had he *'a better right'* to the land surveyed for Mason, and for which he has instituted this suit, than Mason had, at the time the survey was recorded?

'A caveat is a new and summary mode of proceeding, in derogation of the proceedings at common law, instituted by statute; it is necessary, therefore, to pursue the statute strictly, and show to the court that the caveator has a clear right to pursue that mode of proceeding. 1 D. & E. 141.

'Wilson's entry was made on the 9th day of April, 1784. To the date of his entry I fix the commencement of his claim to the land in controversy, it being the first certain and evident act of ownership manifested by him; which is upwards of four months after Mason's survey had been *recorded.*

'As Wilson's right did not exist at the time Mason's survey was *recorded,* he has failed to prove the *better right* required by law; neither has he pursued the statute by assigning proper causes for caveating. Surveying contrary to entry, or making a vague entry, are not stated in the law as exceptions to a survey, or causes for entering a caveat.

'True it is, that there are instances in which surveying contrary to entry would be a good cause of caveating. But this is where there is an existing right before the survey is made or obtained; and the question would then rest on having the *better* right to the land.

'The favourable light in which surveys have been viewed by the legislature is apparent in all the laws which have been enacted respecting the titles to land. They are all to be considered as one law, forming one general system on the same subject.*

'The surveys here alluded to were injurious to the interest of the commonwealth, but being made by the proper officer, were confirmed.

'In this case the commonwealth is not injured, and Wilson, through his partner Handley, had every information necessary to guard him against an interference with Mason's survey.

'Considering the parties both as purchasers of the commonwealth, deriving their claims from the same source; Mason as the first, and Wilson as the second, the following principles will apply in this case respecting notice. Lord Hardwicke, said in the case of *LeNeve v. LeNeve,* Amb. 446, 3 Atk. 634, 'that the taking of a legal estate after notice of a *prior right,* makes a person *mala fide* purchaser, and is a species of fraud.' If a person does not stop his hand, but gets the legal estate when he knew the right in equity was in another, he will be rebutted by this maxim, *'fraus et dolus nemini patrocinari debent.'*

'In the case of *Abney v. Kendall,* 1 Eq. Cas. Abr. 330, pl. 1. 1 Chan. Ca. 38† it was determined that if A having notice that lands were contracted to be sold to B. purchases those lands, and takes a conveyance it shall destroy the purchase, and the land shall be reconveyed to B.

'Mason being considered the first purchaser of the commonwealth, having obtained his survey, through the means of her agent, (though contrary to entry, yet of which she can take no advantage, and which worked no iniquity to any person, the land being vacant), by recording the survey, the entry *above* the forks of the creek was abandoned. Wilson having *notice,* before he made his entry, that Mason had appropriated the land by the recording of the survey, cannot support his claim under the statute; judgment, therefore, must be entered for the defendant.

'The preceding pages contain my opinion delivered in the caveat, George Wilson against Richard Mason, devisee, &c. at the June term, 1800, of the district court of the United States for the Kentucky district.

'As the principles on which the decision was founded will be brought before the Supreme Court of the United States, where I can have no opportunity of assigning my reasons in support of the judgment, with due deference I solicit the court to permit the opinion to be read; by which the principles which governed me in the decision will appear fully before that court which is to reverse or affirm the judgment I have given between the parties.

'This request is grounded upon this single consideration, that what I have been officially obliged to do, may be examined before a final inquiry is had respecting my judicial acts.

(Signed) HARRY INNES.

May 18th, 1801.

**Many acts passed the Virginia legislature giving further time to return plats, &c.*

†1 *Chan. Cas.* 38. *Merry v. Abney* the father, *Abney* the son, and *Kendall.*

The act of December 12, 1792, s. 6 and 9, Rev. Code, p. 80, 81 re-enacts those clauses of the act of 1788.

Mason, for defendant in error.

It is not denied that the acts of congress are, in many cases, paramount to the laws of the individual states; but even a general position of that kind will not decide the present question. This action was brought in a state court, under a state law, before congress legislated upon the subject, and even before congress, or the constitution of the United States, had an existence. Can such an action be affected by subsequent acts of Congress?

The law by which Kentucky was erected into a separate state passed the Virginia legislature in December, 1789. This is an unalterable law, 61*] embracing the citizens *of both states. It is a compact by which they mutually agreed that the rules of property should not be altered. If we admit that by the act of 1792, appeals were allowed in the case of caveats, the admission proves nothing in the present question, because the law of 1789 is an unalterable law, and confined to the then existing state of things. It was not in the power of one of the contracting parties to change the terms of the compact.

But it is said that there was a right of appeal at the time of that compact. Let us examine the laws relative to this subject. The first act is that of 1779, mentioned by the opposite counsel, which declares that caveats shall be tried in the general court, and that there shall be no appeal or writ of error. The next is the act of 1788, which transfers the jurisdiction of the general court to district courts, and declares that "they shall have the same jurisdiction concerning" "caveats" "as the general court heretofore had by law." But the jurisdiction which the general court heretofore had by law was an exclusive and final jurisdiction, from which there could be no appeal. If, then, the district courts were to possess the same jurisdiction, it must be an exclusive and a final jurisdiction. But it is said that by the same act of 1788, an appeal in all cases from the district court was a matter of right. This must evidently mean in all cases where a right of appeal before existed from the general court to the court of appeals; but cannot be understood to give an appeal in a case where it had been expressly excluded by an existing law. The intention of the legislature was to put the district court, as to all cases arising within the district, exactly in the place of the general court, and to give them the same jurisdiction, to be exercised in the same manner, with the same limitations, and liable to appeals only in the same cases. But the act of 1788, erecting district courts on the eastern waters, did not affect Kentucky. The legislature had before, by an act passed in 1782, erected a court on the western waters, called the supreme court for the district of Kentucky, to which it had transferred all the powers and jurisdiction theretofore exercised by the general court of Virginia; and with the rest, the power to try caveats and to give judgment thereon, without any appeal or writ of error to their judgment. The act of 1788 did not take away the ex-62*] *clusive cognizance which the supreme court for the district of Kentucky had respecting caveats, but they retained it till the final separation of Kentucky from Virginia; after which the legislature of Kentucky passed no law authorizing an appeal; so that under the state laws, it is clear that no appeal or writ of error would lie. There being then no appeal under the state laws, the question will be simply whether a writ of error will lie to the district court of the United States for the Kentucky district, upon an action carried there from the state court, which, under the laws of the state, had a final and exclusive jurisdiction of the cause.

The 22d section of the judiciary act of 1789, (Laws U. S., vol. 1, p. 61,) which allows appeals and writs of error generally, did not contemplate a case like the present. This court is bound to take notice of the laws of the several states. By the 34th section of the same judiciary act, p. 74, the laws of the several states are to be the rules of decision in cases where they apply. The remedy by caveat is given by the state law, and the party who chooses to take that remedy must take it with its condition annexed, that no appeal or writ of error shall be allowed. A purchaser under the commonwealth of Virginia acquires his right under this condition. It is a part of the contract from which this court cannot absolve him. The parties to this suit are not the only parties interested in this question; for while the right is hung *in dubio*, whilst it is uncertain to whom the grant ought to issue, the state taxes cannot be collected, the commonwealth having no tenant to whom to resort. Wilson has sought the summary process by caveat, and ought to be bound by the restrictions of that law under which he claims his remedy. He was not compelled to use the summary remedy; he might have resorted to chancery, and then the commonwealth would have had a tenant to pay the taxes. He ought not to have the benefits of this kind of process, without submitting to the inconveniences which may be supposed to attend it. If this opinion is correct, although the laws of the United States provide generally that writs of error may be had, they can only give them as a remedy where a right exists; and if Wilson's right is gone by the judgment of the court below, he is precluded from suing it out by the statute under which he claims.

*Lee, in reply. [*63

This caveat is brought from the district court of the United States, and not from a state court. It is true that it originated in the state court, but it was the defendant Mason, and not Wilson the plaintiff, who brought it into the court of the United States; and if the judgment of that court becomes thereby liable to be reversed upon a writ of error, it is a consequence attributable to the act of Mason alone.

There is nothing peculiar in the nature of the proceeding by caveat, to exclude it from the general appellate jurisdiction which is given to this court by the constitution and laws of the United States. It is not true that this court are to look into the laws of Virginia for their right to correct the errors of the inferior courts of the United States. When a cause is brought from a state court into a court of the United States, it is to be proceeded upon as if it had originated in the latter court, and the act of congress has expressly provided for an appeal or writ of error in the very case of an action removed from a state court into an inferior

court of the United States. Unless this case can be shown to be within some express exception to the general rule, none ought to be presumed by implication. With regard to the compact between Virginia and the inhabitants of Kentucky, it is true that in all matters of substance, where the right of property depends upon it, it is binding upon this court; but in matters of form only, it could never receive the strict construction contended for, even between the parties themselves. The reasoning of the opposite counsel would go to prove that every caveat, depending upon the laws of Virginia, must be tried in the courts of Virginia only, because they had the sole right of trying a caveat at the time of the compact. It would prevent the states of Virginia and Kentucky forever from modifying and regulating their system of courts, and neither state could ever afterwards authorize an appeal upon a caveat.

But an appellate jurisdiction on caveats did exist in Virginia at the time of the compact. It appears by the act of congress, vol. 1, p. 278, that Kentucky did not become an independent 64*] state till June, 1792. The county *courts of Virginia had before that time cognizance of caveats as to lands within their respective counties. Laws of Virginia, Rev. Code, p. 92, s. 11; and in p. 88, s. 53, an appeal is given from the county courts to the district courts in all cases of a certain value, or where the title of land is drawn in question; and in p. 69, s. 14, an appeal or writ of error is allowed from the district courts to the court of appeals, in the same manner as from the county to the district courts.

As to taxes, the state may tax the land before any patent has issued, if they think proper. It is not necessary that there should be a tenant.

The Court directed the counsel to proceed in the further argument of the cause, observing that they would consider this point with the others.

Lee, for the plaintiff in error.

The question is, who has the better right to the grant for 8,300 acres of land, surveyed for George Mason on the 2d of October, 1783.

1st. The decision of this controversy depends on the laws of Virginia, prescribing the terms and manner acquiring title to waste and unappropriated lands; with which there must be a legal and exact compliance.[1]

According *to these laws there must [*65 be a warrant, an entry, and a survey; the warrant being the foundation of the entry, and the entry directing and controlling the survey. If the *entry be made without a warrant, [*66 or if the survey be made of other land than that described in the entry, in either case there is a defect of title.

*In this caveat one of the causes as- [*67 signed is, that the survey of Mason was made contrary to his entry, and this we conceive to be a fatal defect in his title.

2d. The entries made on the 29th of April, 1780, by G. Mason (from whom the defendant derives his title) of his two warrants, No. 1, for 8,400 acres, and No. 2, for 8,300 acres, were valid and sufficient entries of land on the east side of Panther creek, and above the mouth of the west fork thereof, at the time those entries were made. The entry of warrant No. 1 is "on 8,400 acres of land to begin on Panther creek on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

The entry of warrant No. 2 is "on 8,300 acres to begin at the upper corner of his 8,400 acre entry, and run up the creek on the east side, and back for quantity."

3d. If the explanation made on the 27th October, 1780, of the entry of warrant No. 1, on

1.—The following is the substance of those parts of an act of assembly, which are material to this cause, contained in the chancery revision of the laws of Virginia, published in 1785, by order of the general assembly, p. 94, entitled 'An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,' May session, 1779.

The preamble recites, 'Whereas there are large quantities of waste and unappropriated lands within the territory of this commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the public debt, be it enacted,' &c.

§ 1. That an office be constituted for the purpose of granting lands, and a register of the said land office be appointed, &c.

§ 2. 'That any person may acquire title to so much waste and unappropriated lands as he or she shall desire to purchase, on paying the consideration of 40*l.* for every 100 acres, and so in proportion,' &c.

§ 3. Register to grant printed warrants under his hand and seal of office, specifying the quantity of land, and the rights upon which it is due, authorizing any surveyor duly qualified according to law to lay off and survey the same, 'which warrants shall be always good and valid until executed by actual survey:' no warrant to be issued other than pre-emption warrants, before the 15th of October, 1779. No surveyor to permit the entry or location of any warrant before the 1st of May, 1780. A surveyor to be appointed in every county.

'Every person having a land-warrant founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely, as that others may be enabled with certainty to locate other warrants on the adjacent residuum: which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries.

'The surveyor at the time of making the survey shall see the same bounded plainly by marked trees, except where a water course, or ancient marked line, shall be the boundary, and shall make the breadth of each survey at least one-third of its length in every part, unless where such breadth shall be restrained on both sides by mountains unfit for cultivation, by water courses, or the bounds of lands before appropriated. He shall, as soon as it can conveniently be done, and within three months at farthest after making the survey, deliver to his employer, or his order, a fair and true plat and certificate of such survey, the quantity contained, the hundred, (where hundreds are established in the county wherein it lies,) the courses and descriptions of the several boundaries, natural and artificial, ancient and new, expressing the proper names of such natural boundaries, where they have any, and the name of every person whose former line is made a boundary; and also the nature of the warrant and rights on which such survey is made. The said plats and certificates shall be examined and tried by the said principal surveyor, whether truly made and legally proportioned as to length and breadth, and shall be entered with-

the 29th of April preceding, for 8,400 acres, was a subtraction thereof from the land to which it had been applied, a matter not clear of doubt, and therefore not admitted; yet the entry of warrant No. 2, upon 8,300 acres, was not 68*] thereby affected, *but remained unaltered, unimpaired and unsubtracted from the land which it describes with sufficient legal precision and certainty. The relocation of one warrant is not necessarily the relocation of another. If the warrant No. 1 was transferred by a new entry on the 27th of October, 1780, to land some miles below the west fork of Panther creek, yet the warrant No. 2, having been legally located, on the 29th of April antecedent, upon a tract of land some miles above the west fork, remained appropriated to that tract of land.

4th. The entry of 8,300 acres, under warrant No. 2, being such a special and precise entry as the law requires, is an appropriation of the land described in it; and fixes that warrant upon that tract of land, situate upwards of four miles above the west fork of Panther creek: and the survey made by Mason of 8,300 acres on the south side of Panther creek, and below the west fork thereof, and several miles below it, is not a survey of the same land contained in his entry.

A survey, of itself, without a previous legal entry of a land warrant, is not a legal appropriation of waste and vacant land; and therefore this survey, unsupported by a legal warrant and a legal entry, was no legal appropriation, by Mason, of the land in controversy; but an unlawful intrusion thereupon; and the same land remained open to the appropriation of others, who, having notice of the legal survey of Mason, were not precluded by law, or equity, from proceeding in due course of law to obtain title to the same land which is described in that illegal survey which had been knowingly made by the agents of Mason contrary to his legal entry. No grant of the land, therefore, ought to be made to the defendant Mason.

5th. If the claim of the defendant be deemed invalid, then there is no impediment in the way of the plaintiff, whose warrants, whose entry, and whose survey, are perfectly conformed to law.

The two causes assigned by Mason in his caveat against Wilson are resolvable into one, viz., that having notice of the survey, of Mason, it was not equitable but fraudulent *to [*69 acquire a title to the same land which was contained in that survey. But if the law be in favor of the plaintiff, equity is also; for notice of illegal proceedings in one man to acquire property, is no equitable bar to another who shall in all respects proceed according to law.

On the part of the defendant Mason, there was full and complete knowledge of Green river, Panther creek, and the west fork; and with this knowledge, a survey was made of a different tract than the one described and authorized by the entry No. 2, for the purpose of obtaining a grant, in evasion and fraud of the law. Such illegal proceeding ought not to be sustained in a court of justice against another who shall respect and obey the law in all particulars.

The entry of Mason for 8,300 acres on the 29th April, 1780, begins at the upper corner of his entry for 8,400 acres, as made on the same day. The entry for 8,400 acres, well and accurately described a tract of land lying on the east side of Panther creek, opposite a beech on the west side, and four miles above the west fork. This entry being sufficiently certain, the entry for 8,300 acres must be certain also, and describes a particular tract of land lying more than four miles above the west fork.

The west fork was known by that name to the agent of Mason at the time he made the entries on the 29th of April, having encamped thereabouts four or five weeks in the winter

in three months at farthest after the survey is made, in a book, well bound, to be provided by the court of his county, at the county charge.'

'Every person for whom any waste or unappropriated lands shall be so located and laid off, shall, within twelve months at farthest after the survey made, return the plat and certificate of the said survey into the land office, together with the warrant on which the lands were surveyed, and may demand of the register a receipt for the same, and on failing to make such return within twelve months as aforesaid, or if his breadth of his plat be not one-third of its length, as before directed, it shall be lawful for any other person to enter a caveat in the said land office against the issuing of any grant to him, expressing therein for what cause the grant should not issue; or if any person shall obtain a survey of lands, to which another hath by law a better right, the person having such better right may in like manner enter a caveat to prevent his obtaining a grant until the title can be determined; such caveat also expressing the nature of the right on which the plaintiff therein claims the said land. The person entering any caveat shall take from the register a certified copy thereof, which, within three days thereafter, he shall deliver to the clerk of the general court, or such caveat shall become void; the said clerk, on receiving the same shall enter it in a book, and thereupon issue a summons, reciting the cause for which such caveat is entered, and requiring the defendant to appear on the seventh day of the succeeding court, and defend his right; and, on such process being returned executed, the court shall proceed to determine the right of the cause in a summary way, without pleadings in writing; impaneling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed; a copy of such judgment, if in favor of the defendant, being delivered into the land office, shall vacate the said caveat; and if not delivered within three months, a new caveat may for that cause be entered against the grant; and if the said judgment be in favor of the plaintiff, upon delivering the same into the land office, together with a plat and certificate of the survey, and also producing a legal certificate of new rights on his own account, he shall be entitled to a grant thereof; but on failing to make such return and produce such certificates within six months after judgment so rendered, it shall be lawful for any other person to enter a caveat, for that cause, against issuing the grant; upon which subsequent caveats, such proceedings shall be had as are before directed in the case of an original caveat; and in any caveat where judgment shall be given for the defendant, the court shall award him his costs;' 'and in case the plaintiff in any such caveat shall recover, the court may, if they think it reasonable, award costs against the defendant.'

'And for preventing hasty and surreptitious grants, and avoiding controversies and expensive lawsuits, be it enacted, that no surveyor shall at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land, by him surveyed, except only to the person or persons for whom the same was surveyed; or to his, her or their order; unless a caveat shall have been entered against a grant to the person claiming under such survey, to be proved by an authentic certificate of such caveat from the clerk of the general court, produced to the surveyor.'

and spring before he made the entries for Mason. It has always been known by that name since the first exploring of that part of the country. He was informed, while the surveys were still in his power, that they did not conform to his entries, and shown the manner in which they differed, and yet he obstinately persisted in having them recorded. The warrant No. 2, then, was well and sufficiently located on the land above the west fork, and a removal of the location of warrant No. 1, even if such removal could be made according to law, could not be considered as a removal also of the location of No. 2, without an express declaration to that effect. The location of warrant No. 1 was changed, but the location of No. 2 was not. Mason has surveyed it as if it was; and hence results the fatal difference between 70*] *his entry and his survey; by which his survey is a mere void act, and cannot be the foundation of a claim to a patent.

But it may be said, perhaps, that Mason's survey of 8,300 acres, although not authorized by a previous entry, yet being made before Wilson's entry, and Wilson having notice of it, was good against Wilson as well as against the commonwealth. This is denied. As to the commonwealth, it was an intrusion; and as to Wilson, the land was still vacant; it not having been appropriated in the manner authorized by law. Before a grant for land has actually issued, the only record of appropriations is the surveyor's book of entries of locations. The book of surveys was not intended by the legislature as the book to resort to for information as to appropriations; it furnished no evidence of that kind. And as to notice, the principle is well established, that notice of an illegal act is no equitable bar to him who proceeds according to law. Cowp. 280. *Chapman v. Emery;* and *Doe v. Routledge,* Cowp. 708, 711, 712, where Lord Mansfield states the reason for the principle to be, "because if he knew the transaction he knew it was void by law." 5 Co. 60, b. *Gooch's Case.* 1 Eq. Cas. Abr. 334. Tonkins & Ennis, 2 Eq. Cas. Abr. 682. Powell and Pleydell.

Notice could not make that act valid which was void at law. A survey is not the act of appropriation which the law requires. The land not being appropriated according to law, was such waste and unappropriated land as the act of assembly says any person may acquire a title to, on complying with the terms, and by taking the steps prescribed by the act, and Wilson, or any other person, might lawfully appropriate the land, by proceeding regularly according to law.

Mason, then, not having taken the steps required by the act of assembly, had no title at law; and having illegally made his survey, with a full knowledge of all the circumstances, and after having been warned of his error, has certainly no right in equity. Before he obtained a grant, Wilson, by pursuing the steps of the law, acquired a better right, and was thereby entitled to bring his caveat, and obtain a judgment in his favour.

71*] *Daveiss, on the same side.

Notice cannot alter the law, except where the law requires notice. Where a statute requires notice and prescribes the mode, notice in another mode is not sufficient. 4 Term Rep. 368. *King v. Newcomb,* Amb. 444, 445.

This is a case in which Wilson and Mason are both contending *de damno evitando.* The jury have found that by a law passed by the assembly of Kentucky, in 1792, all further entries of land with the surveyors are prohibited, and that ever since no land could be appropriated by virtue of land warrants. Consequently, the principle applies which is laid down by Lord Kaims, in his Principles of Equity, p. 26, 27, 162, 163, 199, "that it is a universal law of nature that it is lawful for one, *certans de damno evitando,* to take advantage of another's error." A warrant is a transitory chattel until it has been located according to law. The entry is the appropriation of a particular tract of land, and the fixing of the warrant to that tract. The survey is of no effect, unless it be a survey of the tract so appropriated. In support of these positions he cited a manuscript report of land cases decided in the courts of Kentucky, pp. 2, 3, *Swearingen v.* ———, p. 35; *Dougherty v. Crow,* 61, 62, 63. *Isaacs v. Willis,* 268, *Owen v. Wilson,* 77, 78, 79. *Kite v. Stevenson,* 182, 183. *Consella v. Briscoe,* 199. *Swearingen v. Same,* 197. *Miller's heirs v. Fox,* 200. *Smith v. Bradford,* 206, 207. *Fry v. Essery,* and other cases in pages 211, 212, 214, 222, 232, 236, 268, 302, 303, 337, 338, 343, 353, 354.

It will probably be contended by the defendant, that the intention of the assembly in requiring an entry, was to give notice to subsequent purchasers; and that notice given or gained in any way is sufficient. But it has been shown that here was no appropriation by Mason; and that the land until appropriated is waste. The land law shows this, because nothing but a regular title is protected by that law. In a statute introducing a new law, or prescribing the mode of acquiring new rights, affirmative words imply a negative of all other modes of acquiring that right, or fulfilling the terms of that law. The land law, by giving one way of acquiring titles, negatives all other modes. In 4 Bac. Abr. 641, it is said, "If an affirmative *statute, which is introductive of any [*72 new law, limits a thing to be done in one manner, it shall not, even where there are no negative words, be done in any other;" and the following cases are there cited. *Stradling v. Morgan,* Plowd. 206, (*b*). *Slade v. Drake,* Hobart, 298. *Wethen v. Baldwin,* Sid. 56. He cited also *Thornby v. Fleetwood,* Strange, 329, and 3 P. Wms. 458, 459, 460, 461. *The King v. Burrage.* Where a certain mode is pointed out by a statute in which a title may be obtained, a conformity to that mode is a condition precedent, without complying with which no title can be obtained. In the present case a warrant, an entry, and a survey are conditions precedent, and a want of either is fatal.

Lee. In the 10th fact, found by the jury for the plaintiff, it is stated, the survey of 8,400 acres was made on the entry of the 17th of October, and that the survey of 8,300 acres was made on the entry of 29th of April. This must prevent the defendant from arguing that the latter survey was made on the entry of October, as well as from pretending that the entry of October applies to the entry of 8,300 acres made in April.

In order to prove that all lands, not entered for in a regular manner, were to be considered as waste and unappropriated, he cited the case of *Jones v. Williams,* 1 Wash. 231, in which

the court call lands waste and unappropriated, although they had been settled and occupied for years.

Mason, for the defendant in error.

1st. The entry of Mason, upon which his survey of 8,300 acres was made, is sufficiently certain, and the survey is in conformity to the entry.

2d. Admitting that the entry was vague, and not corresponding with the survey, yet Mason having paid for the land, and surveyed it, *quoad* the commonwealth, he was a bona fide purchaser, for a valuable consideration, and entitled to the land, provided no step had been 73*] taken *by any other person to acquire title to this land, previous to Mason's survey.

3d. Mason having appropriated this land by a survey actually made, returned to the surveyor's office and recorded, the land ceased to be waste and unappropriated land: and Wilson having a perfect knowledge of these facts before and at the time he made his entry, was and is, (if he could acquire title at all,) in the character of a second purchaser with notice of a prior sale of the same land, and therefore was a fraudulent purchaser.

4th. The plaintiff in error is not, under the provisions of the law, entitled to a caveat in this case, because the better right, which the law meant to protect, was a right existing before or at the time the survey to be caveated was made.

1st. The entry of 8,300 acres is sufficiently certain, by its reference to the entry of 8,400 acres. The surveys of both entries are upon the indentical tracts originally intended to be located. The first description of them in April, 1780, was inaccurate on account of the mistake in the names of places. The particular forks and branches had at that time scarcely acquired any names at all. The facts stated in this case do not admit that the names of the places were known before the beginning of the year 1780, which is the very time when the entries were made. It does not appear that the place now called the mouth of west fork was known by that name before Mason made his entries. It may be a name since acquired, or given by the surveyor or his deputies, who are the persons that generally give names to places in new countries. So soon as the fall of the same year Mason found that the description was not sufficiently accurate, and made an explanatory entry declaring what place he meant by the mouth of the west fork, and stating it to be the forks of Panther creek where it mouths into Green river. A mistake of that kind was by no means improbable, in the then wild and uninhabitated state of the country on and about Green river, when it was dangerous, on account of the Indians, to attempt to set a compass. That such mistakes were general is evident from the names of places which were given. Thus the west fork is in fact a northeast fork; 74*] *what is called the east side of Panther creek is truly the southwest side. The entry of April was, in substance, the location of the tract surveyed; and the memorandum of Mason in October, was only fixing with more accuracy what was before in some degree vague. If this was the fact, then the entry of October was not a relocation of the warrant; it was never removed, but was always fixed to one and the same spot of earth. If, then, the entry of October is nothing more than it purports to be, viz., an explanation of the name of a place which was before uncertain, this same act of explanation which rendered certain the location of warrant No. 1, must of necessity also render certain the location of No. 2, which depends, for its beginning, upon the location of No. 1. *Id certum est quod certum reddi potest.* The two locations are dependent upon, and connected with, each other; and the explanation of the first must also explain the second. It is evident that it was Mason's intention that the two tracts should lie alongside of each other, and the rendering certain the first, upon which the second was dependent, could never be considered as withdrawing the one from the other, and placing them many miles asunder. If it was Mason's intention in October to make a new location, why did he not avow it? No person had applied to appropriate the land he wanted. No one had interfered, or was about interfering, to take up that tract. There was nothing to prevent him from expressly withdrawing the entry of April, and making an entire new location. But his object was not to remove the location which he had actually made, but only more fully to explain the ideas which he had at first intended to express, but which, on account of the inaccurate knowledge of the names of places, and of the real geography of the country, he had failed to do. Taking, then, the entry of October as an explanation only, it applies as well to fix the true location of warrant No. 2 as of No. 1; and the survey of No. 2 is as correspondent to its entry as that of No. 1 is to its entry.

Nothing can more clearly prove Mason's intention to be to explain, and not to remove his entries of April, 1780, than his omitting to say anything respecting his former entry of 8,300 acres, at the time he was explaining the entry of 8,400. Because, having no idea that his act *would be construed to be anything more [*75 than an explanation, it must apply as well to the former as to the latter. But if his intention had been to remove the location of warrant No. 1, he would either have expressly removed No. 2, at the same time, or else would not have ordered the survey of No. 2 to be made contiguous to that of No. 1. He might as easily have explained No. 2 as No. 1.

Words are but the representatives, and not always the true representatives, of ideas. They do not always express, nor are they the uncontrollable evidence of the ideas of the person using them. They may be explained by the tone of the voice, by the emphasis, by the gestures, or by the actions, of the person speaking. To determine at a subsequent period of time, the nature of the act from the words used, and not to suffer the words to be explained by other proof of the nature of the act, is not a fair mode of seeking for truth.

The question is, what particular spot did Mason mean to locate by his entry of April? He has himself answered the question by his explanation in October. The only doubt can be whether he spoke the truth. He certainly had no motive for deception. There were, then, no contending claims. No other person had attempted to locate the land which he wished to appropriate. He had no reason to

wish to preserve the priority of his entries, because the book of entries was open before him, and he could see that no person had entered for the same land; a new entry, therefore, in October, would have been as good as his old entry in April.

The act of assembly says that the warrant "shall be good and valid until executed by actual survey." The survey, then, and not the entry, is the execution of the warrant. The warrant merges in the survey. This shows that the legislature attached greater importance to the survey than to the entry.

If, then, the land surveyed is the same land which Mason fixed his eye upon, but inaccurately described in April, then the survey was correctly made, and pursuant to the actual location.

76*] *2d. But admitting, for the sake of argument, that the survey did not correspond with the entry, yet Mason having paid the money for the land, and surveyed it, he was, as to the commonwealth, a bona fide purchaser for a valuable consideration, and entitled to a grant of the land. The commonwealth could not refuse, because the want of an entry was no injury to her. Mason had his choice among all the waste and unappropriated land in the state. It was of no importance to the commonwealth, whether he took this tract or another. The commonwealth sold all her land at the same price. The land was waste and unappropriated, and the warrant being executed by actual survey was spent and gone, *functus officio*. The commonwealth had no means to prevent the emanation of a grant. As between the commonwealth, therefore, and Mason, this was a contract, for that specific tract of land. It was as if the warrant had been special for that particular land. The warrant having been originally general, became special, as against the commonwealth, by the survey. The land ceased to be waste and unappropriated, as to the commonwealth; who was bound by the survey, and could not sell it to another.

3. This being the case, and Wilson having a full knowledge of all these facts before he made his entry, became a *mala fide* purchaser. This is one of the grounds upon which Judge Innes decided the case. (Here the opinion of Judge Innes was read, with the authorities there cited.) As a second purchaser with notice, he could take only the right which the commonwealth had subject to the contract with Mason.

The preamble of a statute is said to be a key to unlock its meaning. It appears by the preamble of the act of 1779, to have been the object of the legislature, 1st. To encourage migration, and to promote population; 2d. To increase the revenue.

To induce persons to become purchasers it became necessary to secure their titles, and for this purpose, as the situation of the country would not permit them in all cases to make actual surveys, an entry, or location of the land entered in the surveyor's books, was to be considered as equivalent to a survey, for the pur-
77*] pose of appropriating *the land and securing a title. A survey, returned and recorded, is, in itself, a more unequivocal act of appropriation than an entry, and the law has made it the only means of executing the warrant. No time is fixed by law for the making the survey, because in many parts of the state it was at that time impossible to make it, on account of Indians, and no time could be ascertained with any degree of precision when it would become possible. For the security of subsequent purchasers, it also became necessary that some means of notice should be prescribed, that they might avoid an interference with prior rights. Hence it was enacted that the locations of warrants should be entered in a book, and should be so special that others might be enabled, with certainty, to locate other warrants on the adjacent residuum. The object of the commonwealth in requiring entries, was not to secure her own immediate interests, but that of purchasers, by giving them notice; and if the subsequent purchaser acquires such notice, it is of no importance whether it be by an entry which was liable to be changed, or by an actual survey recorded, which was a complete execution of the warrant, and could not be altered. Indeed, the latter seems to be the more complete and effectual notice, and to answer the intention of the legislature better than notice by an entry only.

The other object of the legislature was to raise money. If, then, complete notice of the location was given to the subsequent purchaser, and the money paid to the commonwealth, the two objects of the legislature were fully answered, and neither the commonwealth, nor that subsequent purchaser, had any right to complain. No injury was done to either. The person who, with full notice of these facts, insists upon becoming a second purchaser, becomes such in his own wrong, and if a loss must fall upon either, it must light upon him who thus voluntarily put himself in danger. Where the object of a statutory provision is only to give notice, if notice is had by other means, it has the same effect as if given in the mode required by the statute. Such have been the uniform decisions in England on the statutes of enrolment, and so well established is the doctrine that it cannot be necessary to cite authorities to support it. Although where a new right is given by statute, a strict compliance with the *provisions of the statute is necessary, [*78 yet it is not necessary for every purpose. *Blackwell v. Harper*, 2 Atk. 94, 95. Mrs. Blackwell having designed and engraved certain drawings of plants, but omitted to engrave on the plate the day of their first publication, as required by the statute, Lord Chancellor Hardwicke decreed a perpetual injunction against Harper, notwithstanding that omission; but did not decree an account of the profits.

It will not be forgotten that Handley, a deputy surveyor of the county, was the partner of Wilson in this business, and was the person who actually made the entry, and that he fraudulently took advantage of the knowledge of Mason's surveys, which he acquired by means of his official situation, contrary to the express provisions and spirit of the act of assembly of 1779, which enacts, that "for preventing hasty and surreptitious grants, and avoiding controversies and expensive lawsuits, no surveyor shall at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land by him surveyed, except only to the person for whom the same was surveyed." This clause of the

act was made for the very purpose of preventing others from taking that advantage of surveys which the deputy surveyor himself has here taken; the law not contemplating the case of a surveyor so regardless of his duty and of his oath as to be guilty of an act like this. A title thus founded in fraud can never be supported. Upon a caveat, the court is to exercise a chancery jurisdiction. The act says, "the court shall proceed to determine the right of the cause in a summary way." This they cannot do without chancery powers. The court in Kentucky has so construed the act. MS. Reports, p. 60, *Isaacs v. Willis;* and also in p. 224.

If Wilson, by pursuing the strict letter of the law, has acquired any thing like a legal right, the court, as a court of chancery, will consider those circumstances of fraud which go to invalidate his right in equity.

4. Wilson is not, under the provisions of the law, entitled to a caveat in this case.

The proceeding by caveat is in derogation of the common law, and therefore the act which 79*] authorizes it is to *be construed strictly. The act mentions only four cases in which a caveat may be entered. 1st. If the plat and certificate of survey be not returned into the land office within twelve months after the survey made, it shall be lawful for any other person to enter a caveat; 2d. If the breadth of the plat be not one-third of its length; 3d. If any person shall obtain a survey of lands to which another hath, by law, a better right; 4th. When upon a caveat judgment shall be given for the defendant, and he shall not lodge a copy of that judgment in the land office within three months thereafter. In the 1st, 2d and 4th cases the caveat is allowed for the purpose of protecting the rights of the commonwealth; they do not apply to the present question. In the 3d case the caveat is given as a remedy to him who hath by law a better right, and it is upon this ground that Wilson claims the process.

If we examine the words of the law according to their grammatical construction, or compare them with the spirit and object of the law, we shall find that the better right which can support a caveat, must be a right existing at the time of the survey obtained, and not a right arising afterwards. The words of the act are, "if any person shall obtain a survey of lands to which another hath by law a better right." The word hath is in the present tense, and must apply either to the time of passing the law, or to the time of committing the injury which is the cause of the caveat. It could not apply to the time of passing the act, because at that time there existed no rights to those waste and unappropriated lands which were the subject of that act. The better right, then, was a right to be derived under that law. The injury to be remedied by the caveat was the injury done by a survey of lands to which another should have a better right. But a survey of lands, to which no other person had a right, cannot be an injury to any one, and can be no ground for a caveat. As to Wilson's being in the situation of one *certans de damno evitando*, the assertion cannot possibly be deemed correct. If he is in danger of loss, he has knowingly put himself in danger; he has sought the position he is in, with a full foreknowledge of all its evils. He was under no necessity of interfering with Mason's claims. His warrant was general. The wilderness was before him, and he knew where Mason had surveyed his land. *The same Lord Kaim, who says, "no [*80 man is conscious of wrong when he takes advantage of an error committed by another, to save himself from loss," says also in the same breath, "but in *lucro captando*, the moral sense teaches a different lesson. Every one is conscious of wrong when an error is laid hold of to make gain by it. The consciousness of injustice, when such advantage is taken, is indeed inferior in degree, but the same in kind, with the injustice of robbing an innocent person of his goods or his reputation." Here Wilson evidently had an intention of making gain by the error of Mason; and if by that means he has put his purchase money at risk, it is not for a court of law or of equity to be anxious to assist him. Wilson, finding that Mason had an advantage by the priority of his location, contrived (by the assistance of Handley, his fraudulent coadjutor) a plan by which he hoped to reap the fruits of Mason's industry; and now he would fain make the court believe he was an innocent purchaser, striving to avoid a loss, the danger of which he had incurred by pure misadventure.

Upon the whole, then, Mason having obtained a right to this tract of land against the commonwealth, and Wilson having notice of that right before he purchased, has no claim at all; but if he had, his remedy is not by caveat.

Jones, on the same side.

This cause naturally divides itself into two questions.

1st. Whether Mason has acquired a right to the patent.

2d. If Mason has not, whether Wilson has; for if neither has a right, Wilson can recover nothing.

The entry of Mason in April, 1780, is supposed to be so absolutely binding upon him, that he could not alter it without withdrawing it entirely, notwithstanding that he subsequently said he was mistaken in supposing the land to lie above the west fork, when in fact it was below. A man may go upon the land and fix in his mind a certain tract, but when he goes to the surveyor's office he may mistake its situation, and say it is on the east when it lies on the west, or the north when it lies on the south; but *when he discovers his mistake, an [*81 explanation is no evidence that his choice has been altered. Here is no proof of an intention to withdraw his first entry; or to appropriate a different tract of land from that which he first intended. The only evidence which can be drawn from the entry of October is, that he had been mistaken as to the point of compass, and as to the name of a particular fork of Panther creek. The land which he had chosen lies above a branch of Panther creek which he supposed to be called the west fork, but which is not now known by that name. Mason was one of the first, if not the very first, adventurer in the lands on Panther creek. There is no evidence that particular branches of that creek had names given them before he made his entries in April. He had as good a right to give names to places as any one else.

But a survey itself is as good a location as an

entry. Indeed it is better, because it is an actual location and occupation of the land. The lines are not merely described by words which are uncertain, but are marked out upon the land itself. It is a *pedis possessio*, an actual seisin. A survey differs from an entry as a diagram differs from a problem; or a proposition from its demonstration. If notice is the object of the statute, a survey recorded is better than an entry, as it is more definite and certain. If the object is to give evidence of an appropriation, it is better than an entry in the surveyor's book, because it is an act *in pais*, an actual possession. The one is but the command to locate, the other is the location itself.

In this case entry does not conflict with entry, and survey with survey; but a prior survey and occupation, with a subsequent entry.

A strong difference is made by the act of assembly between a survey and an entry. The first is a satisfaction of the warrant; and various clauses of different acts speak of a survey as the execution of the warrant. But the entry does not affect the warrant, which is declared to be "always good and valid until executed by actual survey." The entry, therefore, is but an intermediate process by which the party gains a priority of right; it is intended merely as a substitute for a survey, until "an actual survey" 82*] can be *made. If, therefore, there had been no entry at all, yet Mason's right is equally good as if his entry had been free from question. He has done the principal act itself, for which an entry is only a temporary substitute. Perhaps he ran some risk before his survey was obtained; but when a survey is completed, the warrant and the entry are no longer of any effect or validity; they merge in the survey as the survey does in the patent.

2d. With respect to the plaintiff's right, it seems clear that it must be a right existing at the time of the survey.

If we were disseisors, as it is contended, then we gained a defeasible inheritance. We had possession, and whether legal or not, is of no consequence; it was a better right than Wilson's, and good against all the world but the lawful owner.

The acquisition of a legal title takes away the remedy by caveat. The warrant, entry and survey, constitute only an incipient equitable title, to be completed by the patent, which a caveat is the proper process to arrest. This being then entirely a contest about equitable rights, the process by caveat must be an equitable remedy, and gives the court an equity jurisdiction.

If this caveat had not prevented, there is no doubt that Mason, having obtained and returned his survey in due time, would have had a patent as a matter of course.

Suppose the commonwealth had attempted like any other vendor, to defeat the claim of Mason, would not a court of chancery have compelled a conveyance? Every thing had been done by Mason which the commonwealth had a right to require; as against her, therefore, there must have been a decree. If so, then this court, exercising the same chancery powers with the court below, will give the same judgment which that court has rightfully given, in deciding that a contract existed between Mason and the commonwealth which a court of chancery would have carried into effect; and that Wilson, having a full knowledge of that existing contract, became a subsequent purchaser; and, therefore, as to Mason, he was a purchaser *mala fide*, and can never defeat the right of Mason.

*Daveiss, in reply.

Can lands be appropriated in more ways than one? If it is decided that the mode of appropriation is unique, then there can be no tantamount act. The one mode pointed out by the statute must be pursued. In attempting to come at the true construction of the land law of 1779, it is highly important to take into consideration the act which immediately precedes it, for the settling of certain then existing claims and rights. They may indeed be called twin acts, being passed on the same day, and referring to each other. The preamble of the first act recognizes the great variety of claims, and the evils resulting from various modes of gaining a title to lands; to remedy which it declares it to be necessary "that some certain rule should be established," &c. The legislature, after settling existing claims, go on to provide a mode of acquiring titles in future, and to fix certain rules which should be observed by all future purchasers of public lands. The great evil intended to be remedied, was the existence of multifarious modes of acquiring titles. To give the act its proper remedial effect, it must be construed strictly; otherwise the evil would continue to be as great as ever. For if you once decide that titles may be acquired in any other mode than that pointed out by the statute, you open again that door to perplexity and ambiguity which the legislature intended to close forever.

It may not be improper here to remark, that no objection has been raised to the intrinsic merits of Wilson's claim. All the objections arise from its relation to Mason's. Wilson, therefore, has an intrinsic legal claim, which nothing can defeat but a prior appropriation of the land. This brings us again to the great questions, what is a legal act of appropriation? and what lands can be called waste and unappropriated?

To ascertain the meaning of these expressions it is not necessary to consult a glossary. The manner in which the legislature has used them on various occasions will leave no doubt upon the subject. Sometimes they call land waste and unappropriated after it has been settled, and sometimes even after it has been cleared and cultivated; and lands once legally appropriated by legal entry, may *again become waste and unappropriated by the purchaser's not following exactly the provisions of the law. Hence, it is apparent that when the legislature use the terms waste and unappropriated land, they mean lands not appropriated in the manner prescribed by law. [*84

We are then to inquire whether, at the time of Wilson's entry, the land was such waste and unappropriated land, as, by the act of assembly, Wilson had a right to appropriate.

We contend that an entry is essential, and that Mason never entered for the land in dispute. The entry called for by the survey is the entry of April, 1780. That is clearly an entry for other land. It is a certain and a special entry. Its beginning is certain, and is above

the west fork. The survey is some miles below the west fork. But we are told the name of west fork is uncertain. That the fork so called is not a west fork, but a northeast fork. But a name is different from a description. The name is arbitrary, and as long as a thing is known by a particular name, it is of no importance what that name is.

But ignorance of the country, and the danger of acquiring accurate knowledge of it, are alleged both as a proof of, and an apology for, the vagueness of the entry. If evidence and excuses of this kind are to be allowed, they will totally defeat the provisions of the law. It will let in those loose and vague claims which it was the object of the legislature to prevent. It is begging the question to argue that Mason was under a mistake because he chose to alter his entry; and that what was originally in itself certain, was uncertain, because Mason by a subsequent act chose so to consider it. But there was a reason why Mason should wish to give it the appearance of a mistake rather than of a removal of his entry. If he had expressly withdrawn his former entry, he would have lost his priority; and to save himself the trouble of examining all the intermediate entries, as well as the risk of omitting any of them, he chose to hold up the idea of correcting a mistake.

The entry of April, then, being sufficiently certain, the warrant attached itself to it, and 85*] the warrant and *entry taken together had the same effect as a special warrant describing that indentical tract of land. If Mason had bought, or could buy, a special warrant stating descriptively the land, he could have no other land than that described in his warrant. When he bought his general warrant he had the power of fixing its location at his election: having made his election, the power is expended, and the location fixed.[1]

But it is contended, that if the entry for 8,400 acres was removed, the entry for 8,300 was removed also; that the one is dependent on the other. This we deny. How is it dependent? Cannot one exist without the other? Or is it because both were made by one person? Suppose the entry of warrant No. 2, had begun at a mile distance due north from the upper corner of entry No. 1. Would the removal of No. 1 be a removal of No. 2.

The description of the beginning of No. 2, was only a description of a certain place, as was that also of No. 1, and his removal of the location of warrant No. 1, did not alter that place. Suppose you make an entry, the beginning of which is a certain natural boundary. I make an entry beginning at the north corner of yours. You afterwards remove your entry. Does mine follow yours, whether I will or not? Again, it is said that No. 2 could not be surveyed without surveying No. 1. But this can make no difference; it might make some additional trouble, but creates no impossibility. The lines of No. 1 may be run so as to ascertain the beginning of No. 2.

1.—WASHINGTON, *J.* Do you deny the right of removing an entry?

Davies. If it were *res integra*, I should. But the whole landed property of Kentucky would be shaken by such a judgment. I admit, therefore, that an entry may be removed; but Mason, as we contend, has not removed his entry of 8,300 acres. Cranch 1.

It is said that a survey is as good an act of appropriation as an entry, and equally answers all the objects of the statute. This might be a good argument, if the court could make laws; but the law does not so consider it. It limits no time in which the survey shall be made. The survey, therefore, cannot be considered as the act of appropriation. By the old land law, indeed, a survey *was the substantial [*86 appropriating act; but the last clause of the land law, p. 98, has altered it in this respect.

It is contended also, that a survey is better notice than an entry.

When a law only modifies certain existing rights, it is to be considered according to the rules of equity; but when a man claims under a law giving a right which did not exist before, he must bring his case strictly within the law. 4 Bac. Abr. 656. 12 Mod. 540. *Birch v. Bellamy.* Viner. tit. Statute, 506, 507.

Notice was not the only object of the law in prescribing an entry. The greater object was to avoid confusion in the sale of lands, and perplexity in the titles, which would have a bad effect upon the sale, and to establish a uniform mode of appropriating lands and locating warrants. The argument that a survey is better notice than an entry, goes to prove that an entry is unnecessary. The surveyor is the agent of the commonwealth with limited powers, which must be strictly pursued, or his acts are void. He is by law directed to proceed in a particular manner, and must not deviate. A special power given by statute must be strictly pursued. 1 Burr. 450, *Rex v. Loxdale.* The surveyor must pursue the entry, and a survey not corresponding with the entry is void. The statute has made an entry necessary. In a statute creating a new law, affirmative words imply a negative. Appropriation means a legal appropriation. The book of surveys could not be intended to give notice, because it is by law shut up for twelve months from every eye but that of the surveyor and his employer. The survey itself could not be notice, because at any time within three months it is alterable by the party, or by the surveyor, and until the end of the three months it does not bind even the party himself, or the surveyor, and for twelve months afterwards it is by law kept secret.

The law being affirmative that you shall give one kind of notice, implies the negative that no other notice shall be sufficient. The survey in itself was wrong, illegal and void. An act in itself wrong can never be the foundation of right. Land Law, p. 90, and *Talbot v. Seeman*, this day decided.

*But in the whole course of decisions in [*87 Kentucky a survey has never been considered as giving a right. The adjudications for eighteen years do not show the date of a survey to be material as to notice, nor has it ever been so considered. There has never been a title supported upon a survey without an entry since the year 1779. To overthrow this course of decisions would shake the titles of half the land in Kentucky. Arguments drawn from the inconvenience of unsettling titles to real estate have always been respected. If it is an error, yet where "it is established, and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, till the legislature think proper to alter it, lest the new

determination should have a retrospect, and shake many questions already settled." 1 Bl. Rep. 264, *Robinson v. Bland*, 2 Bl. Rep. 696, *Rice v. Shute*. 1 P. Wms. 223, *Regina v. Ballivos and Burgenses de Bewdley*. In 1 P. Wms. 399, *Goodright v. Wright*, the court said, "that the altering settled rules concerning property is the most dangerous way of removing land marks." The same doctrine is held in 2 P. Wms. 2, *Dawes v. Ferres;* and in *Wagstaff v. Wagstaff*, 2 P. Wms. 259.

The survey could be no notice to Wilson because it was alterable; he knew it ought to be altered, and he might well suppose it would be altered. The book of surveys is no record, and is not of more authority than the book of entries, which is the only book to be resorted to, to know what lands have been appropriated.

But if the survey was notice, it was notice only of an illegal act. Notice cannot make that lawful which was unlawful in itself, nor that unlawful which was in itself lawful. 4 Term Rep. 639, *Farr v. Newman*.

The court took time till this term to consider, and now the Chief Justice delivered the following opinion:

Opinion of the Court:

This is a writ of error to a judgment of the Court of the United States for the district of Kentucky, rendered on a caveat, and is governed by the land laws of Virginia.

88*] *In the year 1779, the legislature of that commonwealth opened a land office, and offered for sale, with some reservations, so much of that tract of country lying within its boundaries southeast of the river Ohio as was then unappropriated; a part of which now constitutes the state of Kentucky.

Every person who would pay at the rate of forty pounds for one hundred acres, into the treasury of the state, became entitled to such quantity of waste and unappropriated land as was, at that rate, equivalent to the money paid, for which a certificate was given to the register of the land office whose duty it was, on receipt thereof, to issue a warrant for the quantity of land purchased, authorizing any surveyor, qualified according to law, to lay off and survey the same. A warrant might also be issued on certain other rights.

A chief surveyor was appointed for each county whose duty it was to nominate a sufficient number of deputies for the business of his county, and the law proceeded to direct, that "every person having a land warrant founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county, wherein the said lands, or the greater part of them, lie, who shall give a receipt for the same if required. The party shall direct the location thereof so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum; which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries."

George Mason was one of the earliest purchasers under this law.

On the 29th of April, 1780, he made the following entries:

"1780, 29th April, George Mason enters 8,400 acres of land, to begin on Panther creek on the east side *thereof, opposite to a beech on [*89 the west side about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8,300 acres, to begin at the upper corner of his 8,400 acre entry, and to run up the creek on the east side and back for quantity."

Panther creek pursues a general westwardly course from its source till it empties into Green river.

The creek forks something more than twelve miles and one quarter of a mile in a straight line above its mouth; and one of those forks, the direction of which towards its source is northwardly, has, from the beginning of the year 1780, been generally termed the west fork, and the other has been termed Panther creek.

On the 27th of October, 1780, Mr Mason made the following entry with the same surveyor:

"1780, October the 27th, George Mason desires to make his entry of 8,400 acres, more special on Panther creek, viz., to begin four miles above the forks of Panther creek where it mouths into Green river on the east side, running up and back for quantity."

In the months of September and October, 1783, these two entries of 8,400 and 8,300 acres were surveyed by James Hord, one of the deputy surveyors of the county of Jefferson, which surveys, as was the custom, were made conformably to the instructions given by Mr. Mason's agent.

The survey of the entry of 8,400 acres is supposed to conform to the explanation or amendment of that entry made in October, 1780. It begins four miles above the mouth of Panther creek, and something more than eight miles below its forks.

The survey of the 8,300 acre entry adjoins the survey of 8,400 acres on the upper side; and the plat was shown by the surveyor, before he would return it to the then agent *of [*90 Mr. Mason, who, after its supposed variance from the entry was suggested to him, approved it, and directed it to be returned to the office.

These surveys were returned in the course of the fall, 1783.

The supposed variance between the survey and location of the 8,300 acres was afterwards, about the 12th of September, 1784, pointed out by the surveyor to a subsequent agent of Mr. Mason, who also approved of the manner in which the surveys were made, and returned them to the land office.

On the 9th of April, 1783, George Wilson enters with the surveyor of Jefferson county 40,926 acres of land on Panther creek, so as entirely to include George Mason's survey of 8,300 acres.

This entry, though in the name of George Wilson was made by John Handley, a deputy surveyor for Jefferson county, for his own benefit and that of Christopher Greenup, as well as for the benefit of George Wilson, and at the time of making the entry, full knowledge of the previous survey made of the same land for George Mason had been obtained by the said

Handley, who had seen the surveys in the office, and had communicated this information to his two partners in the entry.

In the month of March, 1784, George Wilson entered, in the supreme court of the district of Kentucky, a caveat to prevent a grant from issuing on George Mason's survey of 8,300 acres, because the survey was made contrary to location, and because the entry was vague, he claiming the same, or so much thereof as interferes with his entry made on treasury warrants for 40,926 acres on the 9th of April, 1784.

Pending the caveat, George Mason departed this life, and the suit was revived against Richard Mason, devisee of the said George, at whose petition it was removed into the court of the United States, held for the district of Kentucky. 91*] *A cross caveat was entered in the same court on the part of Richard Mason, to prevent the issuing a patent to George Wilson, and these causes coming on to be heard, it was agreed that the judgment rendered in the caveat *Wilson v. Mason*, should be also entered in the case of *Mason v. Wilson*.

In June term, 1800, the opinion of the court for the district of Kentucky was given, that the defendant Mason had the better right, and it was ordered that the caveat entered by Wilson should be dismissed.

To this judgment the plaintiff Wilson has obtained a writ of error, and the principal question now to be decided by this court is, which of the parties has the better right.

But before entering on the question, it may be necessary to notice a preliminary point made by the counsel for the defendant in error. He contends that in a caveat the decision of the district court is final, and that the cause cannot be carried before a superior tribunal.

To maintain this proposition he relies on an act of the legislature of Virginia, making the judgments of the district courts of the state final in cases of caveat; and on the compact between Virginia and Kentucky, which stipulates that rights acquired under the commonwealth of Virginia shall be decided according to the then existing laws.

This argument would not appear to be well founded had Virginia and Kentucky even been for every purpose independent nations; because the compact must be considered as providing for the preservation of titles, not of the tribunals which should decide on those titles. But when their situation in regard to the United States is contemplated, the court cannot perceive how a doubt could have existed respecting this point. The constitution of the United States, to which the parties to this compact had assented, gave jurisdiction to the federal courts in controversies between citizens of different states. The same constitution vested in this court an appellate jurisdiction in all cases where original jurisdiction was given to 92*] the *inferior courts, with only "such exceptions, and under such regulations, as the congress shall make." Congress, in pursuance to the constitution, has passed a law on the subject, in which the appellate jurisdiction of this court is described in general terms so as to comprehend this case, nor is there in that law any exception or regulation which would exclude the case of a caveat from its general provisions. If, then, the compact between Virginia and Kentucky was even susceptible of the construction contended for, that construction could only be maintained on the principle that the legislatures of any two states might, by agreement between themselves, annul the constitution of the United States.

The jurisdiction of the court being perfectly clear, it remains to inquire which of the parties has the better right.

The title of Mason being eldest, is of course the best, if it be not in itself defective.

In the caveat of the plaintiff in error two defects in the title of the defendant are assigned.

1st. That his entry is vague.

2d. That he has surveyed contrary to his location.

The first was abandoned in argument, and does not appear to the court to have been maintainable.

The second shall now be considered.

To support the allegation that the survey has been made contrary to the location, the entry and the survey are produced.

The entry calls for a beginning on the upper corner of George Mason's entry of 8,400 acres. To ascertain this spot reference must be had to the entry called for. That is to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek and eastwardly for quantity.

*The branch of Panther creek which [*93 was at the date of the entry generally denominated the west fork, is something more than twelve miles and one quarter of a mile above its mouth. The entry of 8,400 acres is to begin four miles above the west fork, and the land in controversy ought to be placed above that entry. Yet it is surveyed below the west fork.

To obviate this difficulty, the counsel for the defendant in error produces and relies upon the entry of October 27th, 1780.

That entry is in these words:

"George Mason desires to make his entry of 8,400 acres more special on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

This entry is contended to be not a removal, but an explanation, of that which had been made on the 29th of April, 1780, and being merely an explanation, the survey of the land in controversy, beginning at the upper corner of the survey of the 8,400 acre tract, conforms to its original location, and is, consequently, free from the exception made to it.

If this position be true, the entry of the 27th of October, 1780, must describe the same land with that which is described, though with less certainty, by the entry of the 29th of April, in the same year.

But the entry of the 29th of April calls for a beginning four miles above the mouth of the west fork of Panther creek, which fork is more than twelve miles in a straight line above the mouth of the creek, and the subsequent entry begins four miles above the forks of Panther creek where it mouths into Green river. The west fork of Panther creek, and the mouth of the same creek, where it empties into the river, are perfectly distinct and separate places, and

were so understood at the time this location was made.

94*] *It is, however, contended, that in the extensive wilderness offered for sale, accuracy of description was not to be expected, and the point of union between a creek and river might well be mistaken for the forks of a creek.

This would not be very probable in any case, but is totally inadmissible in this, because names of places which they were generally understood to possess have been used by the person locating for Mr. Mason, and as there are no other controlling boundaries referred to, they must be understood as designating the water courses which were commonly described by those names, and which any person inclined to locate the adjacent residuum would necessarily suppose to have been referred to by them.

But if the location of October explains without removing that of April, then the original entry might, without such explanation, have been there surveyed, and could not have been properly surveyed four miles above the west fork.

This would scarcely have been attempted.

Indeed the counsel for the appellee, in admitting that an entry made on the land in controversy, subsequent to Mason's entry, but before his survey, would have been good, seems to have disclosed an opinion that the original entry did not comprehend the land in question, and that not the entry, but the survey, is to be relied on as the foundation of his title.

To the court it appears perfectly clear, that the entry of the 27th of October was a removal, and not an explanation, of that of the 29th of April.

It has not been contended that the removal of the 8,400 acre entry has also removed that of 8,300 acres.

The title of Mason, then, if good, must be shown to be so by establishing that a survey without an entry is a sufficient foundation for a title.

With a view to discover whether this question has been settled in Kentucky, all the adju- 95*] dications contained in the *book of reports furnished by the counsel for the plaintiff in error have been examined. It is not perceived either that the question has been directly determined, or that any principles have been settled which govern it.

This case, then, is of the first impression.

The act of the Virginia legislature must be expounded according to the opinion this court may entertain of its import, without deriving any aid from the decisions of the state tribunals.

In 1779, Virginia opened a land office for the sale of an extensive, unsettled, and almost unexplored country, the motives for which are stated in the preamble of the statute to have been "to encourage the migration of foreigners, promote population, increase the annual revenue, and create a fund for discharging the public debt."

Any person whatever might become a purchaser of any portion of these lands by paying into the treasury of the commonwealth the purchase money required by law. By doing so he became entitled to a warrant authorizing any surveyor to lay off for him, in one or more surveys, the quantity of land purchased. It was apparently contemplated by the law that the number of purchasers would immediately become very considerable. The condition of these purchasers in this stage of the contract ought to be distinctly understood. They had acquired a right each to appropriate to himself so much of the vacant land belonging to the commonwealth as he had purchased, but no right either in common or severalty, to the whole or any particular part of the country, until such right should be acquired by further measures.

This was at the same time the situation of a great number of persons, and a prior was in no respect more eligibly circumstanced than a subsequent purchaser, except in the single case of both applying precisely at the same time, for the purpose of appropriating each to himself the same land. Had the purchaser of the first warrant been negligent enough to hold it up until the whole land was appropriated, the title of every subsequent purchaser would have been good against him, and he would have been *without remedy. The original purchase [*96 of a warrant, then, creating only a general claim which gave of itself only in a single case priority of right to the prior purchaser, it became indispensably necessary to prescribe a mode by which this general title should be satisfied by the appropriation of a particular tract of land.

This mode seems to have been prescribed by that part of the act which says, that "every person having a land warrant, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the surveyor of the county wherein the lands or the greater part of them lie." "The party shall direct the location thereof so specially and precisely that others may be enabled, with certainty, to locate other warrants on the adjacent residuum; which location shall bear date the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose."

This mode of appropriation pointed out by the law as that which must be used by any person desirous of locating a warrant on any particular waste and unappropriated land, requires that the location shall be given to the surveyor with the warrant, in order to be entered in a book kept for that purpose, which is denominated the book of entries.

It is apparent throughout the whole act, that the legislature never contemplated a survey as being in itself an appropriation of land, or supposed that one would be ever made, if not founded on a previous entry.

Some few of the many passages which are found in various parts of the law will be selected to evince this position.

The surveyor is forbidden to admit the entry of any warrant on treasury rights, except preemption warrants, in his books before the first day of May next succeeding the passage of the act. But the prohibition does not extend to a survey, and yet this would have been equally necessary if land could have been appropriated by a survey without a previous location.

*It is declared that no entry or loca- [*97 tion shall be admitted for certain lands which are described in the act, and intended to be reserved: but there is no declaration that they shall not be surveyed. This omission mani-

fests an opinion that they could not be appropriated by survey alone.

In prescribing the duty of a surveyor, the law enjoins him to proceed with all practicable dispatch to survey all lands entered in his office; and many rules are given to regulate the surveying of entries; but there is not a syllable in the act which contemplates or makes a single provision for surveys not founded on a prior entry made in the book of entries.

The mode of appropriation, then, which the law designates has not been pursued; but it is contended that another course has been adopted which equally produces all the objects designed to be effected by the location in the book of entries, and which, therefore, ought to be received as a sufficient substitute for an entry.

The legislature of Virginia, when bringing her lands into the market, had undoubtedly a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers for the purpose of particularizing the general title acquired by obtaining a land warrant. The court is by no means satisfied of its power to substitute any equivalent act for that required by the law.

The case of *Blackwell v. Harper*, reported in 2 Atkyns, 93, has been cited to show the authority of a court to dispense with part of a statute directing the mode of proceeding to be observed by a person who claims title under such statute.

That case arose under an act of parliament which directs that "any person who shall invent, or design, engrave, &c. any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on 98*] every such print or prints." *The plaintiff had engraved certain medicinal plants, a work deemed within the act, and had brought a bill to establish her right to the sole property in them, and to restrain the defendant from copying and engraving them, upon the penalties within the act of parliament.

It was objected that the day of publication from which the term was to commence had not been engraved, and so the act had not been complied with, and, consequently, the property had not vested.

Lord Hardwicke was of opinion that the property vested, although the day of publication was not engraved, and that the words directing the day of publication to be engraved on each print were only necessary to make the penalties incur, not to give the title.

"Here," said his lordship, "the clause which vests the property is distinct."

This opinion, however, was given with great doubt, and only an injunction was granted without costs, and without an order for an account.

The case of *Blackwell v. Harper* has, at the bar, been denied to be law. However this may be, it is certainly essentially variant from that before the court.

The opinion of Lord Hardwicke was not that where any circumstance was required by a statute in order to vest a title, other equivalent acts might be received as a substitute; but that the particular statute on which the case depended, did not require the omitted circumstance, since the property was vested by a distinct clause.

By a reference to the words themselves, it will be perceived that the expression of the act of parliament is such as might perhaps warrant this opinion. The property is completely vested before the direction concerning the date of the publication is given, and Lord Hardwicke supposes it to be a question on which judges would differ whether the subsequent words were merely directory or descriptive. A perfect property in the specific thing was supposed by that judge to have been given by other words, and on that idea his decree is declared to have been formed.

*But in the case under consideration [*99 no property in the specific thing is supposed to have been given by other words. No title to it is created by any other part of the act. The purchase of the land warrant gave a power to appropriate, but was no appropriation, and the mode pointed out by the legislature would seem to the court to be that which can alone give title to the particular lands.

But if this opinion should even be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act, nor does it seem to have been so considered by the legislature.

From the circumstances under which the act for establishing the land office was passed, as well as from the expressions of that act, it is apparent that the entry was intended to give complete notice to other purchasers that the land located was already appropriated. The mode of giving this notice it was certainly proper to prescribe. By doing so, the numerous doubts and questions concerning the sufficiency of notice which would inevitably arise from leaving that important fact to the discretion of individuals, in the first instance, and then to the discretion of courts, to be exercised many years after all the lands should be located, would be in a considerable degree obviated.

It was doubtless an important object to obviate them.

The regulations, therefore, respecting entries are all calculated to make them as notorious as possible. Not so of surveys.

The entries and surveys are to be kept in separate books. Why so if a survey amounted to an entry?

The entry must be dated when made by the locator; but the time of recording a survey may appear or not at the discretion of the surveyor, and a subsequent survey may be recorded before one of prior date.

There are to be no blanks in the book of entries, and this regulation is well calculated for the prevention of *frauds in the origin [*100 of titles. It does not apply to the book of surveys.

The book of entries is open to the inspection of every person. The book of surveys cannot be looked into but at the discretion of the surveyor.

If a prior entry be alleged, the person affected thereby has a right to demand a copy thereof; but no copy of a survey can be given to any other than the proprietor until twelve months after it shall have been made.

From the whole act a legislative intention to make an entry, and an entry only, the foundation of title to any particular tract of land, is

strongly to be inferred; and if even an equivalent act could be received, a survey does not appear to be such an act. In this particular case it is true that complete notice was obtained by it, but titles must rest on general principles, and in the general a survey would not, without something more than the law requires, be notice. The law, therefore, cannot contemplate a survey as of equal operation with an entry.

A question has been made at the bar, whether a caveat is in the nature of an equitable action, and on the supposition that it is of that nature, the counsel for the defendant in error has insisted that Wilson, having express notice of Mason's survey, was unable to acquire title to the land appropriated by that survey.

This would be true if the survey gave to Mason any title either in law or equity. But if a survey without an entry was no appropriation; if it gave no title, then notice of the survey could not create a title.

The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other to the extent of his equity. But if he has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.

A point in the case still remains which appears more doubtful, and concerning which very considerable difficulties have been felt.

101*] *Although Mason's survey may give him no title, it is questioned whether Wilson can maintain a caveat against it.

The caveat is a remedy given to prevent a patent from issuing in certain cases where the directions of the law have been violated to the injury of the commonwealth, or where some other person hath a better right. The case before the court is that of a better right. The terms in which this remedy is accorded to the person who would avail himself of it for the purpose of asserting his own title are, "or if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a caveat," &c.

Considerable doubts were entertained whether the word "hath," in the description of the character by whom a caveat might be maintained did not absolutely require that the better right should exist at the time the survey should be obtained. This construction, to which some of the court were at first greatly inclined, would have involved considerable inconvenience, and would have defeated what is deemed the essential object for which the remedy was given.

It has been already stated to be the opinion of the court, that a survey not founded on an entry is a void act, and constitutes no title whatever. Consequently, the land so surveyed remains vacant and liable to be appropriated by any person holding a land warrant. It is difficult to conceive that a remedy designed to enable an individual who has made his entry in conformity with the law, to prevent another from obtaining a grant for the land he has entered, should be withheld from any person whose entry entitles him to the land he has located. It is not less difficult to impute to the legislature an intention to protect a survey to which the law denies all power of appropriating the land it comprehends, or an intention of carrying such survey into grant, while another has legally appropriated to himself the land thus to be granted. It would be difficult to state a case to which the principle, that a remedy should be so extended as to meet the mischief, would apply more forcibly than to this. If, however, the *terms of the law had been [*102 explicit, those terms must have controlled the subject. But the expression of the act is not, if any person shall obtain a survey to which another at the time such survey may be obtained shall have by law a better right, the person having such better right may enter a caveat, &c. The words of the law are not thus express. They are, if any person shall obtain a survey of land to which another hath by law a better right. The word "hath," in its most strict and rigid sense, would refer neither to the time of making the survey, nor of entering the caveat, but to the present moment when the word is used, and would require that the better right should exist at the time of the passage of the act. This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will. Some latitude of construction, then, must be used; some words additional to those used by the legislature must be understood, and this being apparent, the court perceive no sufficient motive for extending the remedy to rights existing when the survey shall be made, and denying it to those which are equally valid, and which exist when the caveat may be entered.

The caveat entered by Wilson is, therefore, maintainable under the land law of Virginia, since his title had accrued when it was entered.

The court is of opinion that the district court of Kentucky has erred in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion I am directed to deliver the following judgment.

Judgment of the Court.

"Whereupon, it is considered by the court that the plaintiff Wilson hath by law the better right to the land in controversy, and that the judgment of the court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land office in Kentucky do issue a grant to the said Wilson upon his survey of 30,000 acres of land registered in the said office, according to the metes and bounds thereof, and *that the said [*103 plaintiff do also recover his costs expended in this court, and in the said district court, all which is ordered to be certified to the said district court, and the said register of the land office accordingly."

In the case of *Mason v. Wilson*, the judgment of the court was, "that the defendant Wilson hath by law the better right to the land in controversy, and that the judgment of the court of the United States for the district of Kentucky be reversed, and annulled; and that the said caveat be dismissed, and that the defendant Wilson recover his costs," &c.[1]

1.—As to the necessity of giving notice in the form prescribed by law, vide Evan's Essay on Bills, 67, 68 69, 70, 71, and 2 H. Bl. 609. *Nicholson v. Gouthit.*

UNITED STATES *v.* SCHOONER PEGGY.

A final condemnation in an inferior court of admiralty, where a right of appeal exists and has been claimed, is not a definitive condemnation within the meaning of the 4th article of the convention with France, signed September 30, 1800.

The court is as much bound as the executive to take notice of a treaty, and will reverse the original decree of condemnation, (although it was correct when made) and decree restoration of the property under the treaty made since the original condemnation.

Quære, as to the extent of the term high seas?

ERROR to the circuit court for the District of Connecticut, on a question of prize.

The facts found and stated by Judge Law, the district judge, were as follows:

"That the ship Trumbull, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels sailing under authority, or pretence of authority, from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, &c. as set forth in said instructions; and said ship did, on the 24th day of April last, (April, 1800,) capture the schooner Peggy, after running her ashore a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port as set forth in the libel; and it further appears, that all the facts contained in the claim are true;[1] whereupon this 104*] court *are of opinion, that as it appears that the said schooner was solely upon a trading voyage, and sailed under the permission of Toussaint, with dispatches from the French government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self defence; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war; therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to the claimant."

From this decree the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge Cushing sat alone, as the district judge declined sitting in the cause, on account of the interest of his son who was one of the officers on board the Trumbull, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize money.

The circuit court, on the appeal, found the following facts, and gave the following opinion and decree:

*"That David Jewett, commander of [*105 the said public armed vessel, called the Trumbull, being duly commissioned, and instructed by the President of the United States, as set forth in the said libel, did, on or about the 23d of April last, capture the said schooner Peggy, after running her aground about pistol shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of Saint Domingo, and afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner, there were ten persons aboard her. That she was then armed with four carriage guns, being four pounders, with four swivel guns, six muskets, four pistols, four cutlasses, two axes, some boarding hatchets, tomahawks, and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee, sugar, and other merchandise. That she had come from Bordeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed on or about the said 23d day of April, with said schooner and cargo, having dispatches from General Toussaint for the French government. That the said Buisson sailed from Port au Prince as aforesaid with the permission and direction of General Toussaint to proceed to Bordeaux; that said schooner so sailed from Port au Prince under convoy of an armed vessel by order of said Toussaint without a passport from Mr. Stevens, consul general of the United States at Saint Domingo, but that Buisson had been promised by Toussaint's brother that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bordeaux for Port au Prince with fifteen men, besides eight passengers, (according to the roll of equipage,) armed with some guns, swivels and muskets; that said captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self defence. That at the time of the said capture, the guns of said schooner were loaded with canister shot, one of which being fired, the shot fell near the bow of the Trumbull; but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said Captain Buisson appeared to be in a disposition, and was prepared with force, to resist the boats which were sent from the Trumbull to board him, a little *pre- [*106 vious to the capture, in case of their attempting it; and that the said schooner and cargo are French property.

1.—The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint to receive on board the cargo which was on board at the time of capture; that she had dispatches from Toussaint to France; that she sailed by his authority on the 23d of April, for France, navigated by 10 men, including Buisson, the claimant, and Gillibert, the commander, and having on board 4 small 3 pound carriage guns, solely for defense against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d of April she was run ashore, a few miles to the westward of Port au Prince, within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground; at which time, and in which situation, the boats and crew of the Trumbull attacked and took possession of her, and got off her. That Toussaint then was and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

"Upon these facts the Court is of opinion as follows, viz.:

"However compassion may be moved in favour of the claimant by some circumstances; such as that he was charged with dispatches from General Toussaint, between whom and the United States there were some friendly arrangements respecting commerce; that he was not in a capacity of greatly annoying trade, from the fewness of his men; and his allegation that he was armed only in defence; yet as the court is bound by law, which makes no such distinctions; as armed French vessels are not protected by any treaty or convention; particularly not by the regulations between General Toussaint and the American consul; and as the said schooner Peggy was in a condition capable of annoying, and even of capturing single, unarmed trading vessels, unattended with convoy; the court cannot avoid being of opinion that she falls within the description, and general designs, of the expression of the law, an armed French vessel.

"2d. That she was captured on the high seas; the argument taken by the claimant's counsel, from the extent of national jurisdiction on sea coasts bordering on the country, not applying to this case so as to acquit the said schooner; the sea coast of Saint Domingo not being neutral; not made so by any treaty or convention; but to be considered as hostile, upon our present plan of laws of defence with respect to France; as much so as any part of the coast of France, as far as regards French armed vessels.

"The Court is, therefore, of opinion, that the said schooner Peggy and cargo are lawful prize:

"It is therefore considered, decreed and adjudged by this court, that the decree of the district court respecting the same, as far as regards their acquittal, be, and the same is hereby reversed; and that the said schooner, 107*] *with her apparel, guns and appurtenances, and the goods and effects which were found on board of her at the time of capture, and brought into port as aforesaid, be, and the same are hereby condemned as forfeited to the use of the United States, and of the officers and men of the said armed vessel called the Trumbull, one-half thereof to the United States, the other half to the officers and men, to be divided according to law; the said schooner Peggy being of inferior force to the said armed vessel called the Trumbull."

This sentence and decree were pronounced on the 23d day of September, 1800.

During the present term, and before the court gave judgment upon this writ of error, viz., on the 21st of December, 1801, the convention with France was finally ratified by the president; the fourth article of which convention has these words:

"Property captured, and not yet definitely condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted,) shall be mutually restored." "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained; the property so condemned shall without delay be restored or paid for."

On the 30th of September, 1800, this convention was signed by the respective plenipotentiaries of the two nations at Paris. On the 18th of February, 1801, it was ratified by the President of the United States, with the advice and consent of the senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July, 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

*This proviso being considered by [*108 the president as requiring a renewal of the assent of the senate, he sent it to them for their advice. They returned it with a resolve that they considered the convention as fully ratified.

Whereupon,

On the 21st of December, 1801, it was promulged by a proclamation of the president.

The controversy turned principally upon two points:

1st. Whether the capture could be considered as made on the high seas, according to the import of that term, as used in the act of congress of July 9th, 1798, vol. 4, p. 163.

2d. Whether, by the sentence of condemnation by the circuit court, on the 23d of September, 1800, the schooner Peggy could be considered as definitely condemned, within the meaning of the 4th article of the convention with France, signed at Paris, on the 30th of September, 1800.

The writ of error was dated on the 2d of October, 1800.

Griswold and Bayard, for the captors.

Mason, for the claimant.[1]

The *Chief Justice* delivered the opinion of the court.

In this case the court is of opinion that the schooner Peggy is within the provisions of the treaty entered into with France, and ought to be restored. This vessel is not considered as being definitely condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence must be interlocutory or final in the court which pronounces it, and receives its *appellation from its determin-[*109 ing the power of that particular court over the subject to which it applies, or being only an intermediate order subject to the future control of the same court. The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word definitive would be rendered useless and inoperative. Vessels are seldom if ever condemned but by a final sentence.

1.—I regret that not having the notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

An interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels not yet condemned would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending. In this case the sentence of condemnation was appealed from; it might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged that the court can take no notice of the stipulation for the restoration of property not yet definitively condemned; that the judges can only inquire whether the sentence was erroneous when delivered, and that if the judgment was correct, it cannot be made otherwise by any thing subsequent to its rendition.

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by, the executive of each nation; and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be as-[*110]serted. *But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper.

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

JACOB RESLER v. JAMES SHEHEE.

After the first term next following an office judgment, in Virginia, it is a matter of mere discretion in the court whether they will admit a special plea to be filed to set aside that judgment.

THIS was a writ of error upon a judgment of the circuit court of the District of Columbia, sitting at Alexandria, in an action for a malicious prosecution brought by Shehee v. Resler, originally in the court of hustings for the town of Alexandria, and transferred by act of *congress of the 27th of February, [*111 1801, concerning the District of Columbia, to the circuit court of that district.

The declaration stated, that on the 26th of December, 1799, Resler, without reasonable cause, procured a certain false, scandalous and malicious warrant to be issued against Shehee, by F. Peyton, Esq. then mayor of the town of Alexandria, charging Shehee with having received from a certain negro slave called ———, the property of Baldwin Dade, certain stolen goods, viz., one box of tallow, knowing the same to be stolen; which warrant was executed upon the said Shehee, who, by means of the false and malicious representations of Resler, was recognized to appear before the court of hustings of Alexandria, at April term, 1800, to answer to the charges contained in the warrant, at which court Shehee was acquitted.

At the rules held at the clerk's office, on the 2d February, 1801, an office judgment was entered against Resler for want of a plea, and a writ of inquiry awarded, returnable to the court of hustings, which by law would have been held on the first Monday of April, 1801. But the act of congress of 27th February, 1801, which provides for the government of the District of Columbia, erected a circuit court for the district, to which it transferred all the causes then pending in the court of hustings; and enacted that the circuit court should hold four sessions a year in Alexandria, viz., on the 2d Mondays of January, April, and July, and the 1st Monday of October.

Two terms of the circuit court, viz., April and July, having elapsed without the writ of inquiry being set aside, the defendant Resler, by his counsel, at October term, 1801, on the 9th day of the month, appeared and moved the court to set aside the writ of inquiry on filing the following special plea in justification, viz., "And the said defendant by his attorney, George Youngs, comes and defends the force and injury, &c. and for plea saith, that on the 26th day of December, in the year 1799, at the town of Alexandria aforesaid, and within the jurisdiction of the court of hustings of said town, a box of tallow belonging to the defendant, as his own proper goods and chattels, of the value of two dollars, *was stolen out of the house of [*112 the defendant, by some person unknown to the defendant, and the said defendant being informed by a certain John M'Gill, his journey-

man, that the said box of tallow was in the house of the plaintiff, complained to Francis Peyton, mayor of the said town, of and concerning the said box of tallow, who, by his warrant, dated the 27th day of December, in the year 1799, called the plaintiff before him and examined him; and upon his examination, and the testimony of sundry persons, bound the plaintiff to appear at the next grand jury court of hustings of said town, to answer the charge contained in said warrant, of and concerning the receiving said box of tallow, so stolen as aforesaid, and which was found in his possession, whereupon the plaintiff appearing was acquitted and discharged by the said court, which is the same procurement of the said warrant and acquittal whereof the aforesaid action is brought, and this the defendant is ready to verify," &c.

The plaintiff objected to the filing of that plea, in this stage of the cause, and, upon argument, the court, on the 13th day of October, refused to receive it; whereupon, the defendant took a bill of exceptions, and pleaded the general issue, upon which, on the 14tb day of October, there was a verdict for the plaintiff, and judgment for 1,000 dollars damages.

On that judgment the defendant brought his writ of error to this court, and the error assigned was the refusal of the court below to suffer the defendant to file the special plea above recited.

The cause was, at this term, argued by C. Lee, for plaintiff in error, and Simms and Mason, for defendant.

Lee. This case depends upon the law and practice of Virginia. By the act of congress of 3d March, 1801, supplementary to the act concerning the District of Columbia, sec. 3, it is enacted, "that the circuit court, for the county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal as is now possessed and exercised by the district courts of Virginia."

113*] *The act of assembly of Virginia, respecting the district courts of that state s. 28, (Rev. Code, p. 85,) provides, that "every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." And in sec. 42, of the same act, p. 87, it is further provided, "that all judgment by default for want of an appearance or special bail, or pleas as aforesaid, and nonsuits or dismissions obtained in the office, and not set aside on some day of the next succeeding district court, shall be entered by the clerk as of the last day of the term; which judgment shall be final in actions of debt founded on any specialty, bill, or note in writing, ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of inquiry of damages; and in all other cases the damages shall be ascertained by a jury, to be impaneled and sworn to inquire thereof, as is hereinafter directed."

Upon an equitable construction of these sections of the act, the practice in Virginia has been to permit the defendant to come in at a subsequent term and avail himself of any such defence as he has, in the same manner as if he had pleaded it at the particular term mentioned. This question has been discussed in Virginia, and received the construction for which I contend. The case of *Downman v. Downman's Executor*, 1 Wash. 26, was a plea of tender after office judgment confirmed. In p. 27, the court say, "these words, 'plead to issue immediately,' are the same as were used in the old act of 1753, for establishing the general court; under which the practice of that court was very liberal, in allowing a defendant to plead that which did not make an issue, but required subsequent pleadings, provided the real justice of the case, and not intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral conditions, where the defendant cannot plead to issue." This is also agreeable to the principle laid down by Lord Holt, in 2 Salk. 622. "That though a judgment be ever so regularly entered, it shall be set aside at any time on payment of costs, so as the plaintiff does not *lose a trial." And again [***114** in p. 28; "Considering the circumstances of this country and the dispersed situation of attorneys and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules (English rules) of practice. It would seem to me proper to allow a discretion in the judges to admit any plea which appears necessary for the defendant's defense, and only to resort to the rigor of the rule where delay appears to be intended." This plea, then, if necessary for the defendant's defense, ought to have been admitted. It contains nothing exceptionable, and the facts stated in it, if true, are a justification. There is no case more proper for special pleading than one in which the prejudices of the people are enlisted on one side or the other. The law only directs what is to be done the first term, but afterwards it is left open to the discretion of the court. In this case, there can be no pretence that the plea was intended for delay, as it was offered on the 9th, and the cause was not tried until the 14th of October, so that there was full time to answer the plea and make up the issue.

To show that this plea is good justification, I refer to the case of *Cowe v. Wirrall*, Cro. Jac. 193, where a similar plea was adjudged good upon demurrer.

It is a common practice, even in the English courts, to permit the general issue to be withdrawn, and a special plea filed, where it is not done, with an intent to delay. *Jefferys v. Walter*, 1 Wilson, 177; and 254, *Taylor v. Joddrell*. But the case of *Downman v. Downman's Executors*, before cited, seems conclusive upon this question.

CHASE, *J.* Have the rules of the Virginia courts been adopted in the circuit court?

Lee. I conceive the circuit court of Alexandria to be in the same situation as the district court at Richmond. And, as I understand the act of congress, they are obliged to adopt the practice of the courts of Virginia, except where the circuit court has actually made a different rule.

*Simms, for defendant in error. [*115

I will not deny that the courts of Virginia have gone the length stated in Washington's Reports. They have used their discretion, and

have considered whether the plea offered tends to the justice of the cause, or whether it is intended only for delay. In this case, the time having passed when the defendant could file his plea as a matter of right, it was entirely in the discretion of the court to admit or reject it.

It is certainly not a sufficient justification for the defendant to say that the magistrate committed the plaintiff; for that neither destroys the evidence of express malice, nor shows probable cause for the prosecution. The magistrate might have committed upon the evidence of the defendant Resler himself; so that this plea would most probably have been overruled upon demurrer, and at any rate would have created delay; for in a matter of so much consequence, it cannot be presumed that the counsel for the plaintiff could at once determine whether to demur or to join issue.

The defendant was not precluded from making a proper defense. He might have shown probable cause on the general issue, for the gist of the action is the want of probable cause; and the court had the power of instructing the jury whether such cause was shown or not. Bull. N. P. 14.

It is said that the plea was offered in a reasonable time. It cannot surely be said that three days in the hurry of the court is a reasonable time to answer such a plea—so say the courts of Virginia.

This plea amounts to the general issue, and therefore ought not to have been received. The justice of the case did not require it, and it is only to promote justice that the courts have ever deviated from the precise terms of law.

Mason, on the same side.

Admitting for a moment that the practice of the Virginia courts was binding upon the cir-
116*] cuit court, yet the *court have only exercised the same discretion which a Virginia court might have exercised. There is a particular time allowed for special pleading; after that time, the admission of a plea is discretionary with the court. The case in Washington's Reports is clear to show that it is altogether a matter of discretion. The court might have refused to receive any plea at all; for the right of the defendant to set aside the office judgment, by pleading to issue, is confined to the court next succeeding the office judgment.

But the defendant had every advantage under the general issue, which he could have had under his plea. It is extremely clear that the plaintiff must show malice, and the defendant matter of justification. The rules of practice in the courts of Virginia, are confined to Virginia. The courts of the United States are not bound by them. They have power to make their own rules.

Lee, in reply.

Our complaint is, that the inferior court has not exercised its discretion in the manner it ought to do. I use the word discretion differently from Mr Mason. The exercise of such discretion is subject to the control of this court. If we look to the decisions of the courts in Virginia, we find that they have soundly exercised their discretionary power. The practice has constantly been to let in the parties notwithstanding any laches. Was it proper in the court to say, that although we have a right to suffer you to bring the question of probable cause before the court, and to take it from the jury, and although you wish so to do, yet we will not permit you, but will compel you to go before the jury; where facts disclosed, not pertinent to the issue, might make an improper impression?

CUSHING, *J.* Do you admit that the defendant might have given in evidence, under the general issue, the facts stated in the plea offered?

Lee. It is sufficient for us if it was a matter of doubt. In such a case, a cautious practitioner will always take the safest method, and plead the facts specially.

*There is no doubt but the court had [*117 a right to make rules of practice for itself. But not having made such a rule in this case, its discretion ought to have been guided by the practice of the Virginia courts. We therefore hope that this court will correct the indiscreet exercise of the power of the court below in this case.

The Court. It is true that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea, or not. But at a subsequent term, it is a matter of mere discretion with the court whether they will admit any special plea at all.

In the present case the facts stated in the plea offered, might have been given in evidence on the general issue; the court exercised their discretion soundly in rejecting the plea.

Judgment affirmed.

TURNER *v.* FENDALL.

A sheriff makes the money upon a *fi. fa.* at the suit of A. *v.* B. and afterwards a *fi. fa.* against A. is put into his hands, he cannot levy it upon the money of A. made by the *fi. fa.* of A. *v.* B., for it does not become the goods and chattels of A. until it is paid over to him; and by the command of the writ the sheriff is in strictness bound to bring the money into court, there to be paid to the plaintiff.

On a motion, in Virginia, against a sheriff for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the term next succeeding that to which the execution has been returned.

Proceedings before magistrates in cases of insolvent debtors are matters *in pais,* and may be proved by parol testimony.

It is not error in the court below to reject, as incompetent, admissible testimony tending to prove a fact not relevant to the case before the court.

Money may be taken in execution if in the possession of the defendant.

THIS was a writ of error to reverse a judgment of the circuit court of the District of Columbia, sitting at Alexandria, rendered on a motion by Fendall against Turner, late sergeant of the corporate town of Alexandria, for the amount of money received by him on a *fieri facias* issued on a judgment in favor of Fendall against one Towers.

This motion was grounded on an act of assembly of Virginia, Rev. Code, p. 317, s. 51, by which it is enacted that "if any sheriff, under sheriff, or other officer shall make return upon any writ of *fieri facias* or *venditioni exponas,* that he hath levied the debt, damages or costs,

as in such writ is required, or any part thereof, and shall not immediately pay the same to the party, to whom the same is payable, or his attorney," "it shall and may be lawful for the 118*] creditor at *whose suit such writ of *fieri facias*, &c. shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer or under sheriff, or securities of such under sheriff, for the money or tobacco mentioned in such writ, or so much thereof as shall be returned levied on such writ of *fieri facias*, &c. with interest thereon at the rate of 15 per centum per annum, from the return day of the execution until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided such sheriff or officer have ten days' previous notice of such motion."

Fendall had recovered judgment against Towers, in the court of hustings in the town of Alexandria, for 627 dollars and 52 cents damages, and 4 dollars and 91 cents costs, on which judgment a *fieri facias* issued, directed to the sergeant of the court of hustings, dated on 13th of December, 1800, returnable to the said court of hustings on the first Monday of February then next. Upon this writ was the following return, viz.: "Sergeant returns, executed on one large copper boiler and sundry casks, and sold for the sum of 703 dollars and 98 cents, including sergeant's commissions, on which money I have levied a writ of *fieri facias*, issued from the clerk's office of the court of Fairfax county, on a judgment obtained by William Deneale against Robert Young and Philip R Fendall, merchants, trading under the firm of Robert Young and company.

"CHARLES TURNER, T. S."

Before the next succeeding term of the court of hustings, after the return of the execution, the act of congress of 27th of February, 1801, concerning the District of Columbia, intervened, by which the laws of Virginia, as they then existed, were declared to be and continue in force in that part of the District of Columbia which was ceded by that state to the United States, and by them accepted for the permanent seat of government; and all suits, process, &c. depending in the court of hustings for the town of Alexandria, were transferred to the circuit court of the District of Columbia established by 119*] that *act; and the first session of the circuit court in Alexandria was by law held on the second Monday of April, 1801.

To that term, April, 1801, Fendall gave Turner notice, in the usual form, that on the first day of the court he should move for judgment against him for the amount of the execution, with interest thereon, according to law; which notice was signed "Philip Richard Fendall, for the trustees of Philip Richard Fendall," and was duly served. Turner not having appeared, the motion was continued to the next term, July, 1801, when he appeared and admitted the regularity of the delivery and continuance of the notice; and the court, upon argument, gave judgment for the plaintiff Fendall; to reverse which judgment, Turner sued out the present writ of error.

The record which came up contained three bills of exceptions.

The first stated that the defendant Turner, to prove that Fendall had taken the oath of an insolvent debtor, and was thereupon discharged out of custody, produced the following writing, viz.: "Fairfax, ss. Whereas Philip Richard Fendall, a prisoner confined in the gaol of Fairfax county, under execution at the suit of Samuel Love, issued from the district court of Dumfries, and it appearing that legal notice had been given, and a warrant issued, for bringing before us, for the purpose of taking the oath of an insolvent debtor, and the said Philip Richard Fendall having this day, in the court house of the said county, delivered in a schedule of his estate and effects, and taken the oath prescribed by law; these are therefore in the name of the commonwealth to command you to discharge the said Philip Richard Fendall out of your gaol and custody, and, for so doing this shall be your sufficient warrant. Given under our hands and seals, this twenty-first day of March, eighteen hundred.

"WILLIAM HERBERT, Seal.
"R. WEST, Seal.

"To the sheriff or keeper of the gaol of Fairfax County;" and offered to prove the hand writing of the said William Herbert and Roger West; and also to prove by oral testimony that the said Philip Richard Fendall did take the *oath of an insolvent debtor before the [*120 said William Herbert and Roger West, whose names are subscribed to the said writing, and also to prove by oral testimony that the said William Herbert and Roger West were magistrates of the county of Fairfax, on the 21st of March, 1800, and had acted as such for many years before; but the court gave it as their opinion that the said writing and oral testimony were not legal evidence to be admitted to prove the above-mentioned facts.

The 2d bill of exceptions stated, that the defendant Turner offered to show to the court that the trustees of Fendall were not entitled to the money levied on the execution of Fendall v. Towers, but the court refused to suffer him to go into that inquiry.

The 3d bill of exceptions stated, that the defendant Turner produced a copy of an execution issued on a judgment obtained by William Deneale against Robert Young and Philip Richard Fendall, (the plaintiff in the motion below,) and a copy of the return, which return was in these words, "Executed on the sum of 682 dollars and 43 cents, money in my hands, being the amount of the sum received by me for the sale of certain property taken by virtue of a *fieri facias*, issued from the clerk's office of the court of hustings of Alexandria, on a judgment obtained by the within named Philip R. Fendall against John Towers.

"CHARLES TURNER, T. S."

And alleged that he had a right, and was bound, to levy that execution on the money of the said Fendall, which he had levied by virtue of the execution of Fendall v. Towers, and which was in his hands separate and distinct from any other money at the time the execution of Deneale v. Young and Fendall was delivered to him; but the court gave it as their opinion that he had not a right, and was not bound so to do.

The case was now argued by Simms, for the

plaintiff in error, and by C. Lee and Swann, for defendant.

121*] *For the plaintiff in error, it was contended.

1st. That the court below was not authorized to render judgment at any other term than that next succeeding the return of the execution.

2d. That the testimony offered to prove the insolvency of Fendall, was competent for that purpose, and ought not to have been rejected.

3d. That the defendant below ought to have been permitted to prove the trustees of Fendall not entitled to receive the money on the execution of Fendall v. Towers.

4th. That Turner had a right to levy the execution of Deneale v. Young and Fendall, on the money of Fendall in his hands.

1st. The act of assembly giving this remedy against sheriffs ought to be construed strictly, because it is a penal law, inasmuch as it subjects the officer to a penalty of 15 per cent. per annum, for not paying over the money levied upon an execution; and because this summary process by motion is in derogation of the common law proceedings.

The words of the act are, that "upon a motion made to the next succeeding general court, or other court from whence such writ shall issue," "*such* court is hereby authorized and required to give judgment accordingly;" that is, "such *next* succeeding court." The court in April was the next succeeding court; but the court in July, at which this judgment was rendered, had no jurisdiction of the cause. And although consent will take away error, yet it will not give jurisdiction.

2d. The testimony offered to prove the insolvency of Fendall, ought to have been admitted.

By the act of assembly respecting insolvent debtors (Rev. Code, p. 314, 315, s. 40 and 41,) upon the debtor's delivering his schedule, and taking the oath, all his estate becomes vested, by act of law, in the sheriff of the county, and debts due to him are to be recovered in the name of the sheriff. This money was either the money of Fendall, and so vested in the sheriff as part of the estate in possession, or else it was 122*] a chose in action, and then the *sheriff is the only person entitled to recover it. In either case, by showing the insolvency of Fendall, we show that the title is out of him, so that he cannot support his motion. The act of assembly does not make the act of the magistrates in administering the oath, and granting the warrant of discharge of an insolvent debtor, a matter of record. Third persons have no means of proving the fact of insolvency but by parol testimony. It must be proved like any other matter *in pais*. We offered the best evidence which the nature of the case will admit. We offered the original warrant of discharge under the hands and seals of the magistrates, and parol proof that they were magistrates at the time, and had acted as such for many years before, together with evidence of their hand writing. General reputation has always been considered as sufficient proof of the official character of a magistrate.

3d. The defendant below ought to have been permitted to show that the trustees of Fendall were not entitled to the money. The notice in this case was given by Fendall for his trustees. Turner could not know whose claims he had to oppose, whether those of Fendall alone, or those of his trustees. It was necessary for him, therefore, to show that neither the one nor the others were entitled to recover upon this motion; and he came prepared to do this, but the court would not suffer him to do it. Fendall, by reason of his insolvency, and the consequent operation of law in transferring all his rights to the sheriff, could not recover in his own name for his own use and benefit; but still, as courts of law will protect trusts and equitable rights where they are made to appear, and as the transfer of the estate and effects of an insolvent debtor, which takes place by the operation of law, does not transfer those things which the insolvent has merely as trustee, and as the name of Fendall might, therefore, still be used for the benefit of the trustees, it was competent and proper for the defendant below to show that the trustees had not that equitable right which the law will protect.

4th. The fourth point seems to divide itself into two parts.

1st. Can money be taken upon a *fieri facias* in any case?

*2d. Can the officer levy a *fieri facias* [*123 on money in his own hands which he has collected for the use of the debtor?

1st. It is a general principle that all goods and chattels, the property of the debtor, may be taken in execution, and when an officer has it in his power to satisfy an execution to him directed, it is his duty to do it, and he is liable to the creditor if he fails so to do. The money of a debtor is a part of his goods and chattels; it follows, that it is liable to an execution. There is no possible reason why it should not be so. It is said there are some old authorities to the contrary, and that the reason given is, that money cannot be sold. Doug. 219, *Armistead v. Philpot*. But the reason of selling the goods taken on execution is that money may be raised, and surely the execution may as well be satisfied by taking money itself, as by taking goods which must be sold to raise the money. In 2 Shower, 166, *Rex v. Webb*, it is said that by a *levari facias* "the sheriff may take ready money." And in this respect there is no difference between a *levari facias* and a *fieri facias*.

The law is expressly laid down in Dalt. Sheriff, 145 and 543, that money may be taken on a *fieri facias*.

2d. If money in the possession of the debtor may be taken, does the money being in the hands of the sheriff make any difference?

In the case of *Rex v. Bird*, 2 Show. 87, "it was resolved by the court, on motion, that on a *fieri facias* the sheriff may sell the goods, and if he pay the money to the party, it is good, and the court will allow of such return, because the plaintiff is thereby satisfied; although the writ run, "*ita quod habeat coram nobis*," &c. The same doctrine is held in 5 Co. 90, a. *Hoe's Case*.

If, then, the sheriff might have paid this money to Fendall, and had so paid it, he would have been bound to seize it again instantly to satisfy the execution of Deneale. If he might have done this, and if it was his duty to satisfy the execution of Deneale, where was the necessity of his *going through the ceremony [*124 of a payment of the money to Fendall. Here

it is stated by the officer that he kept the money of Fendall distinct and separate from all other money, and that he levied the execution of Deneale on that identical money. This is in substance the same thing as if the money had been paid over to Fendall, and afterwards seized by the officer.

On the part of the defendant in error, it was said, in reply,

1st. As to the power of the court to give judgment at a term subsequent to the term next after the return of the execution, that although the act of assembly may be penal, and although the remedy may be in derogation of the common law proceedings, yet, like all other statutes, it must have a reasonable construction. It could never be supposed to intend that if the court did not give the judgment at the first term, the jurisdiction which they once had should cease.

2d. The fact of Fendall's insolvency was not material to the question before the court, because any person who was equitably entitled to the money would not be precluded from his claim by this judgment; and by the act of assembly no one but the creditor in whose name the judgment was rendered is entitled to this summary process against the officer who refuses to pay the money levied upon the execution; and if any other person was in equity entitled to the money, he must still use the name of Fendall. The name of the nominal creditor must be used, or the remedy given by the statute would be wholly lost. He is the only person who could acknowledge a satisfaction upon record, and it ought not to be in the power of the officer to allege an equitable claim in another person to support his own improper act. 3 Cro. 66, 176, *Benson v. Flower*. In that case the creditor had become bankrupt after the money was made upon the execution and before the return; and upon the return, the assignees contended that they had the right to receive the money, but the court ordered it to be paid to the bankrupt, because the assignees were no parties to the suit, and the bankrupt was the only person who could acknowledge satisfaction upon the record; and the money, being levied by the sheriff before the assignment, was to be con-
125*] sidered *as *in custodia legis*, and so not assignable. It was not the money of the bankrupt at the time of the bankruptcy, because it did not become his money until he received it.

But if the insolvency of Fendall were material, still the evidence adduced was not conclusive of the fact, nor even competent to prove it. It was not the best evidence which the nature of the case admitted. If the act of the magistrates was a simple act *in pais*, yet they themselves were the most competent witnesses to prove the fact, and their testimony would be better evidence than paper purporting to be signed by W. Herbert and R. West, who do not style themselves magistrates, even if their handwriting should be proved. It does not appear that they were dead, or that their testimony could not be obtained. And as to common report being evidence of their being magistrates, it certainly was not the best evidence, because their commissions, and the certificate of their taking the requisite oaths of office, were matters of record. Esp. N. P. 741. When the acts of magistrates are questioned in the county in which they are said to be justices, common report may be sufficient, because all persons are supposed to be obliged to take notice of the officers of their county. But in this case they were alleged to be justices of a foreign county. The county of Fairfax is no part of the District of Columbia.

But this was not a trial by jury, and it is very questionable, whether in such a case, a rejection of admissible evidence can be assigned for error, with any more propriety than an admission of incompetent testimony.

3d. It is contended that Turner ought to have been permitted to show that the trustees of Fendall had no right to receive the money. The answer to that is, that the court were not trying the right of the trustees, and could not look into their equitable claims. The court were sitting as a court of law, and not as a court of chancery. If the trustees had an equitable right, they were not precluded from asserting it in a proper manner; if they had not, it did not affect the present question. If they had a legal right, they would not be barred by the judgment in this case. In whatever light the subject is viewed, it appears to be perfectly immaterial to the present question.

*4th. But the fourth point includes [*126 the real merits of this controversy. Had the officer a right to satisfy the execution of Deneale v. Young and Fendall, out of the money in his hands levied by virtue of the execution of Fendall v. Towers?

1st. Money cannot in any case be taken by the officer upon an execution. It is a general principle that on a *fieri facias* the goods taken cannot be delivered to the creditor in satisfaction to the debt, but must be sold; and the books give this as a reason why money cannot be taken. Another reason may be, that money cannot be identified. But the law is different in Virginia from the English law, in respect to the proceedings on execution.

By the act of assembly respecting execution, Rev. Code, p. 309, s. 12 and 13, the officer, on all executions, having published notice of the time and place of sale, ten days before such sale, "shall proceed to sell, by auction, the goods and chattels, so taken, or so much thereof as shall be sufficient to satisfy the judgment or decree, for the best price that can be got for the same." Here it is evident that the legislature did not contemplate the case of money itself being liable to be taken on execution; for they have made it the duty of the officer, in all cases of execution, to advertise and sell the goods taken. But the next section is still stronger, for it provides "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of money or tobacco due thereon, and with condition to have the goods or chattels forthcoming at the day of sale appointed by such sheriff or officer, and shall thereupon suffer the said goods and chattels to remain in the possession, and at the risk of the debtor until that time." It would be absurd to suppose an officer obliged to appoint a day of sale for selling money; yet the giving of a forthcoming bond is a right which the debtor has by law; he is entitled to the delay on giving the security required. But

the bond cannot be taken unless a day of sale is appointed, because there can be no other day 127*] on which the *bond can become forfeited. Hence, then, it is clear that the legislature went upon the ground that money could not be taken on an execution, or they would have excepted such a case from the general words of the law. But if money was liable to be taken on a *fieri facias*, it was a case which must have often happened, and could not have escaped the recollection of every member of the legislature.

A strong argument arises from the want of adjudged cases on this point, and the total deficiency of precedent in practice within our own knowledge.

In the case of *Armistead v. Philpot*, cited from Doug. 219. Lord Mansfield confesses that there are old cases which say that money cannot be taken in execution, even though found in the defendant's scrutoire, and does not cite any cases to the contrary. It is true, he says the reason given is a quaint one, but he does not say it was not good. In that case, the money levied for the debtor was ordered to be paid by the sheriff to the creditor who had an execution, but there was no opposition except as to the attorney's fees on the first execution, which were compromised, and the court and bar agreed that the motion was of the first impression.

2d. But, secondly, this was not the money of Fendall until it was paid to him; and therefore if the law be, as is contended that money of the debtor may be taken in execution, yet the principle does not apply to this case. By the receipt of the money by the sheriff, Fendall did not become entitled to the individual pieces of coin. The remedy against the officer was not detinue or trover, but an action of debt, or on the case. The officer became the debtor of Fendall for so much money, and there is no reason why it should be more liable to an execution in the hands of the sergeant, than in those of any other individual; it was neither the goods nor chattels of Fendall, but a mere chose in action. Fendall could not compel the officer to pay it before the return day of the execution. If in the meantime the money had been lost or destroyed by robbery, fire, enemies, lightning or tempest, it must have been the loss of the officer, and not of Fendall. The command of the writ of *fieri facias*, accord- 128*] ing to its form as *prescribed by the act of assembly, (Rev. Code, p. 306) is, "that you have the said sum of money before the judges of our said court, the day of , to render to the said (creditor) of the debt and damages aforesaid." And the form of the return contained in the same act, p. 307, is, "by virtue of this writ to me directed, I have caused to be made the within mentioned sum of of the goods and chattels of the within named A. B., which said sum of , before the judges within mentioned, at the day and place within contained, I have ready, as that writ requires."

The form of the writ and return is the best possible evidence of the duty of the officer. He is obliged to have the money in court, to be there paid to the creditor; and nothing will excuse him from an exact compliance with the command of the writ, but payment to the person named as a creditor in the execution; and even this not as a matter of right but of favor. In the case of *Rex v. Bird*, cited from 2 Shower, 87, it is only said that a payment to the party will be allowed by the court, and the reason given is because the plaintff is thereby satisfied. "But this is only by permission of the court, and not by force of the law." 2 Bac. Abr. 352. Now if the plaintiff is not satisfied, the reason fails, and, consequently, the rule does not hold good. In 2 Bac. Abr. 352, it is said, "in strictness the money is to be brought into court."

In the case of *Canon v. Smallwood*, 3 Lev. 203, 204, it is said, that the payment of the money to the plaintiff was by permission of the court, not *ex rigore juris;* and the court often orders the sheriff to bring the money into court, and does not permit the plaintiff to have it; of which power the court would by this means be deprived.

In the case of *Benson v. Flower*, before cited from 3 Cro. 166, 176, it is expressly stated that the money, at the time of the bankruptcy, being *in custodia legis*, that is, in the hands of the sheriff, was not the property of the bankrupt, and did not become so until he received it. And in the case of Armistead and Philpot, the money was first brought into court, and there ordered by the court to be paid to the second creditor, on affidavit that other goods and chattels could not be found. This case shows, as strongly as possible, *the necessity of [*129 the sheriff's obeying the command of the writ in bringing the money into court instead of paying it over to the creditor out of court, because otherwise the act of the sheriff would deprive the court of the power of making such an order, and might, in many cases, deprive the debtor of the opportunity of obtaining speedy justice, on a motion to quash the execution for irregularity, or any other cause. Besides, the sheriff might go on and levy for one creditor after another, until the whole sum should be swallowed up in his commissions.

No case can be found in which it has been permitted to be done at the discretion of the sheriff, and yet it is a case which must happen in every day's practice if it could be done.

The *Chief Justice* delivered the opinion of the court.

This was a motion made by the defendant in error against the now plaintiff, in the circuit court at Alexandria, under an act of the Virginia assembly, which declares that "if any sheriff, under sheriff or other officer, shall make return on any writ of *fieri facias*, or *venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable, or his attorney," "it shall and may be lawful for the creditor at whose suit such writ of *fieri facias* or *venditioni exponas*" "shall issue, upon a motion made at the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer, or under sheriff, or securities of such under sheriff, for the money or tobacco mentioned in such writ, or so much as shall be returned levied on such writs," "with interest thereon at the rate of 15 per centum per annum from the return day of the execution

until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided such sheriff or officer have ten days' previous notice of such motion." That Turner had been sergeant of the town of Alexandria, and had returned on a writ of *fieri facias*, issued on a judgment rendered by the court of hustings for that corporation, 130*] *in favor of Philip Richard Fendall, that he had made the debt, and had levied thereon a writ of *fieri facias* issued on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co.

Before the next succeeding term of the court of hustings would have arrived, that court was abolished, and all its powers and duties transferred to the circuit court of the District of Columbia for the county of Alexandria.

To the first term of the circuit court notice was given that a judgment would be moved for, and the notice was signed "Philip Richard Fendall, for the trustees of the said Philip Richard Fendall."

The defendant did not appear to the notice, and it was continued to the succeeding term, when the parties appeared, and the defendant, to prove that P. R. Fendall had taken the oath of an insolvent debtor, and was thereupon discharged, offered in evidence a warrant signed William Herbert and R. West, discharging the said Philip R. Fendall out of custody, as an insolvent debtor, and further offered to prove the handwriting of the said Herbert and West, and also to prove, by oral testimony, that the said Philip Richard Fendall did take the oath of an insolvent debtor before the said William Herbert and Roger West, and that they were, on the 21st of March, 1800, the time of administering the said oath and granting the said certificate, magistrates for the county of Fairfax. This testimony was rejected by the court as not being legal evidence to establish the fact, and to this opinion an exception was taken.

The defendant also offered to show that the trustees of Philip R. Fendall were not entitled to the money levied by virtue of the execution mentioned in the notice, which testimony was likewise rejected by the court; and, to this opinion also, a bill of exceptions was taken.

The defendant then produced the execution issued in favor of Deneale v. Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co. with the return 131*] thereon, showing that it had *been levied on the money of Philip R. Fendall then in his hands, and alleged that the officer had a right and was bound to levy the said execution on the said money, but the Court was of opinion that he had not a right so to do, and to this opinion also an exception was taken. The court then proceeded to render judgment, on the notice, for the plaintiff; to which judgment a writ of error has been sued out of this court; and the errors assigned and relied on are,

1st. That the court for the county of Alexandria was not empowered to render judgment in this case at any term subsequent to that next succeeding the return of the execution.

2d. That the testimony offered to the court to prove the insolvency of Philip R. Fendall, and rejected, was legal testimony to prove the fact for which it was adduced, and ought, therefore, to have been admitted.

3d. That the defendant in the court below ought to have been permitted to prove the trustees of Philip R. Fendall, not entitled to receive the money to recover which the notice was given; and,

4th. That the officer had a right to levy the execution of Deneale on the money of Philip R. Fendall in his hands.

To support the first error assigned, the words of the act of assembly giving the motion have been relied on as only empowering the court to render judgment in this summary mode, at the term next succeeding that to which the execution has been returned.

That is, that although the plaintiff has brought his case rightly into court, yet if, from any cause whatever, the court shall be unable to render judgment at the first term, the suit must be dismissed, and the plaintiff must lose his remedy. The words must be very plain indeed which will force a court to put upon them so irrational a construction as this. On recurrence to the act relied on, it does not appear that a restriction so unusual and so unjust in itself, has been imposed. The words "such court," on fair construction, refer to the court in which the *motion has been made, and [*132 not to the term to which notice was given. The difficulty therefore which would have presented itself, if the notice had been given to a term subsequent to that next succeeding the return of the execution has no existence in this case.

In considering the second error assigned, the court was satisfied that the proceedings before magistrates, in cases of insolvent debtors, are entirely matters *in pais*, and are, therefore, to be proved by parol and other testimony. The evidence offered was certainly legal evidence to establish the fact for which it was adduced. The court, however, is not satisfied of its sufficiency; but without determining that question, and without determining whether, in a case where there is no jury, a judgment ought, for the rejection of testimony which was admissible in law, to be reversed in any state of things, or the cause should be considered as if the testimony had been received, it is the opinion of all the judges, that the party is bound to show the relevancy of the fact intended to be established, to the case before the court.

In the present cause the fact to be established was the insolvency of Fendall, which insolvency is not shown to have been material in the case, since nothing appears in the record to induce an opinion that the proceeding could have been in any other name than his.

Although, then, the testimony rejected was proper and legal evidence towards establishing the fact, yet the court committed no error in rejecting that testimony, for which their judgment ought to be reversed, because the fact does not appear to have been relevant to the cause under their consideration.

On the third error assigned, the opinion of the court is, that whoever might in equity be entitled to the money, or to the use of Fendall's name, the notice as given could only be sustained by showing the legal right of Fendall to recover. A legal right in the trustees would have defeated the action, for it is instituted in

the name of Philip R. Fendall, although it may be for the benefit of his trustees, and neither the reversal or affirmance of this judgment would affect the right of the trustees to proceed in their own names.

133*] *The fourth point is one of considerable importance and difficulty. In discussing it two questions have been made at the bar.

1st. Can an execution be levied on money?

2d. Can it be levied on money in the hands of the officer?

The principle that an execution cannot be levied on money has been argued to be maintainable under the authority of adjudged cases, and under the letter and meaning of the act of the Virginia legislature on the subject of executions.

Yet no such adjudged case has been adduced. Lord Mansfield, in the case cited from Doug. 219, said, "he believed there were old cases where it had been held that the sheriff could not take money in execution, even though found in the defendant's scrutoire, and that a quaint reason was given for it, viz., that money could not be sold;" and it is believed that there may be such cases, but certainly there are also cases in which the contrary doctrine has been held. In 2 Show. 166, it is laid down expressly that money may be taken on a *levari facias*, and no difference in this respect is perceived between the two sorts of execution. In Dalton's Sheriff 145, it is also stated in terms, that money may be taken in execution on a *fieri facias*. The court can perceive no reason in the nature of the thing why an execution should not be levied on money. That given in the books, viz., that it cannot be sold, seems not to be a good one. The reason of a sale is, that money only will satisfy the execution, and if any thing else be taken it must be turned into money; but surely, that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article to produce which is the sole object of the execution.

The act of assembly concerning executions has also been relied on as showing that only such articles can be taken as may be sold. But the provisions of the act can only be considered as regulating the sale of such articles as in their nature require to be sold, and not as ex-

134*] empting *from execution such property as need not be sold. The object is not the sale, but money, and if the money can be made without a sale, it cannot be unlawful to do so. But in the case of an execution for tobacco, money may be sold, and therefore may be executed, and it would be strange if, by an execution ordering a sheriff to make money, money could not be taken, and yet might be taken on an execution ordering him to make some other article.

It is the opinion of the court that money may be taken in execution, if in the possession of the defendant; but the question of greater difficulty is, whether it may be taken by the officer before it has been paid to the person entitled to receive it.

The general rule of law is, that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it in his power to satisfy an execution in his hands, it is his duty to do so, and if he omits to perform his duty, he must be accountable to those who may be injured by the omission. But has money, not yet paid to the creditors, become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum, not for the specific pieces which constitute that sum, and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an earmark; and an action of debt, not of detinue, may be brought against him if he fails to pay over the sum received, or converts it to his own use. It seems to the court that a right to specific pieces of money can only be acquired by obtaining the legal or actual possession of them, and until this is done there can be no such absolute ownership as that an execution may be levied on them. A right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person, and however wise or just it may be to give such a remedy, the law does not appear yet to have given it. The dictum of Judge Buller, in the *case in 1 Durnford and East, 370, [*135 proves that the mere possession of money, as a trustee, does not give to the possessor, before a conversion, such a property in it, as to render it liable for his debts; but does not manifest an opinion that the person for whose use it was received, but to whose possession it has not come, is to be considered as the legal owner of the specific pieces themselves, so that they have become, in contemplation of law, his goods and chattels. Indeed it is observable in that case, that if the money had been due to the parish at the time bankruptcy of the defendant, who was an overseer of the poor, took place, the parish would have been in no better condition than other creditors, and would have possessed no exclusive property in the money claimed.

Although the dictum of Judge Buller may appear to militate somewhat against this position, yet the principle of the decision is in its favor, for the judgment of the court is declared to be founded on the fact that the debt was not a debt till after the bankruptcy.

The case cited from 3 Croke, 166, 176, expressly states the property of the money while in the hands of the sheriff, not to be in the creditor; and although the inference of the court from that principle does not appear to have been warranted, yet the principle itself is believed to be certainly correct.

In the case of *Armistead v. Philpot*, Doug. 219, the court directed the money of the debtor to be paid to the creditor, whose execution was in the hands of the sheriff holding that money also; but this direction would have been unnecessary if the sheriff had possessed a previous right to make the appropriation.

It is stated in Barnes's Notes, 214, to have been adjudged in Trinity term, 32d and 33d of George II. in the case of *Staple v. Bird*, where a sheriff had levied an execution on money in his hands, that he should, notwithstanding this ex-

ecution, pay the money to the person entitled to the benefit of the first judgment. It is true that in that case the person in whose name the judgment was rendered, was not entitled to the money received under it, but the case is not stated to have been decided on that principle; **136***] and *the very frequency of such a state of things furnishes an argument of no inconsiderable weight against the right to levy an execution on money so circumstanced. The equitable right of persons, whose names do not appear in the execution, ought to be preserved; and considerable injustice might result from imposing on the sheriff the duty of deciding at his peril on such rights.

Considering the case, then, either on principle or authority, it appears to the court that the creditor has not such a legal property in the specific pieces of money levied for him, and in the hands of the sheriff, as to authorize that officer to take those pieces in execution as the goods and chattels of such creditor.

But the money becomes liable to such execution the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. It appears unreasonable that the law should direct a payment under such circumstances. If the money shall be seized the instant of its being received by the creditor, then the payment to him seems a vain and useless ceremony which might well be dispensed with; and if the money should, by being so paid, be withdrawn from the power of the officer, then his own act would put beyond his reach, property rendered by law liable to his execution, and which, of consequence, the law made it his duty to seize.

The absurdity involved in such a construction led the court to a further consideration of the subject.

The mandate of a writ of *fieri facias*, as originally formed, is, that the officer have the money in court on the return day, there to be paid to the creditor. Forms of writs furnish strong evidence of what was law when they were devised, and of the duty of the officer to whom they are directed. Originally it was regularly the duty of the officer to have the money in court, and it has been held, that not even payment to the creditor himself could excuse the non-performance of this duty. The rigor of this rule has been considerably relaxed, but the form of the writ, as directed by a late act of the legislature of Virginia, yet is, that the money shall be in court on the return day, and there appears no excuse for omitting this duty, **137***] unless *it shall have been paid to the creditor. The sheriff may certainly make such payment out of court, if no circumstance occurs which legally obstructs or opposes it, such as an injunction from the court of chancery, in which case, by the law of Virginia, the money must be returned; or an execution against the goods and chattels of the person to whom the money in his hands shall be payable. In the latter case it seems to the court still to be the duty of the sheriff to obey the order of the writ, and to bring the money into court, there to be disposed of as the court may direct. This was done in the case of Armistead v. Philpot, and in that case the court directed the money to be paid in satisfaction of the second execution. This ought to be done whenever the legal and equitable right to the money is in the person whose goods and chattels are liable to such execution.

In the case of Turner and Fendall, the sheriff not having brought the money into court, but having levied an execution on it while in his hands, has not sufficiently justified the non-payment of it to the creditor; and therefore the court committed no error in rendering judgment against him on the motion of that creditor. If the payment of the damages should be against equity, that was not a subject for the consideration of the court of law which rendered the judgment.

Judgment affirmed.

(FEBRUARY, 1803.)

WILLIAM MARBURY
v.
JAMES MADISON, Secretary of State of the United States.

The Supreme Court of the United States has not power to issue a mandamus to a Secretary of State of the United States, it being an exercise of original jurisdiction not warranted by the constitution.

Congress has not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution.

An act of congress repugnant to the constitution cannot become a law.

The courts of the United States are bound to take notice of the constitution.

A commission is not necessary to the appointment of an officer by the executive; semb.

A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters patent.

The president cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law.

A justice of peace in the District of Columbia is not removable at the will of the president.

When a commission for an officer not holding his office at the will of the president, is by him signed and transmitted to the Secretary of State, to be sealed and recorded, it is irrevocable; the appointment is complete.

A mandamus is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled.

AT the last term, viz., December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, Esq. late attorney general of the United States, *severally moved [***138** the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the senate ad-

NOTE.—*Original jurisdiction of court of last resort in mandamus case*—see note, 58 L. R. A. 833.
Mandamus, when the proper remedy and when not—see note, 39 L. ed. U. S. 160.

vised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c.; and that the seal of the United States was in due form affixed to the said commissions by the secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as Secretary of State of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the fourth day of this term. This rule having been duly served, Mr. Lee, in support of the rule, observed, that it was important to know on what ground a justice of peace in the District of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the President. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive jour- 139*] nals respecting *the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31st January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature of the office of Secretary of State. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the president. In the first, his duty is to the United States or its citizens; in the other, his duty is to the President; in the one, he is an independent and an accountable officer; in the other, he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1, p. 359, entitled "An act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, "Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondences, commissions, *or instructions to or with public minis- [*140 ters or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given, and the duties imposed, by this act, no mandamus will lie. The secretary is responsible only to the president. The other act of congress respecting this department was passed at the same session on the 15th September, 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department and the other the Secretary of State. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the President, and for the non-performance of which he is not more responsible to the President than to any other citizen of the United States. It provides that he shall receive from the President all bills, orders, resolutions and votes, of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives, and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they *shall have been [*141 signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated

under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the president cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are intrusted, and he alone is answerable for their due performance. The Secretary of State, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the Secretary of State, respecting which they 142*] *cannot be bound to answer. Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the Secretary of State. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must show that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The Court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them, justices of the peace. That Mr. Marbury and Mr. Ramsay called on the Secretary of State respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question "who gave him that information;" and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were *recorded, as he had [*143 not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but he believed, and was almost certain, that Mr. Marbury's and Col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace, signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed, he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the Secretary of State.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as Secretary of State at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not

to answer, as to any facts which came officially to his knowledge while acting as Secretary of State.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

144*] *1st. He did not think himself bound to disclose his official transactions while acting as Secretary of State; and,

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated that the duties of a Secretary of State were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; 145*] it *is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it, and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what has been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause what had been done with them by others.

To the other questions he answered that he had seen commissions of justices of the peace of the District of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, Col. Hooe, or Col. Ramsay, justices of the peace; there were, when he went into the office, several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

*Mr. Lee then read the affidavit of [*146 James Marshall, who had been also summoned as a witness. It stated that on the 4th of March, 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the Secretary of State, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him, for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for Col. Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions:

1st. Whether the Supreme Court can award the writ of mandamus in any case?

2d. Whether it will lie to a Secretary of State in any case whatever?

3d. Whether, in the present case, the court may award a mandamus to James Madison, secretary of State?

The argument upon the first question is derived not only from the principles and practice of that country from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the Supreme Court, and by reason of its supremacy must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of

issuing the writs of mandamus and prohibition. 147*] 3. Inst. 70, 71. *Shall it be said that the court of king's bench has this power in consequence of its being the Supreme Court of judicature, and shall we deny it to this court which the constitution makes the Supreme Court? It is a beneficial, and a necessary power; and it can never be applied where there is another adequate, specific, legal remedy.

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States, (except the cases in which it has original jurisdiction,) with such exceptions, and under such regulations, as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must, then, be a jurisdiction somewhere competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other specific means of compelling its performance."

In the *Federalist*, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review 148*] the proceedings *of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the Supreme Court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, s. 13, have expressly given the Supreme Court the power of issuing writs of mandamus. The words are, "the Supreme Court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of *The United States v. Judge Lawrence*, 3 Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel Judge Lawrence to issue a warrant against Captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required was not a proper one to support the motion. In the case of The United States v. Judge Peters, a writ of prohibition was granted. 3 Dal. Rep. 121, 129. This was the celebrated case of the French *corvette the Cassius, [*149 which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the Supreme Court, in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the secretary at war, commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids did not support the case on which the applicant grounded his motion. The case of *The United States v. Hopkins*, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States' loan. Upon argument, the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in all cases; nor to the president in any case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a mandamus; but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c., he is a ministerial officer of the people of the United States. As such he has

duties assigned him by law, in the execution of which he is independent of all control but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer, having public duties 150*] to perform, *should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, he is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usuages of law, to any persons holding offices under the authority of the United States."

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the president, who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Paterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered to do so by the president.

Mr. Lee replied, that after the president has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the president has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty 151*] to seal, record, and deliver *it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

[3d. The third point is, whether, in the present case, a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the District of Columbia are judicial officers, and hold their office for five years. The office is established by the act of congress passed the 27th of February, 1801, entitled "An act concerning the District of Columbia," c. 86, s. 11 and 14, p. 271, 273. They are authorized to hold courts, and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, c. 52, s. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the president. The appointment of such an officer is complete when the president has nominated him to the senate, and the senate having advised and consented, and the president has signed the commission, and delivered it to the secretary to be sealed. The president has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought, therefore, to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. *This cause [*152 may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments, or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace; and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

It only remains now to consider whether a mandamus, to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law."

It is the general principle of law that a mandamus lies, if there be no other adequate, specific, legal remedy. 3 Burr. 1267. *King v. Barker et al.* This seems to be the result of a view of all cases on the subject.

The case of *Rex. v. Borough of Midhurst*, 1 Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of *Rex. v. Dr. Hay*, 1 W. Bl. Rep. 640, a mandamus issued to admit one to administer an estate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a ministerial act which concerns the public; 1 Wils. 283. 1 Bl. Rep. 640; although there be a more tedious remedy. Str. 1082. 4 Burr. 2188. 2 Burr. 1045. So if there be a legal right, and a remedy in equity. 3 Term Rep. 652. A mandamus lies to obtain admission into a trading company. *Rex. v. Turkey*

Company, 2 Burr. 1000. Carth. 448. 5 Mod. 402. So it lies to put the corporate seal to an instrument. 4 Term Rep. 699. To commissioners of the excise to grant a permit. 2 Term Rep. 381. To admit to an office. 3 Term Rep. 575. To deliver papers which concern the public. 2 Sid. 31. A mandamus will sometimes 153*] lie in a *doubtful case, 1 Lev. 113, to be further considered on the return. 2 Lev. 14. 1 Sid. 169.

It lies to be admitted a member of a church. 3 Burr. 1265, 1043.

The process is as ancient as the time of Edw. II. 1 Lev. 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing, or show cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding; if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the District of Columbia.

Afterwards, on the 24th February, the following opinion of the Court was delivered by the *Chief Justice.*

Opinion of the Court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to 154*] show cause why a mandamus *should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two countries, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

*It appears, from the affidavits, that [*155 in compliance with this law, a commission for William Marbury, as a justice of the peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint, ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the president, and is completely voluntary.

2d. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

*3d. The commission. To grant a [*156 commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by

averting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

157*] *This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department *of [*158 foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;" "Provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and *the commission is valid. No other [*159 solemnity is required by law; no other act is to be performed on the part of the government. All that the executive can do to invest the person with his office is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been con-

jectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly; let it be conceded, that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the delivery should be made personally to the grantee of the office; it never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the secretary to affix the seal to the commission after it shall have been signed by the President. If, then, the act of delivery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemni- **160*]** ties are the evidence *of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the Secretary of State would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that *the original had [*161 been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who *has declined to accept, and not in the [*162 place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made.

But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2d. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

163*] *The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his Commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigations, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself is, whether this can be arranged **164*]** *with that class of cases which come under the description of *damnum absque injuria;* a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor, or of profit. The office of justice of peace in the District of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June, 1794, vol. 3, p. 112, the Secretary of War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise term, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. *No act [**165** of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, (vol. 3, p. 299,) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent; or, the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not. must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important po-
166*] litical powers, in the *exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

167*] *The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They can not be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice *of peace for the [*168 county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.

2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3d. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2d. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his Commentaries, page 110, defines a mandamus to be "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrow, 1266, in the case of *The King v. Baker et al.*, states, with much precision and explicitness, the cases in which this writ may be used.

"Whenever," says that very able judge "there

is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, 169*] or dispossessed or such right, and *has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, 170*] should at first view be considered *by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is *again repeated, that any applica- [*171 tion to a court to control, in any respect, his conduct would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the Secretary of War to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who have been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, mak-

ing it the duty of the Secretary of War, in conjunction with the attorney general, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the 172*] United *States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the Secretary of War, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court, the decision was, not that a mandamus would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case; the decision necessarily to be made of the report of the commissioners did not confer on the applicant a legal right.

The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; 173*] and being so *appointed, he has a right to the commission which the secretary has received from the President for his use. The act of congress does not indeed order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, or its value. The value of a public office not to be sold is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present *case; because the [*174 right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

*If the solicitude of the convention, [*175 respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which

might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, 176*] seems not to belong to *appellate but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited *and acts allowed, are of [*177 equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

*So if a law be in opposition to the [*178 constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of

these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

179*] *Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution *contemplated that [*180 instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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*BAILEY E. CLARK [*181
v.
ROBERT YOUNG AND CO.

In Virginia it is not absolutely necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser.

If a promissory note of a third person be indorsed by the purchaser of goods to the vendor, as a conditional payment for the goods; *quære*, whether the vendor is, in any case, obliged to sue the maker of the note before he can resort to the purchaser of the goods on the original contract of sale?

A suit against the defendant as indorser of the note, and a suit against the defendant for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.

It is not necessary for the plaintiff to offer to

return the note, to entitle him to bring suit for the goods sold.

ERROR from the circuit court of the District of Columbia, sitting in the county of Alexandria.

This was an action on the case for goods sold and delivered by Young & Co. to Clark. The declaration had three counts; one for the price of the goods; one on a *quantum valebant;* and one for money had and received.

The cause came on to be tried in the court below, on the general issue, at April term, 1802.

The facts, on the trial, appeared to be, that on the 9th of September, 1794, Young & Co. sold to Clark 400 bushels of salt, at 4*s.* 3*d.* per bushel, amounting to 283 dollars and 33 cents. At the time of the sale and delivery of the salt, Clark assigned to Young & Co. a negotiable promissory note, made by one Mark Edgar to Pickersgill & Co. and by them indorsed to Clark, dated September 5th, 1794, for 289 dollars, payable 60 days after date, at the bank of Alexandria. That Young & Co. instituted a suit in Fairfax county court, in Virginia, against Clark, on his indorsement of this note; upon the trial of which cause, Clark, by his counsel, "prayed the opinion of the court, whether the plaintiffs could maintain their action against him, previous to their having commenced a suit and obtained judgment against the drawer, or maker of the note; and until his insolvency should appear;" "and the court gave it as their opinion that they could not; and directed the jury accordingly." Whereupon, a verdict was found for the defendant. It also appeared that at the time the note was indorsed by Clark to Young & Co. as well as at the time when it became payable, Mark Edgar, the drawer of the note, was in bad circumstances, and was supposed and reputed to be insolvent. And that about the middle or last of December, 1794, he left Alexandria, and had never returned to it.

182*] *The record which came up to this court contained three bills of exceptions:

1. The first contained a demurrer, on the part of the defendant below, to the evidence, which the circuit court refused to compel the plaintiffs to join. This exception was abandoned by the counsel for the plaintiff in error.

2. The second bill of exceptions was in these words: "memorandum, in the trial of this cause, the defendant gave in evidence to the jury, that the plaintiffs had instituted a suit against him, in the county court of Fairfax, upon the indorsement of the promissory note of Mark Edgar, herein before mentioned; the proceedings in which said suit are in these words, to wit:" (here was inserted the record of Fairfax county court,) "Whereupon, the counsel for the defendant prayed the court to instruct the jury, that if, from the evidence given in this cause, they should be of opinion that the promissory note aforesaid, was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares, and merchandise, sold as aforesaid, (although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandise, or received as such by the plaintiffs, but merely as a conditional payment thereof,) yet the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the plaintiffs against the defendant upon his indorsement aforesaid, made the note so far a payment to said plaintiffs, for the said goods, wares and merchandise, as to preclude them from sustaining any action against the said defendant for the goods, wares and merchandise, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the said suit upon the said note against the defendant, and that having been decided against the said plaintiffs, were barred from sustaining this action against the said defendant. But the court refused to give the instruction as prayed, and instructed the jury that if they should be of opinion, from the evidence, that the salt was sold and delivered by the plaintiffs to the defendant, and the note was indorsed by the defendant to the plaintiffs in consequence of the salt sold, although the said indorsement was not intended *as an absolute payment [*183 and received as such by the plaintiffs, but merely as a conditional payment thereof, then the same is a discharge for the salt sold, unless it is proved that due diligence has been used by the plaintiffs to receive the money due on the note; but the bringing a suit against Mark Edgar is not absolutely a necessary part of said diligence; but the want of such suit may be accounted for by the insolvency of the said Edgar, if proved; or by the conduct of the defendant himself preventing such suit; to which refusal and direction of the court, the defendant, by his counsel, prays leave to except," &c.

3. The third bill of exceptions stated, that "the defendant by his counsel then prayed the opinion of the court and their direction to the jury, that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar; or that Edgar had taken the oath of an insolvent debtor, or had absconded, at the time the note became payable; or unless the plaintiffs could show that they had offered to return and reassign the said note to the said defendant previous to the institution of this suit. But the court having before, in the trial of the said cause, on application by the defendant to instruct the jury in the manner set forth in his second bill of exceptions, given directions to the jury, comprehending all the material points contained in the above prayer, refused to give the instruction as prayed, to which refusal the defendant, by his counsel, prayed leave to except," &c.

Verdict and judgment for the plaintiffs, for the full amount of the salt sold; on which judgment the defendant brought a writ of error to this court.

Swann and Mason, for the plaintiff in error.

C. Lee and E. J. Lee, for the defendants.

Swann. If a note is indorsed to the vendor at the time of the sale of goods, although it is not agreed to be an absolute *payment, [*184 yet it is a conditional payment, viz., if the note be paid, or if it be indorsed over by the vendor, or if he is guilty of laches. 5 Term Rep. 513. *Kearslake v. Morgan.* In that case the plea (which was adjudged good on demurrer) stated that the note of one W. Pierce was indorsed by

Morgan to Kearslake, "for and on account" of the goods sold, and that Kearslake "then and there accepted and received the note for and on account" of the sum due for the goods.

The defendants in error, if they have been guilty of laches, have made the note their own, and must suffer the loss. 2 Wils. 353. *Chamberlyn v. Delarive.*

The question then arises, what was due diligence in this case. As the law stands in Virginia, Young & Co. ought to have sued Mark Edgar, the maker of the note. Such is the opinion of Judge Roane, in the case of *Mackie v. Davis*, 2 Wash. 230, which is confirmed by the judgment of the court of appeals in the case of *Lee v. Love*, in 1 Call's Rep. 497.

But it is unnecessary to resort to the general law in Virginia on this point, because the court of Fairfax county has decided the law in this case, and while that judgment stands unreversed it is conclusive. The plaintiffs have made their election of two modes of proceeding to recover the money; having failed in one, they are barred as to the other. The same evidence is necessary to support both, and this is the test to prove that they are for the same cause. 3 Wils. 304, *Kitchen v. Campbell.*

That court has decided that Clark was not liable on his indorsement of the note, because Young & Co. had not brought suit against Edgar; or, in other words, they have decided that Young & Co. have not used due diligence, and, therefore, have made the note their own; and if so, the original contract for the salt is at an end. Yet the court below have decided this very question differently. They have said that a suit against Edgar was not a necessary part of due diligence. The same question, between the same parties, has been differently decided by the two courts.

185*] *Mason, on the same side.

The court below was concluded by the decision of the county court of Fairfax. *Nemo bis vexari debet.* The plaintiffs below had two modes of recovering their money from Clark, viz., by a suit for the salt sold, or by an action against Clark on his indorsement of the note. They made their election of the latter, and it has been decided against them. This ought to end the business. 3 Wils. 304, *Kitchen v. Campbell.*

E. J. Lee, contra.

The question seems to turn on the second bill of exceptions. It appears by that, that the note was not given as an absolute, but a conditional payment. It is unreasonable to suppose that the condition was, that Young & Co. should be obliged to prosecute a suit against Edgar through all the courts of Virginia.

The prayer was to instruct the jury that a suit must be proved to have been prosecuted against Edgar, and his insolvency made to appear.

The judgment of the county court of Fairfax is no bar. It was not even a bar to a second suit by Young & Co. against Clark on the same note. For the opinion of that court was not generally that the suit would not lie against Clark on his indorsement, but that it would not lie against him previous to a suit against Edgar, and his insolvency being made to appear. Therefore, after proving Edgar insolvent by a suit, Young & Co. might have brought a second suit against Clark and recovered, for any thing that appears by the opinion of that court.

If, then, Young & Co. might have had a second action upon the note, they may well bring a suit upon their original cause of action. The opinion of the Fairfax court was only that the plaintiffs had brought their action too soon.

It is said this is the same cause of action which has been decided in the county court of Fairfax, and that the judgment in that court is a bar to this action.

*In order to prove this, it is necessary [*186 to show not only that the same evidence applies to both, but the former judgment must have been upon the same point. And that point must be on the merits. 5 Bac. Abr. new ed. p. 442.

In the case of *Kearslake v. Morgan*, cited from 5 Term Rep., it did not appear what had become of the note; it might have been paid. Besides, that was a case under the statute of Anne, which makes promissory notes a payment.

The case of *Chamberlyn v. Delarive*, in 2 Wils. 353, was decided on the gross negligence of the plaintiff in holding the order four months without making a demand of the money, until the drawee failed.

The refusal of the court below to give the instruction prayed, and the direction which they did give to the jury, are both justified by the decisions of the court of appeals of Virginia. That court has never decided that a suit against the maker of the note is, in all cases, necessary before resort can be had to the indorser. It is true that in the case of *Mackie v. Davis*, Judge Roane said, that "the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money discharged from any control of the assignor over the subject;" and that "it is, therefore, his duty to bring suit." But that was only an obiter opinion, not applicable to the point of the cause. It is certainly not a self-evident truth, nor is it very apparent how the conclusion flows from the premises; and Judge Carrington, in his opinion, in the same case, p. 231, says, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case he went far enough." In that case, indeed, a suit had been brought; but the courts of Virginia have never laid down any general rule as to what is due diligence in such a case. In the case of *Lee v. Love*, in Call's Rep. and *Minnis v. Pollard*, Call. 226, it seems rather to be inferred that a suit is not in all cases necessary. In the case of *Mackie v. Davis*, the court decided that the remedy of the assignee of a bond against the assignor, was by the common law; and it is clear from *the [*187 case of *Lambert v. Oakes*, in 1 Ld. Raym. 443, that, by the common law, the indorsee of a note had his remedy against the indorser, if the money was not paid by the maker of the note on demand.

If, therefore, a suit against the maker of a note is not, in all cases, necessary to charge the indorser, the court below were right, both in refusing the instruction as prayed, and giving the opinion which they did.

C. Lee, on the same side.

1. The point arising from the first bill of exceptions is, that the court might well refuse to compel the plaintiffs below to join in demurrer to the evidence. This point being now agreed, I shall consider.

2. Whether the court did right in refusing the instruction to the jury, as prayed in the second bill of exceptions.

It is not necessary to inquire whether the instructions which they did give was right, but whether they were bound to give that which was asked.

If the note was not received at the time, as absolute payment for the salt, Young & Co. had a right of action for the price of the salt, upon demand and refusal of payment of the note by Edgar. The liability of the indorser to the indorsee of a note is at common law, and not by the custom of merchants, or the statute of Anne. And by the common law, nothing more was necessary to fix that liability than a demand upon the maker of the note, and his refusal to pay. Upon this, and this only, the right of action accrued against the indorser. It is true that Young & Co. had two remedies. They might either sue Clark upon his indorsement, or upon the original contract for the salt. Having failed in the former, they are not precluded from resorting to the latter. Their election of the first is not a waiver of the last.

The action in Fairfax county, on the note, was no bar to the action in the District of Columbia, upon the account. The note was no 188*] payment of the account, nor *was the former action for the same cause as the present. The causes of action, and the evidence necessary to support them, were entirely different. The declaration in Fairfax county contained three counts; 1st. A special count on Clark's indorsement of the note; 2d. For money lent; 3d. For money had and received.

In the present action the declaration has also three counts; 1st. For the price of the salt sold; 2d. A *quantum valebat;* 3d. Money had and received.

The same evidence will not support both actions. The indorsement of Clark is the evidence necessary in one. The delivery of the salt is the evidence to support the other.

In the case of *Kitchen v. Campbell*, 2 Bl. Rep. 827, 831, the court said, "the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments, in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will sustain both the actions;" and cited *Putt and Royston*, 2 Show. 211. Raym. 472. 3 Mod. 1. Pollexfen, 634. *Mortimer and Wingate*, Moor, 463. Bro. Action on the case, 97, 105. And not only must it require the same evidence to support both, but in both the question must be the same. 2 Bl. Rep. *Kitchen v. Campbell*, p. 832. Esp. Rep. 130. *Ruff v. Webb*. This was an action for a servant's wages, against his master, who had given him a draft for the full amount of his wages, on a third person, which was not stamped. And although the plea stated that he accepted it in absolute payment, yet it was held to be no bar.

The case of *Kearslake v. Morgan* depends on the statute of Anne, which declares that a note given for a debt due by account, shall be a satisfaction, unless the plaintiff uses due diligence. No such statute exists in Virginia.

In the case of *Chamberlyn v. Delarive*, there was no demand at all upon the drawee of the bill. Neither of those cases, therefore, were like the present.

*Swann, contra. [*189

If a note is agreed to be taken in payment absolutely, it is a satisfaction; but where there is no such agreement, the law implies a condition that the holder shall use due diligence. The county court at Fairfax has decided that Young & Co. have not used due diligence. That decision is valid and conclusive all over the world, until reversed by a competent authority. How, then, does this case stand? Young & Co. sold salt to Clark, and received a note, as a conditional payment, or a collateral security, no matter which; which note they have made their own by their own laches. The maker of the note has become insolvent and run away. Who ought to bear the loss? The law says clearly, the person who has been negligent, who has not complied with the requisites of the law.

It is immaterial whether the judgment in Fairfax is an absolute or a temporary bar; for if it is a temporary bar only, yet Young & Co. have not done what that court decided to be necessary.

Mason, on the same side.

A judgment on the same question between the same parties is conclusive until reversed. What is the same question? It is the real merits, the matter of right between the parties.

The same evidence is not the criterion. Trespass and trover require different evidence; yet if the merits of the same question are the gist of both, the one is a bar to the other. Here the question was the same as in Fairfax, viz., Whether Young & Co. had not been guilty of laches in respect to the note; for if they had, they had barred themselves not only from a right to recover upon the note, but upon the original contract for the salt. One and the same question will decide both cases. That question is upon the merits, and is in fact the only question in dispute between the parties.

It is not important whether the note was received as an absolute or a conditional payment. For if it was a *conditional payment, [*190 the laches of Young & Co. have made it absolute. There is no evidence of notice to Clark of the default of Edgar, until the bringing of the suit in Fairfax county, which was 18 months after the note became payable. Having two remedies for the price of the salt, Young & Co. could not resort to both. They made their election to sue upon the note, and having pursued that remedy to judgment against themselves, they are forever barred.

The county court of Fairfax have decided the only question which existed between the parties, the negligence of the plaintiffs below, whereby they had made the note their own; and therefore they must abide the loss.

Feb. 17th. The *Chief Justice* delivered the opinion of the court.

This was a suit brought by the defendants in error against the plaintiff, in the circuit court of the District of Columbia sitting in the county of Alexandria, and the declaration contains two counts for goods, wares and merchandises

sold and delivered, and one for money had and received to their use. The cause came on to be tried on the general issue, and a verdict was found for the plaintiffs below, on which the court rendered judgment.

At the trial of the cause it appeared that the suit was brought for a quantity of salt sold and delivered by Robert Young & Co. to Clark: after which Clark indorsed to Robert Young & Co. a promissory note made by Mark Edgar to John Pickersgill & Co. which had been indorsed by them to the said Clark, and which was payable 60 days after date.

This note was protested for non-payment; after which a suit was brought thereon by Robert Young & Co. in the county court of Fairfax against Clark; and the declaration contained two counts, one on the indorsement, and the other for money had and received to the use of the plaintiffs. In this suit verdict and judgment was given for the defendant Clark, the Court of Fairfax being of opinion that a suit could not be maintained against the in- [*191] dorser *of the note, until a judgment had been first obtained against the drawer, and his insolvency made to appear.

After the determination of that action, this suit was instituted on the original contract; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if from the evidence given in the cause they should be of opinion that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandises sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandises, or received as such by the plaintiffs, but merely as a conditional payment thereof, yet the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the said plaintiffs against the said defendant, on his indorsement aforesaid, made the said note so far a payment to the said plaintiffs, for the said goods, wares and merchandises, as to preclude them from sustaining any action against the said defendant for the said goods, wares and merchandises, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the suit aforesaid upon the said note against the said defendant, and that having been decided against the said plaintiffs, they were barred from sustaining this action against the said defendant.

This instruction the court refused to give, but directed the jury, that if they were of opinion from the evidence, that the salt was sold and delivered as alleged, and that the promissory note aforesaid was indorsed by the defendant to the plaintiffs in consequence of the salt sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said salt, or received as such by the plaintiffs, but merely as a conditional payment thereof, the same is a discharge to the defendant for the salt sold to him, unless it is proved that due diligence has been used to receive the money due on the note; but that the bringing suit on the said note against Mark Edgar was not essentially necessary to constitute the said diligence; and that the said diligence may be proved by other circumstances, and their omitting to bring the said suit against Edgar may be accounted for by the insolvency of Edgar, *if proved, or any conduct of the de- [*192] fendant which may have prevented the bringing of the said suit.

To this opinion the counsel for the defendant excepted, and then prayed the court to direct the jury that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar, or that Edgar had taken the oath of insolvency, or absconded at the time the note became payable, or unless the plaintiffs could show that they had offered to return and reassign the said note to the said defendant, previous to the institution of this suit.

This direction the court refused to give, and referred the jury to their opinion already given on the principal points now stated, and to which an exception had already been taken. This opinion was also excepted to. A verdict and judgment was then rendered for the plaintiff, without giving credit for Edgar's note, which judgment is now brought into this court by writ of error.

On these exceptions it has been argued that the court has erred, because,

1st. The conduct of the plaintiffs, Young & Co. has disabled them from maintaining this action, and such ought to have been the direction to the jury.

2d. The verdict and judgment in Fairfax court is a bar to this action.

The conduct of the plaintiffs was entirely before the jury, to be judged of by them from the evidence, excepting only that part of it respecting which the court gave an opinion. We are, therefore, only to inquire whether the opinion given by the court be erroneous.

It is agreed on both sides that the note in this case was not received as payment of the debt, and, consequently, did not extinguish the original contract. It was received as a conditional payment only, and the opinion of the court was, that in such a case the want of due diligence to receive the money due thereon would discharge the defendant. But the court proceeded to state that due *diligence [*193] might be proved although no suit was instituted; and that circumstances, such as the known insolvency of Edgar, the drawer of the note, or any conduct of Clark, preventing a suit, would excuse Young & Co. for not having instituted one.

This opinion of the court seems perfectly correct. The condition annexed to the receipt of the note cannot be presumed to have required that a suit should be brought against a known insolvent, or that it should be brought against the will of the indorser; if he chose to dispense with it, or took means to prevent it, nothing can be more unreasonable than that he should be at liberty to avail himself of a circumstance occasioned by his own conduct.

It is not intended to say that the person receiving such a note is compellable, without special agreement, to sue upon it in any state of things. It is not designed to say that he may not, on its being protested, return it to the indorser, and resort to his original cause of action; it is only designed to say that, under the

circumstances of this case, nothing can be more clear than that there was no obligation to sue.

The Court gave no opinion that the suit in Fairfax was, or was not, a bar to that brought in the county of Alexandria.

It is, however, clear, that no such bar was created.

To waive the question, whether in such a case as this with declarations for such distinct causes, a verdict in a prior suit may be given in evidence as a bar to another suit really for the same cause of action; it is perfectly clear that in this case the same question was not tried in both causes.

In Fairfax the point decided was, that the suit against the indorser would not lie until a suit had been brought against the drawer; in the suit in Alexandria the point to be decided was, whether the plaintiffs had lost their remedy on the original contract, by their conduct respecting the note. These were distinct points, 194*] and the merits of *the latter case were not involved in the decision of the former.

On the second bill of exceptions, the only real new point made, is, whether the action is maintainable unless Robert Young & Co. had offered to return and reassign the note before the institution of the suit.

Unquestionably Clark is entitled to the benefit of the note, but as it was no extinguishment of the original cause of action, there was no absolute necessity to prove an offer of the note before the institution of the suit. Indeed it does not appear, in this bill of exceptions, whether the note was merely a collateral security or a conditional payment. This is nowhere stated positively. In the first opinion of the court it is stated hypothetically, and that opinion must be considered on the presumption that such was the fact. But no such presumption is raised respecting the second bill.

Judgment affirmed with cost.

WILSON v. LENOX AND MAITLAND.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest.

Quære, whether if the holder of the bill of exchange, after due notice to the indorser of the non-payment by the drawee, charge the bill in account current against the drawer, and upon the whole of that account the balance due is less than the amount of the bill, the indorser is thereby discharged.

Whether the indorser is discharged by the holder's receipt of part from the drawer, after due notice given to the indorser.

Whether it be necessary to aver protest for non-acceptance in an action on protest for non-payment?

Whether the drawer be a competent witness for the indorser in an action against the latter?

ERROR to the circuit court of the District of Columbia, sitting at Alexandria, on a judgment obtained by the present defendants in error, against the plaintiff in error, in an action of debt, as indorser of a bill of exchange for 300*l.* sterling, drawn on the 2d of January, 1799, at Alexandria, by A. and W. Ramsey, on Findley Bannatyne & Co., London, at ninety days sight, payable to Wilson, the plaintiff in error, and by him indorsed to the defendants. This bill was presented for acceptance on the 28th of February, 1799, and refused, and, on the 1st of June, 1799, protested for non-payment. The declaration was "of a plea that he render unto them the sum of 300*l.* sterling, with damages, interest and charges of protest, on a protested bill of exchange, which *to them he [*195 owes, and from them unjustly detains;" and goes on to state the drawing of the bill of exchange, "according to the custom of merchants," the indorsement by Wilson to Lenox and Maitland, the refusal of Findley, Bannatyne & Co. to accept the bill on its being presented for acceptance, (but does not state a protest for non-acceptance, nor notice of the non-acceptance given to Wilson,) and the protest, "in due form according to the custom of merchants," for non-payment; "of which the said defendant, afterwards, to wit., on the day of , in the year aforesaid, at the town and county aforesaid, had notice, whereby, and by force of the act of assembly of the commonwealth of Virginia, in such case made and provided, action accrued to the said plaintiffs to demand and have of the said defendant the said sum of 300*l.* sterling, with damages, interest and charges of protest; nevertheless, the said defendant, although thereto often required, hath not paid unto the said plaintiffs the said sum of three hundred pounds sterling, with damages, interest and charges of protest, but the same to pay hath hitherto refused, and still doth refuse, to the damage of the plaintiffs 750 dollars, and thereupon they bring suit," &c.

The act of assembly of Virginia, which gives the action of debt on a protested bill of exchange, (Rev. Code, p. 121,) provides, "that where any bill of exchange is, or shall be drawn for the payment of any sum of money, in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer, or indorser, shall be subject to the payment of fifteen per centum damages thereon, and the bill shall carry an interest of five per centum per annum, from the date of the protest, until the

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NOTE.—Where the holder of a promissory note sent it when due to the bank at which it was payable, and the bank, erroneously supposing the maker to be in funds, credited the holder with the amount, but on discovering its mistake next day, corrected it, and served the indorsers with notice of non-payment; *held*, in an action on the note against the indorsers, that it had not been paid, and that due steps had been taken to charge them.

The Troy City Bank v. Grant.
Hill & Denio Sup. 119.

Where a check deposited by plaintiffs with defendant for collection was sent by defendant to a bank which was its collecting agent, the latter bank charging the check to the drawer's account, and crediting defendant with the amount in pursuance of an arrangement made between the two banks, the checks being returned to the drawer, a third party, as a voucher, and the collecting bank then failed and passed into the hands of a receiver.

Held: That such charging and crediting constituted a payment of the check to defendant, rendering it liable for the amount of the check to plaintiff.

James Briggs v. The Central National Bank.
61 How. Pr. 250.

Appropriation of maker's bank deposit in payment of.

National Bank of Newburgh vs. Daniel Smith,
5 Hun, 183.

money, therein drawn for, shall be fully satisfied and paid."

"§ 3. It shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately; and judgment shall and may be given for such princi-
196*] pal, damages *and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for the interest upon the said principal money recovered, after the rate of five per centum per annum, until the same shall be fully satisfied."

"§ 4. In all bills of exchange given for any debt due in current money of this commonwealth, or for current money advanced and paid for such bills, the sum in current money that was paid or allowed for the same, shall be mentioned and expressed in such bill, and in default thereof, in case such bill shall be protested, and a suit brought for the recovery of the money due thereby, the sum of money expressed in such bill shall be held and taken as current money, and judgment shall be entered accordingly."

"§ 6. In any action which hath been, or shall be, commenced, and is or shall be depending for the recovery of any sterling money, in any court of record within this commonwealth, wherein the plaintiff or plaintiffs shall recover, such courts shall have power, and are hereby directed, by rule to be entered at the foot of their judgment in such action, to order such judgment to be levied or discharged, in current money, at such a difference of exchange as they shall think just."

The cause in the court below was tried upon the plea of *nil debet*, and the jury found a verdict for the debt in the declaration mentioned, and one cent damages; it was therefore considered by the Court, "that the said plaintiffs recover against the said defendant their debt aforesaid, amounting to three hundred pounds sterling, and their damages aforesaid, by the jurors aforesaid in form aforesaid assessed, and also their costs by them about their suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be discharged by the payment of eight hundred and fifty-five dollars and twenty-three cents."

The record which came up contains six bills of exceptions.

197*] *1. First. That the defendant Wilson produced in evidence to the jury the accounts of the plaintiffs Lenox and Maitland, against A. and W. Ramsay, the drawers of the bill, whereby the latter were charged as debtors to Lenox and Maitland, on the 22d of August, 1799, for the amount of the bill and damages in dollars and cents, among many other debts and credits, upon which whole accounts current, a balance of 1,095 dollars only appeared to be due from A. and W. Ramsay to Lenox and Maitland; and thereupon prayed the opinion of the court whether, by making the said bill an item of account, as stated in the aforesaid accounts against the said A. and W. Ramsay, the said Wilson was not thereby, as indorser, discharged; and the Court were of opinion that he was not.

2. Second. That the defendant offered to prove that the plaintiffs had received part of the money from the drawers of the bill since the defendant Wilson had notice of the protest, but the Court were of opinion that the same, if proved, would not discharge Wilson as indorser.

3. Third. That the defendant offered to prove by the bill and protest, that after the protest of the said bill, at the request of Roberts, Curtis & Co., the then holders of the bill, it was paid by Dorin, Strange & Co., to Roberts, Curtis & Co. for the honor of Lenox and Maitland, the plaintiffs, and thereupon prayed the opinion of the Court, whether, as the bill had been so paid, this action would lie against the defendant as indorser, and the court gave it as their opinion that it would lie.

4. Fourth. That the defendant prayed the opinion of the court, whether it was not incumbent on the plaintiffs to prove the value of current money received here for the bill upon which this action is brought, which bill is in these words: "Exchange for 300*l.* sterling, Alexandria, 2d. January, 1799. Ninety days after sight of this our first of exchange, (second, third and fourth of the same tenor and date unpaid,) pay to the order of William Wilson, Esq., the sum of three hundred pounds sterling, for value here received, and place it to account, as advised by Andrew and William Ramsay." "To Messrs. Findley, Bannatyne & Co., London." And the Court gave it as their opinion, that it is not necessary for the plaintiffs *to prove the [*198 value given here in current money for the said bill.

5. Fifth. That the defendant offered to prove by the account thereunto annexed that the bill, upon which this suit was brought, was given in the commonwealth of Virginia, either for dollars and cents due in the said commonwealth, from A. and W. Ramsay, to the plaintiffs, or for dollars and cents advanced by the plaintiffs or some other persons for the said A. and W. Ramsay, in the state of New York, and prayed the opinion of the court, whether, if the said facts were proved to the jury, the said bill ought not to be settled according to its nominal amount as current money of Virginia. Where-

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A part payment, does not discharge the whole note, although so agreed, unless made as a compromise, as when claim is disputed.
Jenks v. Burr, 56 Ill. 450.
2 Parsons N. & B. 218.
Finch v. Sutten, 5 East. 220.
Pinnel's Case, 5 Co. 117.
Price v. Cannon, 3 Mo. 453.
Myers v. Byington, 34 Ind. 205.

Part payment made to the holder, by the maker or acceptor, either before, at, or after, maturity of the note or bill, will not discharge the drawer or indorser, except to the amount of the sum so paid.
Greenawalt v. McDowell, 65 Penn. St. 464.
Hill v. Bostick, 10 Yerg. (Tenn.) 410.
James v. Badger, 1 John. Cas. 131.
Bk. U. S. v. Hatch, 6 Pet. 250.
Mason v. Peters, 4 Vt. 101.
English v. Dailey, 2 B. & P. 61.

The holder may take part payment from any party, and sue the others for the residue.
Hewitt v. Goodrich, 2 Car. & P. 468 (after dishonor).
Gould v. Robinson, 8 East. 576.
Walwyn v. St. Quintin, 1 B. & P. 658.
English v. Dailey, 2 B. & P. 61.

In Hightower v. Ivy, 2 Port. (Ala.) 308, it was *held*, that a refusal of indorsee, who had sued

upon the court instructed the jury, that if they were of opinion, from the evidence offered, that the bill of exchange was given for any debt due from A. and W. Ramsay, in current money of the commonwealth of Virginia, or for current money advanced and paid for the said bill, and the sum in current money that was paid or allowed for the same is not expressed in the bill, the sum expressed in the bill shall be held and taken as current money of Virginia; and if, from the evidence offered, they should not be of that opinion, that the sum expressed in the bill shall be taken and held, as so expressed, to wit, in sterling money.

6. Sixth. That the defendant offered to examine William Ramsay, one of the drawers of the bill, to which the counsel for the plaintiffs objected, and the Court gave it as their opinion, that the said W. Ramsay was an incompetent witness in the cause.

The second, third, fourth and fifth exceptions seem to have been abandoned in the argument in this court.

C. Lee, E. J. Lee and Swann, for the plaintiff in error.

Simms, for the defendants.

The errors insisted on by the counsel for the plaintiff in error were,

1st. The opinion of the court below, as stated in the first bill of exceptions.

199*] *2d. The rejection of W. Ramsay as a witness.

3d. That there was no protest for non-acceptance of the bill.

4th. That the declaration does not state any demand of payment of the bill, made on the drawees.

5th. The damages are not laid in the same currency as the debt.

6th. The jury have awarded that the sterling debt should be discharged by the payment of 855 dollars and 23 cents.

7th. The debt demanded is not certain.

E. J. Lee, for the plaintiff in error.

1st. The court below erred in not instructing the jury that the defendants in error, by charging the bill in account against the drawers, in the manner stated in the accounts, had discharged the indorser. The Court ought at least to have left it to the jury to decide whether the circumstances did not amount to a discharge of Wilson.

By the account of Lenox and Maitland against the drawers of the bill, it appears that, after charging the amount of the bill, and damages, interest and charges of protest, and turning the amount into dollars and cents at such rate of exchange as the defendants in error pleased, there was only a balance of about 1,000 dollars due to them from the drawers; it is not reasonable that they should recover more than is due to them against an innocent indorser who must look to insolvent drawers for his indemnification. The defendants have in fact given credit to the drawers for the amount due on the bill, and have agreed to liquidate it in account. If the holder of a bill receives part of the money from the acceptor without giving notice to the drawer, the latter is discharged. Bull. N. P. 275. So if he receives part from the drawer, he discharges the indorser. Here no notice was given to Wilson;[1] *or if there was, it is waived by the [*200 conduct of Lenox and Maitland. In the case of *Dingwall v. Dunster*, Doug. 247, (235.) it is true that Judge Buller says, that nothing but an express agreement can discharge an acceptor, but the court are careful to distinguish between the case of an acceptor and that of a drawer or indorser. The implication is, that there are many circumstances which will discharge the latter, without an express agreement. The court ought, at least, to have instructed the jury that they might infer a discharge from the circumstances of this case.[2]

2d. W. Ramsay, the drawer of the bill, ought to have been admitted as a witness. He had no interest which would render him incompetent. The verdict in this case could not have been given in evidence either for or against the witness; and whether Lenox and Maitland recovered against Wilson, or not, he was still liable to an action as drawer, to Lenox and Maitland, if they failed against Wilson, or to Wilson, if they succeeded. In the case of *Smith, qui tam v. Prager*, 7 Term Rep. 62, the rule is clearly laid down to be, that "no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." The objection only goes to his credit, unless the judgment can be given in evidence for him in any other suit. The same principle is confirmed in the case of *Jordaine v. Lashbrooke*, 7 Term Rep. 601, where, in a suit between the indorsee and the acceptor of a bill, the payee was called and allowed as a witness to defeat the action, by proving that the bill, although dated at Hamburgh, was in fact drawn in London, and so void for want of a

1.—CHIEF J. Does the bill of exceptions state that notice was not given to Wilson? If it does not you cannot argue upon the want of notice.

E. J. Lee. It does not. But the declaration does not allege notice of the non-acceptance, nor of the non-payment; but only of the protest for non-payment, and a material fact not averred cannot be presumed to have been proved.

2.—CHASE, J. There is no doubt a drawer or indorser may be discharged in express terms; or by facts amounting to a discharge; but where the discharge is not express but by implication arising from facts, the jury, and not the court, are to decide whether it is a discharge; the court ought not to say it was a discharge.

maker, to receive part payment from him, discharged the indorser, it appearing that it could not be afterwards recovered.

Proof of the presentment of a bill for acceptance and due dishonor and notice to the drawer is sufficient to maintain the suit, although there are subsequent averments in the declaration of presentment for payment, non-payment and notice thereof, which are not proved. The right of action is complete by the non-acceptance, protest and notice.

Wallace v. Agry, 4 Mason U. S. c. c. 336.

2 Dan. on Neg. Inst. § 932.

In action by indorsee of a foreign bill, against drawer or indorser, for non-payment, the plaintiff is bound to prove a protest for non-acceptance as well as for non-payment, and the protests are the only regular evidence of the fact.

Lenox v. Leverett, 10 Mass. 1.

See Note to Brown v. Barry, 3 Dall. 369, Book 1 of this edition, p. 640.

The disabilities of witnesses, by reason of interest, in the event of, or by reason of being parties to, an action or proceeding, have been abolished in many of the states, by statute, so that, in those states, a witness is competent notwithstanding such interest, or being such party.

stamp. It may be observed in that case, that 201*] *it was admitted that there could be no objection on the ground of interest, but the objection relied on was, that the witness ought not to be permitted, from motives of policy as it respected mercantile credit, to impeach a negotiable instrument to which he had assisted in giving currency by his indorsement; and even that objection was overruled. In the case of *Carter v. Pearce*, 1 Term Rep. 163, the court said that "the bare possibility of an action being brought against a witness is no objection to his competency;" and that, "in order to show a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other."[1]

3d. Here was no protest for non-acceptance, nor does the declaration state a demand of payment from the drawees, nor notice of the non-payment, or non-acceptance given to Wilson. The protest for non-payment is not evidence that the money was demanded at the time the bill became payable. 4 Bac. Abr. 735. Gwyllim's edition.

In the case of *Rushton v. Aspinwall*, Doug. 679, (653,) it is expressly decided that the plaintiff must allege in his declaration a demand and refusal of the acceptor on the day when the note was payable, and notice thereof to the indorser before he can be made liable; and that the want of such averments in the declaration is not cured by a verdict. And Lord Mansfield there lays down the rule to be, "that where the plaintiff has stated his title or ground of action defectively, or inaccurately, (because, to entitle him to recover, all circumstances necessary in form and substance to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption."

The demand and refusal of the drawee to pay is the very substance of the plaintiff's title to 202*] recover; and, therefore, *the not setting it forth in the declaration is a total omission of his cause of action.

4th. The damages are not laid in the same currency with the bills and the promise. To support this objection he relied on the decision of the court of appeals of Virginia, in the case of *Scott's Executors v. Call*, 1 Wash. 115, and *Skipwith v. Baird*, 2 Wash. 165.

C. Lee, on the same side.

1st. The question to the court below was, whether the plaintiffs by making the bills an item of the accounts, as therein stated, had not discharged the indorser Wilson. The accounts of Lenox and Maitland against the drawers of the bill, begin in 1798 and end in 1800. The bills are entered in account, on the 22d of August, 1799, and charged with interest and damages; and the amount carried out from sterling into dollars and cents, at such rate of exchange as the defendants in error pleased. They have therefore changed the nature of the demand, and given credit to the drawers for a certain sum in the currency of the United States. They have, as far as they were able, manifested their intention to give credit to A. and W. Ramsay.

These circumstances being subsequent to the notice to Wilson, are a discharge in law, and are equivalent to an express discharge. If I am right, the court ought to have instructed the jury that these facts discharged all persons but A. and W. Ramsay. Perhaps the court might have left it to the jury to infer an intention to discharge the indorser; but the court ought not to have instructed the jury that Wilson was not thereby discharged as indorser.

2d. The objection to the competency of W. Ramsay as a witness was not good. If he had any interest, it was in favour of the plaintiffs. The objection was made generally, and goes to his proving any fact whatever. A witness may be competent to prove some facts and not others. He was competent to prove, not only that the bill was charged in account, but that it was given up and came surreptitiously to the possession of the plaintiffs, if the fact had been so. I state this only to show that he ought not *to have been wholly excluded. On a [*203 criminal prosecution for forgery, the party whose name is forged may be a witness. 1 Dall. 110. The doctrine that a man shall not be permitted to disprove a paper to which he has put his name to give it credit, is overruled in the case of *Jordaine v. Lashbrooke*, cited from 7 Term Rep. 601. In the case of *Walpole v. Pulteney*, cited in Doug. 249, (237,) in the note, at the second trial of the cause at Guildhall, at the sittings after Michaelmas term, 1779, before Skynner, Chief Baron, Alexander, the indorser of the bill, was sworn as a witness for the acceptor, and no objection made to his competency. But in this case there is not any interest whatever in the witness. For if the evidence of Ramsay went to discharge Wilson, still it would not go to discharge Ramsay himself. There is a case also in Espinasse's Reports, in which the acceptor was sworn as a witness in a question between the indorsee and drawer.

Simms, contra.

1st. The charge of the bill in account against the drawers does not amount to a legal discharge of the indorser. It is neither an express nor an implied discharge. The holder has a remedy against all or any of the indorsers or the drawer, until he gets full satisfaction. If he gives due notice to the party to whom he means to resort, he is not bound to commence suit *instanter*. If he receives part from the drawer, it is so much to the benefit of the indorser, and he has no right to complain. Due notice is all that the indorser has a right to require, and if he does not then secure himself, it is his own fault. The case from Buller's N. P. 275, is not denied to be law; but Buller there says, "if the indorsee give credit to the drawer, without notice to the indorser, it will discharge him." But here it is admitted that notice was given, and the allegation is, that notwithstanding such notice, the subsequent charge in the accounts of Lenox and Maitland against the drawers has discharged the indorser.

Lenox and Maitland might have brought suit against the drawers, without prejudice to their claim against the indorser; *a fortiori*, the charging a bill in account against the drawers cannot prejudice the claim against the indorser.

2d. W. Ramsay was offered as a witness gen-

1.—CHASE, J. Upon the statute of gaming, usury, and the like, but in no other case, are the drawers, indorsers, &c. competent witnesses. The cases all show it.

204*] erally, *without a release from Wilson. The court were right in rejecting him both on the grounds of interest and of public policy.

If judgment should be rendered against Wilson, Ramsay as drawer would be clearly liable to refund Wilson the costs of suit; and a relief from that liability was a clear interest.

A party to a negotiable paper ought not to be permitted to discredit it.

An underwriter cannot be a witness for another underwriter in an action upon the same policy.

The case in Doug. 247 does not affect the present. The note in 249 is of an ancient case; and there Walpole's own book was produced with a memorandum that Pulteney was discharged from his liability as acceptor.

All the cases cited are where a party to the bill has been admitted as a witness either *ex necessitate*, or on the ground of public convenience and policy. The case of *Jordaine v. Lashbrooke* was one where the revenue would have been defrauded of the stamp duty, if the witness had been excluded; and to prevent that evil he was admitted.

In the cases of usury the maker of the note or other security is not admitted unless the debt has been paid. And in the case of forgery, it is a public criminal prosecution in which the injured party is always admitted.

The fault of the declaration, if it does exist, is cured by the verdict under the statute of *jeofails* of Virginia, which declares, that no judgment after verdict shall be stayed or reversed, for mispleading, insufficient pleading, or for omitting the averment of any matter, without proving which the jury ought not to have given such verdict. Rev. Code, 118. But the averment was not necessary. The declaration contains an allegation that the bill was protested in due form, according to the custom of merchants, for non-payment; and, by the custom of merchants, the bill could not have been protested until demand and refusal of payment. 205*] *But this action is grounded on the act of assembly, and not on the custom of merchants; and by the act it is only necessary that it should be a protested bill of exchange.

As to notice of the non-acceptance and non-payment not being alleged in the declaration, the fact is not so. The declaration alleges that the bill was presented for acceptance, and refused; and afterwards, on the 1st of June, protested in due form according to the customs of merchants for non-payment; of which (that is, of all the facts before recited) the defendant had notice, &c.

As to the damages being laid in current money; this is always done when tobacco, or foreign money, is sued for. There are some unintelligible cases in the court of appeals of Virginia; but they have never decided the present point. In one case the court said that if the suit is for a sterling debt, its value must not be laid in current money, because the law of Virginia authorizes an action of debt for sterling money.

Simms, on a subsequent day, stated that a demand of payment was not necessary where the bill was not accepted; and cited Lilly's Entries, 44 and 45. The declaration states the non-acceptance, and the protest for nonpayment.[1]

He also mentioned a case in Peake's Rep. where a party to a bill of exchange was refused as a witness; but did not produce the book.

Swann, in reply.

1. The plaintiffs below having assumed a rate of exchange, and charged the amount in account against the drawers, is conclusive evidence of their intention to extinguish the sterling debt.

2. The jury have awarded that the sterling debt should be discharged by the payment of 800 dollars,[2] the balance *of the account, [*206 therefore, and not the rate of exchange, must have been the guide of the jury.

3. The testimony of Ramsay was not to destroy the paper, but to explain the nature of the consideration; to show that it was given for current money of Virginia, so as to bring it within the operation of the 4th section of the act of assembly respecting bills of exchange given for current money due in Virginia. This act applies as well between indorsee and indorser as between payee and drawer;[3] and if the bill was given for current money due in Virginia, the sum mentioned in the bill is to be taken as current money, and not as sterling.

4. A protest for non-acceptance, and a demand of payment from the drawee, at the time the bill became payable, were requisite to enable the plaintiffs below to recover. Kyd on bills, 76, 87. It being an action on the statute makes no difference, because the statute gives the action only to such persons as have "a right to demand any sum of money upon a protested bill of exchange." The holder, therefore, must show a right to demand the money, independent of the provisions of the statute; and to ascertain whether he has such a right, we must resort to the custom of merchants, and see whether he has complied with all the requisites of that custom.

5. This is an action of debt; and the demand is uncertain. The debt demanded is the principal, damages, interest and charges of protest, without stating the amount of the charges of protest. The principal is certain, because it is stated to be 300*l.*, and the damages and interest are certain, because the law has ascertained their relative proportion to the principal; but there is nothing in the declaration by which the amount of the charges of protest can be rendered certain.

6. The damages ought to have been laid in sterling, and not in dollars. The damages follow the nature of the debt. The act of assembly has authorized sterling debts to be sued for and recovered as such. Sterling money is not to be considered as foreign money. 2 Wash. 165, *Skipwith v. Baird*. The court of appeals of Virginia in *that case decided that the [*207 damages must be laid in sterling.[4]

The court are to fix the rate of exchange; but

1.—CHASE, *J.* A protest for non-acceptance is absolutely necessary in the case of a foreign bill. Cranch 1.

2.—The fact does not so appear in the record.

3.—CHIEF *J.* The law has been so construed in Virginia.

4.—CHIEF *J.* In that case the court spake of the damages which constitute part of the debt in an action under the statute upon a bill of exchange, and not of those damages which are demanded at the end of the declaration for the non-payment of that debt. There is no such decision respecting the latter.

here the jury have awarded at what sum in current money the sterling debt should be paid, and it is evident that the 800 dollars which the jury said should discharge the debt, is not the exchange, but the balance of account.[1]

Simms cited 3 Dall. 365, *Brown v. Barry*, to show that a protest for non-acceptance was not necessary; and that a protest for non-payment being alleged in the declaration, it was not necessary to aver a demand of payment from the drawee.

C. Lee. The act of *jeofails* in Virginia is construed to be the same as that of England, although the words are somewhat broader. 2 Wash. 203. *Stevens v. White*.[2]

Feb. 22d. At a subsequent day, the court having suggested an error, not noticed by the counsel, or not much relied on at the argument, as being apparently fatal, viz., that the costs of protest which are uncertain are joined as part of the debt declared for.

208*] *Simms, for the defendants in error, was now permitted to support the declaration.

1st. The declaration is sufficiently certain. An action of debt will lie for what may easily be reduced to a certainty.

Nothing can be more easily ascertained and rendered certain than charges of protest on a protested bill of exchange. They always appear upon the protest; and the indorsement on the protest is always considered as evidence of their amount. No other evidence is ever required.

Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. Doug. 6. *Walker v. Witter*. It is not necessary that the plaintiff in debt should recover the exact sum demanded; same case and page. 2 W. Bl. Rep. 1221, *Aylett v. Love*. If so, then a demand of the charges of protest on a protested bill of exchange particularly described in the declaration, is good, because the sum or amount of those charges is capable of being ascertained by the protest without further evidence.

It is admitted that the amount of damages or interest need not be stated in the declaration.

To ascertain the amount of interest, reference must be had to the protest to find its date, from which time the interest begins to accrue; a reference to the same protest will ascertain the amount of charges.

2d. But if the charges of protest are not demanded with sufficient certainty, yet the judgment ought not to be reversed on that account; because the judgment is not rendered for the charges of protest, but is rendered for 300*l.* sterling, the principal of the bill. It is now well settled that in an action of debt, judgment may be rendered for less than is demanded in the declaration. Doug. 6 *Walker v. Witter*, 1 H. Bl. 249, *M'Quillin v. Cox*.

*In the present case the demand is [***209** for the principal sum drawn for by the bill of exchange, with damages, interest and charges of protest thereon. It appears by the record and by the evidence produced by the plaintiffs in error, which is made a part of the record, that a part only of the original demand on the bill was due, the residue having been settled and paid. Shall the judgment, then, be reversed for not stating the amount of the charges of protest, which had been previously paid, and for which the judgment was not rendered?

No other action can be brought by Lenox and Maitland against Wilson for the charges of protest on the bill of exchange, stated in the declaration; no judgment has been rendered for them in the present action. How, then, has he been injured, or how can he be injured, by the omission to state the amount of the charges in the declaration?

In the declaration four distinct things are demanded, viz.: 1. The principal; 2. The damages on the protest; 3. The interest; 4. The charges of protest.

I take it to be settled law, that if a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alleged, especially if it be not of an entire demand.

An action of debt might be brought for the principal sum due on a bill of exchange, without including the damages, interest and charges of protest. If, then, an action of debt be brought for the principal, damages, interest and charges of protest, and the damages, interest and charges of protest, or either of them, should not be demanded with sufficient certainty, it would not be error to render judgment for that which was sufficiently alleged.

In this case the principal sum is demanded with sufficient certainty, and for the principal sum only is the judgment rendered. Cro. Jac. 104. *Woody's Case*, 4 Bac. Abr. 25, 26.

*A man shall not reverse a judgment [***210** for error, if he cannot show that the error is to his disadvantage. 5 Co. 39, b. *Tey's Case*. It appears by the record that judgment was not rendered for the charges of protest, therefore, the plaintiff in error has sustained no damage or injury by reason of not alleging in the declaration the amount of the charges of protest.

3d. If the omission of the amount of the charges of protest, could in any stage of the proceedings be considered as an error, it is [illegible]ed by the verdict. By the act of assembly of Virginia, (Rev. Code, p. 118,) it is declared that after a verdict of twelve men, no judgment shall be stayed or reversed, for any mispleading or insufficient pleading. The omission, if it is an error, must be one or the other. In Jacob's Law Dict. it is said to be mispleading if any thing be omitted that is essential to the action or defense.

The title to recover in the action is the protested bill of exchange; that is set forth in the declaration. The title, therefore, is not wholly defective in itself, though it may be set forth

1.—CHASE, *J.* If you have no law of Virginia authorizing such a judgment, it is bad, because at common law no condition or alternative can be added to the judgment. It is not a good judgment at common law.

CHIEF *J.* If it is bad, the defendant cannot complain. It is for his benefit.

CHASE, *J.* That may be the opinion of the Chief Justice; but I have considered the question in a greater case than this. I am well satisfied (and it will be difficult to alter my opinion) that at common law no condition can be annexed to a judgment.

Simms. It is the practice of Virginia. The law of Virginia allows discounts to actions of debt, and the judgment is to be rendered for the debt, to be discharged by the sum really due.

2.—CHIEF *J.* The decisions have been so, although the statute of Virginia is broader than the English statute. The general principle decided by the court of appeals of Virginia is, that a verdict will not cure the want of an averment of a material fact which goes to the gist of the action.

defectively in not stating the amount of the charges of protest; so that it comes within the rule in the case of *Rushton v. Aspinwall*, and 1 Call. 98. *Vass v. Chichester*.

The court is not bound to inquire into errors, if the party does not show them. 2 Bac. Abr. 217.

E. J. Lee, in reply.

The case of *Walker v. Witter*, in Doug. 6, does not say that the sum demanded may be uncertain, but only that you may recover a less sum than that demanded. The demand must be certainly expressed, if it be possible, at the time of bringing the action.

In the cases of *Scott's Ex'r v. Call*, 1 Wash, 115, and *Skipwith v. Baird*, 2 Wash. 165, the amount of the charges of protest are particularly mentioned; in one they were 4*s.* 6*d.* in the other 7*s.* 8*d.*

211*] *Feb. 26. The *Chief Justice* delivered the opinion of the court.

In this case there was an objection taken to the plaintiff's declaration, which was in debt on a protested bill of exchange. The declaration claims 300*l.* sterling, with damages, interest and charges of protest, on a protested bill of exchange, without stating, in any part of it, the amount of those charges. The verdict is for the debt in the declaration mentioned, on which judgment is rendered, to be discharged by a less sum.

The objection is, that the demand is uncertain, inasmuch as the amount of the charges of protest, which constitute a part of the debt claimed, is not stated.

The clause of the act on which this suit is instituted is in these words: "It shall be lawful for any person or persons," &c., "to prosecute an action of debt for principal, damages, interest and charges of protest against the drawers," &c. The charges of protest constitute an essential part of the debt, and the declaration would not pursue the act if those charges should be omitted. This part, therefore, cannot be considered as surplusage. It is a component part of the debt for which the action is given. Being a necessary part, its amount ought to be stated with as much certainty as the amount of the bill.

As this is a mere technical objection, the court would disregard it, if it was not a principle, deemed essential in the action of debt, that the declaration should state the demand with certainty.

The cases cited by the counsel for the defendant in error do not come up to this case. They relate to different debts; this to a single debt composed of different parts.

Judgment reversed and arrested.

See the case of *Rudder v. Price*, 1 H. Bl. Rep. 550.

212*] *CLARKE *v.* BAZADONE.

A writ of error does not lie from the Supreme Court of the United States to the general court for the Territory northwest of the Ohio.

THIS was a writ of error issued from this court to the general court for the territory northwest of the river Ohio, to reverse a judgment rendered in that court against Clarke, the plaintiff in error, in favor of Bazadone, on a foreign attachment for 12,200 dollars damages, and 95 dollars and 30 cents cost.

The general court of the Northwestern Territory was established by the ordinance of the old congress, under the confederation, and the principal question was, whether a writ of error would lay from this court to the general court of that territory.

There was no appearance for the defendant in error.

Mason, for the plaintiff in error contended,

1st. That this court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a supreme court, independent of any express provisions of the constitution or laws of the United States.

2d. That this court has the power under the constitution of the United States.

1st. It is a general principle that the proceedings of an inferior tribunal are to be corrected by the superior, unless the latter is expressly restrained from exercising such a control. This is a principle of the laws of that country from which we derive most of our principles of jurisprudence, and is so intimately connected with them that it is difficult to separate them.

In the Saxon times, the Wittenagemote was the supreme court, and had the general superintendence.

But in the time of William the Conqueror, the *aula regis* was established as the sovereign court of the kingdom, *and to that court [*213 devolved all the former judicial power of the Wittenagemote; the power of superintending the other courts was derived from the principle of supremacy. 1 Crompton's Practice, 3, 5, 12, 21, 22, 26, 27, 28, 1 Bac. Abr. 553, 2 Bac. Abr. 187. A writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on such examination to reverse or affirm the same, according to law.

2 Bac. Abr. 213. The court of king's bench superintends the proceedings of all other inferior courts, and by the plenitude of its power corrects the errors of those courts; hence it is that a writ of error lies in that court, of a judgment given in the king's bench in Ireland. And upon a judgment in Calais, when under the subjection of the king of England, a writ of error lay in the king's bench. 4 Inst. 282. A writ of error would have laid to the king's bench from these colonies, before the revolution, but for the particular provisions of charters, &c. 2 Bac. Abr. 194. Wherever a new jurisdiction is erected by act of parliament, and the court acts as a court of record, according to the course of the common law, a writ of error lies on their judgments.

The power is inherent in every superior court, to revise the judgments of its inferior.

2d. By the constitution of the United States, art. 3, s. 1, 2, the judicial power is vested in one supreme court and such inferior courts as congress shall, from time to time, ordain and establish; and shall extend to all cases arising under the constitution and laws of the United States, and to controversies in which the United States shall be a party. And the Supreme Court is to have appellate jurisdiction in all these cases,

with such exceptions, and under such regulations, as congress shall make. Congress has made no exception of the present case; and no regulation of congress was necessary to give this court the appellate power. It derives it from the constitution itself.

This is a case arising under the laws of the United States.

214*] *The very existence of the court whose judgment is complained of, is derived from the United States. The laws adopted for the Northwestern Territory derive their whole obligatory effect from the ordinance of the old congress, and are, in fact, laws of the United States, although copied from the state laws. All power and authority exercised in that territory have emanated from the United States; and all offences there committed are against the authority of the United States.

If, then, this is a case by the constitution cognizable by the judicial authority of the United States; if by the constitution, this court has appellate jurisdiction in all such cases, and if this case is not within any exception made by the constitution, or by any act of congress, nothing is wanting but to devise a mode to bring the cause before this court. The writ of error is the common and well known process in like cases, and by the fourteenth section of the judiciary act of 1789, every court of the United States is expressly authorized "to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." If, then, the court has jurisdiction, no difficulty can occur as to a mode of exercising it.

The Court quashed the writ of error.

On the ground that the act of congress had not authorized an appeal or writ of error from the general court of the Northwestern Territory, and, therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case.

HOOE & CO. *v.* GROVERMAN.

A charter party was made, whereby the owner let the whole tonnage of a vessel for a voyage, to be made by the hirer, to a foreign port, with a cargo and back with return cargo to be safely delivered, and whereby the owner covenanted that the vessel should be kept during the voyage, in good condition, and furnished with proper rigging, &c., and with mariners, the hirer to pay freight, and stipulated demurrage occasioned by his default; at Falmouth, where the vessel was to touch it was seized and detained by British officers nearly three months on suspicion of being French property.

Held: That the hirer did not become owner of the vessel for the voyage, or responsible for the course taken by the Captain, or liable for demurrage for the detention at Falmouth.

ERROR from the circuit court of the District of Columbia, in an action of covenant, by Groverman, owner of the brig Nancy, against 215*] Hooe & Co. *the freighters, for demurrage, at the port of Falmouth, in England, from the 19th of June to the 11th of September, 1798, at the rate of 6*l.* 6*s.* sterling per diem.

The declaration alleged the breach of the covenant in not paying the demurrage, and the cause went to trial in the court below, upon the issue of covenants performed. The jury found the following special verdict, viz.:

"We, of the jury, find that the defendants and plaintiff made and executed the charter party hereunto annexed, in these words, to wit: "This charter party indented," &c. "witnesseth, that the said Groverman hath granted, and to freight letten, to the said R. T. Hooe & Co. the brig, whereof he is owner, called the Nancy, commanded by James Davidson, a citizen of the United States aforesaid, now lying in the port of Alexandria, of the burden of 197 tons, or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant, and to freight let, unto the said R. T. Hooe & Co. the whole tonnage of the aforesaid vessel, called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria; in a voyage to be made by the said R. T. Hooe & Co. with the said brigantine, in manner after mentioned, that is to say, to sail, with the first fair wind and weather that shall happen after she is fully and completely laden, from the said port of Alexandria, with a cargo of tobacco to be shipped by the said R. T. Hooe & Co. to the said port of Havre de Grace; and there deliver said cargo to Messrs. Andrews & Co. of that town, merchants, or to their assigns, in good order, the danger of the seas only excepted. And at the said port of Havre de Grace to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brig as a return cargo; with which said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo, the danger of the seas only excepted, to the said R. T. Hooe & Co. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co. their executors, &c. that the said brig now is, and at all times during the said *voyage shall be, to the best endeav- [*216 ors of him the said Groverman, and at his own proper cost and charges, in all things made and kept tight, stiff, staunch, strong, and well appareled, furnished and well provided, as well with men and mariners sufficient and able to sail, guide and govern the said vessel, as with all manner of rigging, boats, tackle and apparel, furniture, provisions and appurtenances fitting and necessary for the voyage aforesaid. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co. that he will allow them twenty-five running days from the date hereof for the lading on board the said vessel, the aforesaid cargo of tobacco at the port of Alexandria; ten working days for discharging said cargo at the port of Havre de Grace, to be computed from the day after she comes to her moorings at the said port; and twenty days more after the said ten days run out, for lading on board the aforesaid return cargo; also ten working days after said vessel arrives back and is permitted to an entry at the custom house at Alexandria for receiving her inward cargo, which is to be delivered at the wharves of said R. T. Hooe & Co.

"In consideration whereof the said R. T. Hooe & Co doth covenant, promise and grant

NOTE.—*Demurrage, general principles*—see notes, 41 L. ed. U. S. 937; 21 C. C. A. 337; 46 C. C. A. 4.

to and with the said W. Groverman, his executors, &c. by these presents, that they the said R. T. Hooe & Co. or their consignee, shall and will pay to the said W. Groverman, or his assigns, at the port of Havre de Grace, the sum of 21,000 livres tournois, in hard money, on discharge of the cargo of tobacco aforesaid; also 7,200 livres in hard money, on shipment of the return cargo aforesaid; and further, that they the said R. T. Hooe & Co. shall and will pay, or cause to be paid, to him the said W. Groverman, or his assigns, the sum of 8*l.* 8*s.* current money of Virginia, day by day, and for every day's demurrage, if any there should be by default of them the said R. T. Hooe & Co. at the port of Alexandria. And the sum of 150 livres, in hard money, day by day, and for every day's demurrage, if any there should be by default of them the said R. T. Hooe & Co. or their assignee, at the port of Havre de Grace. And the said R. T. Hooe & Co. doth further covenant to and with the said W. Groverman, and the 217*] aforesaid *James Davidson, commander of the brigantine aforesaid, that Andrews & Co. their consignee aforesaid, shall pay to the said captain, for his primage, five per cent. upon the outward and inward freights at Havre de Grace, and before his departure therefrom. For the true and faithful performance of the covenants in this charter party, the parties bind themselves, each to the other, in the penal sum of 3,000*l.* current money of Virginia, to be recovered by the party observing, against the party failing to perform the same. In witness whereof, we have hereunto interchangeably set our hands and affixed our seals, this tenth day of April, 1798.

"W. GROVERMAN, Seal.
"R. T. HOOE & Co., Seal."

"And the provisional articles in these words, to wit:

"The following provisional articles are concluded upon, made and agreed to by and between William Groverman, owner of the brigantine Nancy, commanded by James Davidson, and R. T. Hooe & Co. since entering into the charter party hereto annexed.

"1. The captain, or commander, shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth in such manner as to appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours, or longer, if desired, in day light, during which time there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co., of Havre de Grace. 2. On receiving these orders, the captain, or commander, must proceed directly from Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports deliver his cargo, to such person or persons as the aforesaid orders may direct. 3. If the vessel arrives at any other of the aforesaid ports than Havre de Grace, the time of discharging the outward cargo, taking in her inward cargo, demurrage, if any there should be, her outward and inward freight, primage, &c. shall be the same as if she had arrived at and 218*] discharged at Havre *de Grace. 4. The outward freight shall be considered as 875*l.* sterling; the inward freight 300*l.* sterling, primage five per cent. on the freights, and the demurrage 6*l.* 6*s.* sterling per day. And if the vessel discharges in London, the payments shall be made in sterling cash; if at any other port, in good bills of exchange at 60 days on London, without diminution of the above sums, except so much as the captain may be authorized to receive for his port charges and disbursements. 5. If the vessel is detained over 24 hours at Falmouth, demurrage shall be paid for the time at the rate stipulated in the charter party. 6. These articles shall not be made known to any person whatever, except the captain and chief mate. The vessel shall be cleared out for Havre de Grace only, and furnished with a *role d'equipage*, and all other papers whatever that may be necessary at this custom house. No letters whatever shall be received on board except such as the said R. T. Hooe & Co. puts into the possession and care of the captain.

"7. The charter party first entered into, the copy of which is hereunto annexed, shall be in force and considered as the only contract between the parties for this voyage, and go unconnected with these articles to Havre de Grace, and there and from thence govern, unless in the case of the vessel being from Falmouth ordered to a different port: then, and in that case, the charter party shall only be considered as the great outlines of the bargain between the parties, to be positively, governed by these articles; but the 4th article to be in force as to payments at any place.

"In testimony whereof, we have hereunto set our hands and affixed our seals, this 11th day of April, 1798.

"WILLIAM GROVERMAN, Seal.
"R. T. HOOE & Co." Seal.

"We find that James Davidson, master of the brigantine Nancy, in the said charter party and provisional articles mentioned, on the morning before the departure of said vessel from the port of Alexandria, signed an acknowledgment, written on said provisional articles in these words, to wit: "I do acknowledge that I am *to act agreeably to the foregoing [*219 provisional articles, notwithstanding the charter party to Havre de Grace.

"JAMES DAVIDSON."

"We find that the said James Davidson, before he sailed from Alexandria on the voyage in the said provisional articles mentioned, was told by R. T. Hooe, one of the defendants and freighters of said vessel, that on his arrival off Falmouth, a town in England, he would receive instructions from Mr. Fox, the American consul, and that he must abide by such instructions. We find that on the 20th of June, 1798, the said vessel arrived in Falmouth roads about three leagues from the port of Falmouth, and the said James Davidson, the master thereof, laid the vessel to, off Falmouth, and immediately proceeded in a pilot boat to Falmouth, went on shore and applied to the said Fox, the American consul, for orders where to proceed with the said brigantine and cargo. The said Fox told the said Davidson that he had not received any orders from him, and that therefore he must bring the brigantine Nancy into the port of Falmouth, and there remain with the said brigantine and her cargo until orders were received for him to proceed to his port of discharge.

Upon receiving which answer and orders from the said Fox, the said Davidson, in conformity thereto, returned on board his said vessel with a pilot employed by said Fox for the purpose of conducting said vessel into the port of Falmouth; and on the same day the said Davidson brought said vessel to anchor in the port of Falmouth aforesaid. We find that the said Fox informed the said Davidson that he must wait with said vessel at anchor in the port of Falmouth until the said Fox could procure orders for him from Thomas Wilson, of London; which said Fox and Wilson are the same persons mentioned and named in the aforesaid provisional articles. We find that on the 21st day of June, 1798, the said James Davidson again went on shore and reported his said vessel, and delivered his papers to the collector of the customs for the port of Falmouth aforesaid, which papers the said collector refused to return, saying that he suspected the cargo on board said vessel was French property, and on the same day caused the said vessel to be seized. We find that on the 23d day of the said month of June, the said Davidson received orders from the said 220*] *Thomas Wilson, through the said Fox, to proceed with the said vessel and cargo to the Downs, and thence to London. We find that the said vessel was detained in the port of Falmouth aforesaid from the said 21st day of June, 1798, until the 11th of September following, in consequence of the seizure aforesaid. We find that on the said 11th day of September the said vessel proceeded from the port at Falmouth to the Downs by the aforesaid order of the aforesaid Thomas Wilson. We find that the said brigantine and cargo were the bona fide property of American citizens alone. We find that by an act of Parliament of Great Britain passed in the 29th year of George III. c. 68, s. 12, and in force at the time the said brigantine arrived off Falmouth as aforesaid, it is enacted and provided in the following words, to wit:" "And be it further enacted," &c. "And by the 30th section of the said act, it is enacted and provided in the following words, to wit:" "Provided always," &c. "We find that the said Fox urged the danger arising under the said act as a reason why the said vessel should be brought to anchor in the port of Falmouth, there to wait for the orders of the said Thomas Wilson, of London, and why the said vessel should not lay off Falmouth without the limits of the said port. We find that the said vessel was, on the said 20th of June, laden in part with 240,000 pounds of tobacco of the growth of the United States. We find that the said Davidson, at Falmouth aforesaid, made and entered a protest in these words, manner and form following, to wit: 'To all people,' &c.

"We find that it was by the default of the defendants, or their agents, in failing to have orders ready on the arrival of the said vessel off Falmouth as aforesaid, designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson by the said Mr. Fox, that the said Davidson did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to seizure and detention aforesaid. If the law be for the plaintiff, we find for the plaintiff 794*l.* 19*s.* 9*d.* Virginia *currency, damages; if the law be for [*221 the defendants, we find for the defendants."

The court below being of opinion that the law was for the plaintiff, judgment was entered accordingly; and the defendants sued out the present writ of error.

Swann and Simms, for the plaintiffs in error.

C. Lee and E. J. Lee, for the defendant.

Simms. In this case it is material to ascertain whether Hooe & Co ought to be considered as the owners of the vessel, and the captain as their agent, for the voyage; or whether Groverman is to be considered as the owner, and the captain as his agent.

Whether the freighter or owner of a ship is to be considered as the owner for the voyage, depends upon the nature of the contract between them. If the freighter hires and employs the master, and the master is subject to his orders and direction during the voyage, then the freighter is considered as the owner for the voyage; but if the owner hires and employs the captain and hands, then he is the owner for the voyage, and liable for their misconduct. This fully appears from the case of *Vallejo v. Wheeler*, Cowp. 143.

In the present case, Groverman was to employ and pay the master and the mariners. He covenants that they shall perform a specific voyage; that the vessel shall sail with the first fair wind after she is fully laden; that the cargo shall be delivered in good order, the danger of the seas only excepted; that the vessel was at the time of making the charter party, and should continue during the voyage, at his expense, tight, staunch and well found. The captain and crew, therefore, must have been subject to the control of Groverman during the voyage, and he was liable for their misconduct, and if any loss happened thereby, he, and not the freighters, was to bear it.

Indeed, it is expressly stipulated that the owners shall give instructions to the captain to touch at Falmouth, *there to lay off and [*222 on 24 hours, or longer if desired, in day light, for orders from Mr. Fox, Mr. Wilson, or Messrs. Andrews & Co., and that on the receipt of such orders, he should proceed to the port directed by those orders.

If the captain has disobeyed his instructions from his owner and employer, the freighters surely cannot be liable. Groverman must look to his agent, the captain, for redress. It is probable, however, that the captain did the best he could for the interest of all concerned; and there is no more reason that the owner should look to the freighters for indemnification for the detention of his ship, than there is for the freighters' looking to the owner for indemnification for the detention of their goods. If the captain deviated from his instructions, it was at his and his employers' risk.

But the captain was bound by the provisional articles to carry the vessel into Falmouth. She was there in the regular course of her voyage, and, by the articles, Hooe & Co. had a right to detain her there upon payment of the stipulated sum for demurrage. Being, then, in the regular course of the voyage, the detention by a foreign power gives no right to claim demurrage

for the time she was in the hands of the British government under the seizure. The remedy of Groverman was against his insurers, and not against the freighters. If he has not insured, it was his own fault, and he must stand his own insurer. Park on Insurance, 87, 88, 89. 2 Burr. 696, *Goss v. Withers*. If the owner could recover demurrage from the freighters on the detention by a foreign government, that detention might continue so long that the stipulated demurrage might amount to twice the value of the ship and cargo. He had a right to abandon to the underwriters; but the freighters can never be presumed to have become insurers. Hooe & Co. contracted to pay demurrage for such detention only as should happen through their default; but here the detention was by the British government. The court below have, therefore, erred in giving judgment for the plaintiff on the special verdict for the whole demurrage, from 21st June to 11th of September, 1798. The vessel was seized before the expiration of the twenty-four hours, which were al-
223*] lowed by *the agreement. Hooe & Co. therefore, were not liable to pay any demurrage at all. Or if it shall be considered that Hooe & Co. were liable for demurrage after the vessel had been twenty-four hours at Falmouth, until orders were received from Thomas Wilson, they could be bound to pay only for two days, because it is found that the captain received his orders to sail for London on the 23d of June. If Hooe & Co. were liable for those two days' demurrage, and no more, the court below ought to have awarded a *venire facias de novo*.

But if Hooe & Co. had not a right to order the brig to Falmouth, yet Groverman has not a right to recover the damages he may have sustained thereby, in the present action, but his remedy was by a special action on the case. An action of covenant can only be maintained for not doing an act covenanted to be done, or for doing an act covenanted not to be done. There was no covenant on the part of Hooe & Co. that the vessel should not go into the port of Falmouth; and if there was, yet the plaintiff in his declaration does not aver such a covenant, or declare on the breach of it. The only breach assigned is the non-payment of demurrage. If the vessel had no right to go into the port of Falmouth, then her going in is not a case provided for by the contract, and, consequently, the contract can form no rule for ascertaining the damages.

If the vessel had a right to go into Falmouth, then the consequent seizure is not chargeable to Hooe & Co. If she had not a right to go in, then no damages can be recovered in the present form of action; nor in any other, because the act complained of is Groverman's own act, or the act of his agent, the captain, for whose conduct Groverman himself is responsible.

It is true the jury have found that it was by the default of Hooe & Co. in not having orders ready at Falmouth, that the vessel was obliged to go into the port, and that the seizure and detention took place. But if this is a breach of any one of the covenants, yet it is the breach of a covenant not declared upon, nor is the breach assigned, and, therefore, no damages can be given in this action for the breach of that covenant.

*E. J. Lee, for the defendant in error. [*224

Hooe & Co. were owners for the voyage. The captain was bound to obey their orders. Fox and Wilson were their agents. They, by their agent, ordered the vessel into port, contrary to the terms of their agreement: the detention was the consequence of their misconduct, and they ought to be liable for demurrage.

If a person hires a chattel, the hirer is the owner for the time for which he has hired it. Cowp. 143. *Vallejo v. Wheeler*. In that case, p. 147, it is said, that "there seems to be great reason for a distinction between a general ship, and one that is let to freight to a single person only. The former carries the goods of all mankind; every man that chooses it is at liberty to load his goods aboard her; and the merchant who ships his goods in such a vessel has no command over her. He does not hire or employ the master; neither is the master subject to his order or direction during the voyage. But in the case of a vessel let to freight to one merchant only, and by him alone freighted, he may be supposed to employ the master, and have the direction of the vessel and the voyage; and, therefore, whatever is done by the captain is to be considered as done by the merchant's servant." The captain, therefore, in taking the vessel into the port, when, by the agreement, he was only to lay off and on, acted as the servant of Hooe & Co. and by their orders, expressly given through their agent Mr. Fox.

But if Hooe & Co. were not owners *pro hac vice*, yet, having been the cause of the vessel's going into port, whereby she was seized, they are liable.

It is said in Molloy, 375, (257,) book 2, c. 4, § 9, that "if the ship, by reason of any fault arising from the freighter, as lading aboard prohibited or unlawful commodities, occasions a detention, or otherwise impedes the ship's voyage, he shall answer the freight contracted and agreed for."

It is immaterial what was the immediate cause of the detention; if it happened by the fault of Hooe & Co. here is a positive covenant to pay demurrage if the vessel is detained.

*But it is said, we have not brought [*225
our action for damages for carrying the vessel into port. It is true that we have not; and the reason is, that the parties themselves having by covenant fixed the rate of damages, no action but covenant would lay.

The furnishing the vessel with men, furniture, &c., does not make Groverman the owner. The captain signed the provisional articles by which he bound himself to obey the orders of Fox and others, the agents of Hooe & Co., and whether the captain was the agent of Groverman, or not, still Hooe & Co. have rendered themselves liable by ordering him to go into the port.

C. Lee, on the same side.

It is of no importance who was the owner; for the detention is clearly the consequence of default of Hooe & Co. The action is brought for not paying demurrage according to express covenant. The defense set up is, that the vessel was improperly carried into the port; and that the captain being the agent of Groverman, he must abide the loss. We admit that it was unlawful for the vessel to go into the port; this

is the ground of our right. Suppose the captain was the agent of Groverman, and Fox the agent of Hooe & Co.; by whose fault or orders was the vessel carried in? Clearly by the orders of Hooe & Co. No man has a right to order my servant; but if he does, and by that means misleads him, and a loss happens, he must be liable. Hooe gave instructions to the master how to act. If it was lawful for him to do so, then he must be considered as the owner, and the obedience to his orders, in all its consequences, is chargeable to him.

If it was not lawful, then his improper interference, if it mislead the master, is also chargeable to him. Unless he was the owner he had no right to instruct the captain; it was a wrongful act. If he was the owner, there is no pretence for not paying the demurrage.

If it should be said that the act of parliament refered to in the special verdict, and which is 226*] generally called *the hovering act, justified the orders to carry the vessel into port, the answer is, that the parties must be supposed to have understood that business, and agreed to the risk.

The finding of the jury respecting the orders not being ready, although it is apparently in favor of the defendant in error, is not considered as materially affecting the case, because, by the agreement, Hooe & Co. were not bound to have the orders ready, but might keep the vessel waiting, upon paying the stipulated demurrage.

Swann, for the plaintiffs in error.

The questions which seem to arise in this case are these:

1. Are Hooe & Co. liable at all for this detention?

2. If they are at all liable, are they liable in this form of action?

1st. The vessel had a right to go into the port of Falmouth, and was, therefore, in the regular course of her voyage.

If so, then the seizure and detention of the vessel by the British government was not by the default of Hooe & Co. and the case is not within the contract.

Hooe & Co. were not bound absolutely to have the orders ready on the arrival of the vessel at Falmouth; but the contract provides for the case of the orders not being ready, and Hooe & Co. were at liberty to detain the vessel at Falmouth for orders, on paying a stipulated sum for demurrage. The words of the 5th provisional article are, that "If the vessel is detained over 24 hours at Falmouth, demurrage shall be paid at the rate stipulated in the charter party." The parties are presumed to know the course of trade in the voyage about which they were contracting. Cowp. 605, *Bond v. Nutt*. They must have known that the vessel could not lawfully lay off and on more than 24 hours without being liable to seizure under the act of parliament. This created a necessity for the vessel's going into port. Not indeed a physical necessity; that was not requisite to justify it. It was 227*] *sufficient if in prudence and discretion it was necessary and advisable for the general benefit of all parties concerned. Cowp. 601, *Bond v. Nutt*, Park. 310. Burn's M. in 103, 133. The words, "at Falmouth," strongly indicate this to have been the understanding of the parties themselves; and the very action itself, founded upon the contract, for demurrage at the port of Falmouth, is a direct affirmance of the right to go into the port. If the vessel had no right to go into the port, then demurrage cannot be claimed under the contract, because it is a case not provided for by the contract. If the vessel had a right to go into the port, then she was still in the regular prosecution of her voyage at the time when she was seized by the British government, and, consequently, the detention cannot by chargeable to Hooe & Co. They have covenanted only against their own default, and their own acts. Groverman had other means of securing himself against all other risks. He ought to have insured; if he has not, it is his own fault; he stands as his own insurer, and his remedy is by recourse to the British government. Suppose the vessel had been seized at Havre de Grace by the French government; can it be supposed that Hooe & Co. would have been liable? It will not be contended that they would; and yet there is in fact no difference between the two cases.

Hooe & Co. cannot be considered as the owners, because, in the first place, the hiring of the vessel was not general, it is of the tonnage only; this excludes the cabin and the captain's perquisites. Groverman employs the master and crew, and stipulates for the good condition of the vessel during the voyage, and for the safe transportation of the goods, the danger of the seas only excepted: thereby clearly making himself responsible for the fidelity and good conduct of the master and mariners. Groverman was, therefore, clearly the owner of the vessel for the voyage. He covenants to instruct the captain to touch at Falmouth and wait for orders. He covenants that the captain shall proceed to such port as shall be mentioned in those orders. Now he never would have done all this, if the captain was not subject to his control. If, then, the captain was the servant of Groverman, and has improperly carried the vessel into port instead of laying off and on, how can Hooe & Co. be liable *for the consequences. It is [*228 said, because Fox advised or directed it; and Fox was the agent of Hooe & Co.

Then it amounts to this, that Groverman, by his agent the captain, and Hooe & Co. by their agent, Mr. Fox, finding the vessel to be in danger by laying off and on, have consulted together as to the best means of preventing loss to all parties, and agreed that the vessel should go into the port. To which of the parties is this error, if it is one, to be imputed? Certainly to neither; it was their mutual act, intended for their mutual benefit, and neither has a right to complain, or to make the other liable for the subsequent, and perhaps consequent, seizure by the British government.

Fox had no authority to order the vessel, except as to which of the ports mentioned in the provisional articles, she should go. The directions to the captain, therefore, to come into the port, must have been considered by the captain only as matter of advice. He was not bound to follow it.

Suppose I advise an act to be done, and it turns out unfortunately; am I to be liable for the consequences? Suppose even that the vessel went in purely to oblige and benefit Hooe & Co., yet they would not thereby become liable for accidents happening without their default.

If my friend in coming to serve me, receives an injury from a third person, am I liable?

If the provisional articles do not provide for the vessel's going into the port, yet Mr. Fox and the captain acted correctly. A case arose not provided for by express contract; they did right, therefore, in mutually consulting for the common good of their employers, and although the result of their deliberations may have proved unfortunate, yet neither party can criminate the other.

2. If Hooe & Co. are liable at all, it is not in this form of action.

The covenants which they are bound to perform are,

1. To pay the freight.

229*] *2. To furnish orders at Falmouth.

3. To pay so much per diem for their own detentions.

Now it is admitted, that this detention was by the British government, and if the vessel was in her voyage while in the port of Falmouth, there was no default of Hooe & Co. by which that detention can be chargeable to them. But if the vessel was out of her voyage, and had been carried into port by Hooe & Co. contrary to the agreement, then it is a case not provided for by the charter party, and, therefore, demurrage as such cannot be claimed. In such a case the remedy would be only for the tort. Suppose they had burnt the vessel; no action of covenant would lay for that wrong. The injury complained of is the ordering the vessel into port.

Feb. 23. The *Chief Justice* delivered the opinion of the court.

This is a writ of error to a judgment rendered in the circuit court of the District of Columbia, sitting in Alexandria, on the following case:

A charter party was entered into between the parties on the tenth day of April, 1798, whereby Groverman let to Hooe & Co. a vessel of which he was owner, for a voyage to Havre de Grace.

The first article states the indenture to witness, "that the said Groverman hath granted, and to freight letten, to the said R. T. Hooe & Co. the brigantine Nancy, whereof he is owner, commanded by James Davidson, a citizen of the United States, now lying in the port of Alexandria, of the burden of 197 tons, or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant, and to freight let, unto the said R. T. Hooe & Co. their executors and administrators, the whole tonnage of the aforesaid vessel called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria, in a voyage to be made by the said R. T. Hooe & Co. with the said brigantine, in manner hereinafter mentioned; that is to say, to sail with the 230*] *first fair wind and weather that shall happen after she is completely laden, from the said port of Alexandria, with a cargo of tobacco to be shipped by said R. T. Hooe & Co. to the said port of Havre de Grace, and there deliver the said cargo to Messrs. Andrews & Co. of that town, merchants, or their assigns, in good order, the danger of the seas only excepted; and at the said port of Havre de Grace to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brigantine, as a return cargo, with which the said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo to the said R. T. Hooe & Co."

Groverman further covenants with the said R. T. Hooe & Co. that the vessel is, and shall during the voyage be kept, in good condition, and furnished with all manner of necessary and proper rigging, &c. and with mariners to navigate her. He further covenants to allow twenty-five running days for lading the vessel at the port of Alexandria, thirty days for discharging her cargo and taking on board the return cargo at Havre, and ten days for receiving her inward cargo at Alexandria.

In consideration of these covenants, R. T. Hooe & Co. engage to pay the stipulated freight, and 8*l.* 8*s.* for every day's demurrage, if any there should be by their default, at the port of Alexandria; and one hundred and fifty-one livres by the day for every day's demurrage, occasioned by their default at the port of Havre de Grace.

On the 11th day of April provisional articles were entered into between the same parties by which it was stipulated that,

1st. "The captain, or commander, shall be instructed by his owner, previous to his sailing from Alexandria, to touch at Falmouth in such manner as shall appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours (or longer if desired) in daylight, during which time there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co. of Havre de Grace.

*2d. "On receiving these orders, the [*231 captain, or commander, must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports deliver his cargo, to such person or persons as the aforesaid orders may direct."

The third and fourth articles apply the covenants of the chapter party, respecting the conduct of the vessel in the port of Havre, to the contingency of her being ordered to some other port; and to the freight, and stipulate the demurrage to be 6*l.* 6*s.* sterling by the day.

The fifth article is in these words:

5th. "If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time at the rate stipulated in the charter party." On the 20th of June, 1798, the vessel arrived in Falmouth roads, about three leagues from the port of Falmouth, where the master laid her to, and immediately went on shore, and applied to Mr. Fox, the American consul, for orders where to proceed. Fox replied that he had received no orders for him, and that, therefore, he must bring the vessel into the port of Falmouth, and there remain until orders were received for him to proceed to his port of discharge.

These orders were given to avoid the penalties of the British hovering act, which subjected to forfeiture the vessel and cargo if found in the situation in which the Nancy would have been, if she had waited for orders without entering the port. The captain immediately brought his vessel into port, where she was seized on suspi-

cion of being French property, and detained for nearly three months.

After the seizure, on the 23d day of June, the captain received orders from Thomas Wilson, through Fox, to proceed with his vessel to London, there to deliver her cargo.

This suit is brought by Groverman to recover damages against R. T. Hooe & Co. for this detention.

The declaration states the charter party and provisional agreement, and then assigns a breach 232*] of them in these *words: "And the said plaintiff doth aver that the said brig arrived off Falmouth, on the 19th day of June, 1798, when the captain, by the orders of the aforesaid Mr. Fox, the agent of the said defendants, conveyed her into the port of Falmouth, by means whereof the said brig was detained in the aforesaid port of Falmouth more than twenty-four hours, to wit, from the 20th day of June last aforesaid, to the 11th day of September in the year 1798, when she sailed by the orders of Andrews & Co. the agents for the said defendants, for the Downs." And the declaration then charges that the defendants had not paid the demurrage stipulated in the charter party, or in the provisional articles.

Issue was joined on the plea of conditions performed, and the jury found a special verdict, containing the facts already stated, and further, that before the vessel sailed from Alexandria the captain was told by R. T. Hooe, that on his arrival off Falmouth he would receive instructions from Mr. Fox, the American consul, and that he must abide by such instructions; and that it was by the default of the defendants or their agents in failing to have orders ready on the arrival of the said vessel off Falmouth as aforesaid, designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson, (the master,) by the said Mr. Fox, that the said Davidson did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to the seizure and detention aforesaid; if the law be for the plaintiff, the jury find 794*l.* 19*s.* 9*d.* Virginia currency, damages; if the law be for the defendants, then they find for the defendants.

The circuit court was of opinion that the law was for the plaintiff, and rendered judgment in his favor.

To support this judgment, the special verdict ought to show that R. T. Hooe & Co., the defendants in the circuit court, have broken some covenants contained in the agreements between the parties; and that the breaches assigned in the declaration are upon the covenants so 233*] broken. *The breach assigned is the nonpayment of demurrage stipulated to be paid, for a longer detention than twenty-four hours at Falmouth; and it is to be inquired whether the declaration makes a case showing demurrage to be demandable, and how far the special verdict sustains that case.

The case made by the declaration is,

That on the arrival of the vessel off Falmouth, the captain took her into port by order of Mr. Fox, by means whereof she was detained more than twenty-four hours.

The question arising out of this case, for the consideration of the Court, is,

Does it show a breach of covenant on the part of R. T. Hooe & Co. which subjects them to demurrage for the detention stated?

The fifth article is supposed to be broken. The words of the covenant are: "if the vessel is detained over 24 hours at Falmouth, demurrage shall be paid for the time, at the rate stipulated in the charter party." If this clause provides for every detention whatever, however it may be occasioned, the inquiry is at an end, and the judgment should be affirmed. But on looking into the provisional articles, the general expressions here used will be found to be explained.

The first of these articles stipulates that the captain should touch at Falmouth, there to lay off and on for twenty-four hours (or longer if desired) in daylight, during which time there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co. of Havre de Grace.

Here, then, is a power given to R. T. Hooe & Co. to detain the vessel longer than twenty-four hours, lying off and on at the port of Falmouth, waiting for orders, and it is the only rational construction which can be given the contract to suppose that the fifth article refers to the first.

*A certain number of days are allow- [*234 ed for lading the vessel in Alexandria. But more days may be required, in which case demurrage is to be paid. So with respect to discharging and relading the vessel at the port of delivery in Europe; and so with respect to the return cargo in Alexandria: in each case demurrage is stipulated in the event of a longer detention than is agreed on.

When, then, a time is given to wait for orders at Falmouth, it is reasonable to suppose that the demurrage, which is to be paid, for a longer detention than the time given, relates to a detention occasioned by waiting for orders, or some breach of covenant by R. T. Hooe & Co.

The declaration does not state the vessel to have waited, lying off and on, for orders but to have been taken into court by the orders of Mr. Fox, when she was seized and detained by the officers of the British government.

The covenant, then, was broken by taking the vessel into port, and it is to be inquired who is answerable for this breach.

It has been argued that R. T. Hooe & Co. are answerable for it, because,

1. Their orders for the further prosecution of the voyage ought to have been in readiness as stipulated.

2. The vessel was taken into port by the orders of their agent, for whose acts they are accountable.

3. The captain was, for the voyage, their captain; and the stipulation to lay off and on, therefore, being broken by him, was broken by them.

To the first argument, founded on the nonreception of orders, the observation already made may be repeated. The declaration does not attribute the detention to that cause, but to a compliance with the orders of Fox in taking the vessel into port.

If, however, the charge in the declaration had been, that orders were not ready on the arrival of the vessel, *that charge would have [*235

been answered by the contract itself, which allows a delay of twenty-four hours for the reception of orders, without paying demurrage, and a longer time, if required, on paying therefor at the rate of 6*l.* 6*s.* sterling by the day.

The failure, then, to have the orders, for the further destination of the vessel, in readiness on the arrival of the captain, or even within the twenty-four hours after his arrival, was no breach of contract on the part of R. T. Hooe & Co. since it was an event contemplated, and provided for, by the parties; and the question whether in the actual case which has happened, that is, of a delay longer than twenty-four hours in giving the orders, but of a seizure before that time elapsed, R. T. Hooe & Co. are responsible for demurrage accruing between the termination of the twenty-four hours and the receipt of the orders, cannot be made in this case, because there is no allegation in the declaration which puts that fact in issue.

The court will proceed, then, to consider whether,

2d. R. T. Hooe & Co. are made accountable for the vessel's being taken into port, since that measure was adopted in pursuance of the instructions of their agent, Mr. Fox.

The finding of the jury goes far to prove that the defendants in the court below have made themselves responsible for the conduct of Fox. They find that R. T. Hooe informed the captain before he sailed from Alexandria, that on his arrival off Falmouth, he would receive orders from Mr. Fox, and that he must abide by such instructions. This finding creates some difficulty in the case. But this communication from Mr. Hooe to the captain ought to be taken, it is conceived, in connection with the provisional articles. Those articles explain the nature of the orders to be received, and by which the captain was directed to abide. In them it is expressly stipulated that on receiving these instructions, the captain should proceed directly for Havre de Grace, London, Hamburgh, Bremen or Rotterdam, as he should be directed. The orders, then, which he was to receive and obey, must be supposed compatible with this agreement. **236*]** *This construction is the more reasonable, because, annexed to the provisional articles, is an acknowledgment on the part of the captain, that he was to act conformably to them. He ought not to have understood declarations of the kind stated in the verdict, as directing a departure from a written agreement entered into by the owner and freighters of the vessel, and to which he had bound himself to conform.

This article seems, too, to explain the power delegated by Hooe & Co. to Fox; and to show that he was their agent for the purpose of directing the further destination of the vessel, but for no other purpose.

If this be the correct mode of understanding this part of the verdict, and it is believed to be so, then the particular conduct of Hooe & Co. did not authorize the captain to obey the orders of the American consul in taking the vessel into port; nor are they responsible for the consequences of that measure, unless they could be considered as responsible for a violation of the covenant by the act of the captain.

If these facts are to be differently understood, and the communication made by Hooe to the captain is to be understood as authorizing him to obey any order given by Fox, though that order should be directly repugnant to the provisional articles, still the liability of Hooe & Co. in this suit, will depend on the question whether the covenant to lay off and on at the port of Falmouth, was a covenant on the part of the owner, or of the freighters, of the vessel. This depends so much on the question whether Groverman or R. T. Hooe & Co. were owners of the vessel for the voyage, that it will more properly be considered with that point.

3. Was the captain under the direction of Groverman or Hooe & Co. for the voyage?

This is to be determined by the whole charter party, and the provisional articles taken together.

It has been observed at the bar, and the observation has considerable weight, that Groverman lets the tonnage of *the vessel, and [*237 not the whole vessel, to the freighters. The expression of the charter party, it will be perceived, varies in the part descriptive of the agreement, from what is used in the part constituting the written agreement. The indenture witnesses, "that the said Groverman hath granted, and to freight letten, to the said R. T. Hooe & Co. the brigantine Nancy, whereof he is owner," &c. but immediately proceeds to say, "and for and in consideration of the covenants hereinafter mentioned, doth grant, and to freight let, to the said R. T. Hooe & Co. the whole tonnage of the aforesaid vessel, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France," &c. As the latter are the operative words which really constitute the contract, it is conceived that they ought to prevail in construing that contract. Groverman, then, has only let to Hooe & Co. the tonnage of the vessel, and, therefore, is the less to be considered as having relinquished ownership of her during the voyage. There are other circumstances which serve to show that the direction of the vessel, during the voyage, was intended to remain with Groverman. The cargo is to be delivered to Messrs. Andrews & Co. of Havre de Grace, in good order, the dangers of the seas only excepted. This is an undertaking on the part of Groverman, which he certainly would not have made if he had relinquished the direction of the voyage to Hooe & Co. If the vessel *pro hac vice*, had been their vessel, Groverman would not have contracted for the delivery of the cargo; and for the delivery to a specified person.

If the freighters had owned and commanded the vessel, they might have delivered the cargo in Havre to any other person, or have discharged at a port short of Havre, without injury to Groverman. So the cargo taken on board at Havre is to be such as Andrews & Co. may think proper; which return cargo is to be delivered to Hooe & Co. in Alexandria. These stipulations all indicate that the voyage was to be performed under the orders of Groverman, because the acts stipulated are to be done by him, and the covenants are his covenants.

This is further evidenced by the subsequent language of the charter party. The succeeding sentence begins with the words, "And the said Groverman doth further *covenant to [*238 and with the said R. T. Hooe & Co." &c. showing

that the preceding covenants were all on the part of Groverman. This further covenant is not only for the present condition of the vessel, but that she shall be kept well appareled and well manned by the said Groverman during the voyage. The captain, then, was Groverman's captain, the mariners were Groverman's mariners; and this furnishes an additional reason for supposing the captain and mariners to be under his direction.

After some further covenants on the part of Groverman, the charter party proceeds thus: "In consideration whereof the said R. T. Hooe & Co. do covenant, &c. to and with the said W. Groverman, &c. that they will well and truly pay the freight stipulated therein."

Thus the whole language of the charter party goes to prove that the covenants respecting the voyage are on the part of Groverman, and on that account, as well as on the account of his letting only the tonnage of the vessel, and furnishing the captain and mariners, &c. he is to be considered as the owner of the vessel for the voyage, under the charter party. This opinion is strengthened rather than weakened by the provisional articles.

The first article stipulates that particular instructions respecting the voyage shall be given to the captain, by Groverman, before its commencement. The words are: "The captain or commander shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth," "there to lay off and on twenty-four hours (or longer if desired) in daylight," &c. These orders, then, to the captain were to be given by Groverman, and it was by his authority that the captain was to act on that occasion. This explains the doubt as to the person who was to be considered as covenanting that the vessel should lay off and on, for twenty-four hours, at the port of Falmouth, and tends to show who was responsible for the breach of that covenant. This, too, is in addition to covenants in the charter party, which are plainly Groverman's, and is therefore the more to be considered as a covenant on his part. The act was to be performed by his authority, and the covenant was his covenant.

239*] *On a consideration, then, of the whole contract between the parties, the court is of opinion that Groverman remained the owner of the vessel during the voyage, and is answerable for any misconduct of the captain.

The covenant to lay off and on at the port of Falmouth, being the covenant of Groverman, the freighters are not answerable in this action for the breach of it, should the orders of Fox be understood as their orders. It is probable that the course taken by the captain was the most prudent course; but were it otherwise, the orders of Fox might excuse the owner from any action brought by the freighters for loss sustained by them in consequence of going into Falmouth, but could not entitle him in this action against the freighters.

It is, then the opinion of this Court, that on this special verdict, the law is for the defendants.

Judgment reversed, and the circuit court to enter judgment for the defendants.

GABRIEL WOOD, Original Defendant,
v.
WILLIAM OWINGS and JOB SMITH, Assignees of WILLIAM ROBB, a bankrupt, original Plaintiff.

A deed of lands in Maryland signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment on the 14th of June will not cause it to be such a deed as is contemplated in the bankrupt act which came into operation on the 2d of June.

ERROR from the fourth circuit court sitting at Baltimore.

This was an action on the case for money had and received by Wood to the use of Robb, the bankrupt.

Judgment below was entered by consent, subject to the opinion of the court on a case stating the following facts, viz.:

*On the 30th of May, 1800, Robb be- [*240 ing in possession of his household furniture, and having two vessels and no other property on the high seas, signed, sealed and delivered, a deed to Charles Garts and Gabriel Wood, trustees in behalf of themselves and other creditors of Robb, therein particularly named, and such others of his creditors as should by a certain time assent to the terms of the trust; by which deed, Robb, in consideration of five shillings, and towards payment of the debts due to the particular creditors therein named in the first place, and in the next place of such of his creditors as should agree to the terms of the trusts; grants, bargains, sells, &c. to Garts and Wood, all his estate, real, personal and mixed, and choses in action, &c. in trust to sell the same and collect the debts, &c. and on receipt of the money to retain in the first place the amount due to Garts and Wood, for money lent, &c. then to pay the debts due to the other creditors particularly named, and then to pay the debts due to such of his other creditors as should, within a certain time, agree to the terms of the trust; and if there should be a surplus, to pay it over to Robb. That this deed was acknowledged on the 14th of June, 1800. That Robb did not, on the said 30th of May, 1800, deliver to Wood his books, but they remained in Robb's possession. That the vessels were not conveyed to Wood by any other conveyance than that before mentioned. That Robb continued in possession of his household furniture, books of accounts, and all his papers, until the suing out of the commission of bankruptcy, except the policies of insurance on the vessels, which were delivered to Wood at the time of delivering the deed. That Robb considered Wood as having a right to take possession of the books and papers and personal estate, at any time after the delivery of the deed, but did not then expect to be obliged to stop business; on the contrary, that he actually went on with the hope of retrieving his affairs until the 20th of June, 1800. That Robb was a trader before and after the 1st of June, 1800; that at the time of signing, sealing and delivering of the said deed, he was the legal proprietor of a lot of ground in the state of Maryland, as assignee of a term of 99 years, renewable for ever, and was also possessed of personal property, and had debts due to him; that Garts and Wood, and the other persons in the

deed particularly named, were creditors 241*] *of Robb; and that there were other creditors besides those particularly preferred in the deed. That a commission of bankruptcy issued against Robb on the 12th July, 1800, founded on the execution and acknowledgment of the said deed, under which Robb was declared a bankrupt, and his effects were assigned to the plaintiffs, Owings and Smith, by a deed of assignment on the first of May, 1801. And that the action is brought to recover all moneys received by Wood, in virtue of the said deed to Garts and Wood. If on the above state of facts the plaintiffs were entitled to recover, then judgment was to be entered for the plaintiffs for 3,000 dollars; but if, &c. then judgment of *non pros.*

By the bankrupt act of the United States, s. 1, it is enacted, that "from and after the 1st day of June next," (June 1, 1800,) "if any merchant," &c. "with intent unlawfully to delay or defraud his creditors, shall make, or cause to be made, any fraudulent conveyance of his lands or chattels," "he shall be deemed and adjudged a bankrupt."

Two questions were made by the counsel in the court below, viz.:

1st. Whether this deed can be considered as made at the time of its acknowledgment on the 14th June, 1800, so as to constitute it an act of bankruptcy, under the bankrupt law of the United States, which came into operation on the 2d June, 1800, or whether the acknowledgment shall relate back to the 30th May, 1800, the day on which the deed was signed, sealed and delivered, so that the deed shall be considered as made on that day.

2d. Whether, if made after the 1st of June, 1800, it can be considered as such a fraudulent conveyance as is contemplated by the 1st sect. of the bankrupt law.

Martin, for the plaintiff in error.

Now waived the second point, and relied entirely on the first.

This involves three questions:

242*] *1st. Whether the deed, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is an act of bankruptcy under the law which came into operation on the 2d of June.

2d. Whether the signing, sealing and delivery shall be considered as going forward to the time of acknowledgment; or,

3d. Whether the acknowledgment shall refer back to the time of the signing, sealing and delivery.

The debtor, independent of the bankrupt act, may prefer one creditor to another. No creditor can prevent him, unless by taking out a commission of bankruptcy. This principle is acknowledged by all the state governments, and by the laws of England, in cases not within the bankrupt law.

In the case of *Hooper v. Smith*, 1 Bl. Rep. 441, one Hooper being bona fide indebted to his mother in the sum of 800*l.* at 8 o'clock in the morning assigned and delivered to his mother, half his stock in trade, which was taken away immediately to his mother's lodgings. On the evening of the same day he committed an act of bankruptcy. His assignees, by stratagem, got possession of the goods and sold them. The mother brought trover against the assignees, and recovered. Lord Mansfield, in that case, said, that "a preference to one creditor, especially by assigning only part of his goods, and to pay only part of the debt, has been frequently held to be good; particularly in the case of *Cock v. Goodfellow*, (the case of a parent and child,) *Small v. Owdley and others.*" "Suppose he had sold the goods in question to John or Thomas, and, with that ready money, had paid his mother part of her debt; would that sale or payment have been void?"

The courts of Virginia, Maryland and Pennsylvania have always recognized the same principles. If the bankrupt law had never passed, this deed would have been protected in courts of law and equity.

Is this a fraudulent conveyance under the bankrupt law?

*The acknowledgment is necessary [*243 for some purposes, but not to constitute it a deed.

A deed is defined to be a writing on parchment or paper, sealed and delivered. Suppose a mortgage of lands, containing a covenant to pay money, be not acknowledged, it would not at law convey a legal title to the land, but it would be good as a covenant to pay the money; and would be good to pass an equitable title to the land. Suppose it contained a conveyance of land and chattels; it would be good as to the chattels.

This shows that acknowledgment is not a necessary part of the deed; but only that a deed, not acknowledged, will not pass a legal estate in lands, as to creditors.

But the act of Maryland, November session, 1766, c. 14, s. 2, says, "that no estate of inheritance, &c. shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged before the provincial court, &c. and be also enrolled in the records of the same county," &c. It must therefore be a deed before the acknowledgment. And by the fifth section of the same act it is declared that every such deed shall have relation, as to the passing and conveying the premises, from the day of the date thereof; thereby evidently contemplating it to be a deed from its date. This section was inserted because, by the former act of 1715, the deed took effect only from the time of its acknowledgment. But the law is the same independent of the positive declaration of this act. 1 Bac. Abr. 277, Bargain and Sale, and 2 Inst. 674, 675, where Lord Coke, in his exposition upon the statute of 27 Hen. VIII. c. 16, of enrollments, says, "And when the deed is enrolled within six months, then it passeth from the livery of the deed. And, albeit, after the delivery and acknowledgment, either the bargainor or bargainee die before enrollment, yet the land passeth by this act." "And by the words of this statute, when the deed is enrolled, it passeth *ab initio.*" And he cites the case of *Mallery v. Jennings*, determined in the common pleas, 42 Eliz. which was this: "One Sewster was seized of certain lands in fee, and acknowledged a recognizance *to [*244 Turner, whose executrix brought a *scire facias* upon the recognizance, bearing date the 9th November, 41 Eliz. against Sewster, and al-

leged him to be seized of those lands *in dominico suo ut de feodo*, the day of the *scire facias* brought; and the truth of the case being disclosed by long pleading, was this: Sewster, 7th November, before the recognizance acknowledged, by deed indented for money, had bargained and sold the said land to another, and the deed was enrolled on the 20th November following. The question was, whether Sewster was, upon the whole matter, seized in fee the 9th of November, the deed being not enrolled until the 20th of the same November. And it was adjudged, *una voce*, that Sewster was not seized in fee of the land on the 9th day of November. For that when the deed was enrolled, the bargainee was, in judgment of law, seized of that land, from the delivery of the deed. And it was resolved, that neither the death of the bargainor nor of the bargainee, before enrollment, shall hinder the passing of the estate. And that a release of a stranger to the bargainee, before enrollment, is good. So that it holds not by relation, between the parties, by fiction of law; but in point of estate, as well to them as to strangers also. And that a recovery suffered against the bargainee, before enrollment, (the deed indented being, afterwards, within the six months, enrolled,) is good, for that the bargainee was tenant of the freehold, in judgment of law, at the time of the recovery. And *non refert* when the deed indented is acknowledged, so it be enrolled within the six months. And all this was afterwards affirmed for good law by the court of common pleas, Trin. 3 Jac. upon a special verdict given in an *ejectione firmæ* between *Lellingham and Alsop;* and further it was there resolved, that if the bargainee of land, after the bargain and sale, and before the enrollment, doth bargain and sell the same, by deed indented and enrolled, to another; and after the first deed is enrolled, within the six months, the bargain and sale, by the bargainee, is good."

In 18 Viner, 289, tit. *Relation*, it is said, "when two times, or two acts, are requisite to 245*] the perfection of an *act, it shall be said, upon their consummation, to receive its perfection from the first."

If A. makes a deed to B. on the 30th of May; and another for the same land to C. on the 1st of June, and acknowledges it the same day; afterwards, on the 14th of June, he acknowledges the deed to B. this overreaches the deed to C. and the acknowledgment of the deed to B. is not a fraudulent act.

Suppose A. makes a bona fide deed to B. for valuable consideration, on the 30th of May. On the first of June A. commits an act of treason. On the 14th of June he acknowledges the deed to B. The land is not forfeited by the treason of A.

If an indictment had been found for forging this deed, and to support the indictment, evidence had been given of the forgery of the acknowledgment only, would that have supported the indictment?

If a declaration upon this deed, stating it to have been made on the 14th of June, had been drawn, would it have been supported by producing in evidence this deed signed, sealed and delivered on the 30th of May?

This deed intends to convey choses in action and personal effects as well as lands. As to the former, the deed is good without acknowledgment; for as to the choses in action, the deed without acknowledgment is an equitable assignment, and if acknowledged it would have amounted to nothing more.

But if the assignees are entitled, they must take the bankrupt's estate subject to all the equity of others. 2 Vesey, sen. 585, 633. Cooke's Bankrupt Law, 203. *Taylor v. Wheeler*, 2 Vern. 564.

Courts of law will protect equitable rights; as in the case of *Winch* and *Keeley*. 1 Term Rep. 619, where the plaintiff having assigned his right of action to Searle, and having become bankrupt, was still held able to support the action for the benefit of Searle, notwithstanding the assignment of his effects under the bankrupt laws.

*And by the authority of ex parte [*246 *Byas*, 1 Atk. 124, if the assignees had received the money due to Robb, the bankrupt, they would have been obliged to pay it over to Wood, the plaintiff in error, instead of receiving it from him.

The deed is not fraudulent *in se;* and would not now be questioned if the bankrupt law had not been passed. Although it is a deed of all his effects, yet it is not an absolute deed, nor was it made on any secret trust, or for his own benefit. The only thing which can be alleged against it is, that it gives a priority to some of his creditors, and this he had a clear right to do both in law and equity. It was not made in secret; it holds up no false colours; it enables him to receive no false credit. He might have sold the property for ready money, and paid any one of his creditors in full. But making a deed of trust, he has prevented a sacrifice of his property, whereby it is competent to satisfy a greater number of his creditors, and he is himself rendered more able to pay the residue of his debts by his future industry.

The committing an act of bankruptcy is, in law, considered as criminal. The bankrupt law is, therefore, in this respect, to be construed strictly. It ought not to be extended beyond the letter of the law. Cooke's B. L. 67. Cowp. 409, 427, 428. 5 Term Rep. 575. 7 Term Rep. 509. *Fowler v. Padget*.

But however fraudulent the deed might have been, yet it was no act of bankruptcy, under the act of congress; because not executed after the 1st of June; unless the acknowledgment can be considered as the making of the deed. And if it was not an act of bankruptcy, the title of the defendants in error fails.

Harper, contra.

The act of bankruptcy charged, is the making a fraudulent deed after the 1st of June, 1800. The counsel for the plaintiff in error having abandoned the second point which was made, and strongly contended for, in the court below, the only question now to be considered is, whether the deed was made before or after the 1st of June.

*A deed at common law is an instru- [*247 ment in writing, signed, sealed and delivered. If it be signed and sealed, but not delivered, it is no deed; and the reason is, that until the last act of volition is performed, there is still a power of recalling it.

The cases from the English books respecting the statute of enrollments are not applicable to

the law of Maryland respecting acknowledgment. The English laws only protect creditors and purchasers without notice. But the law of Maryland is intended to protect the maker of the deed himself, to prevent forgeries and fraud, and to give a further solemnity, that the grantor may have more time to reflect, and to secure himself from being suddenly entrapped. The law therefore superadds to signing, sealing and delivery, a further act of volition.

It is said that a court of equity will set up such a deed; true, it would, in certain cases; but not because it is a paper signed and sealed; but because it is a contract for a valuable consideration. But this deed would never have been supported in a court of equity, if it had not been completely valid at law. Suppose Robb had refused to acknowledge it; and application had been made to chancery to carry the deed into effect; it would have been refused.

Can a deed be said to be made when it is not complete? It was not complete on the 30th of May; something was still to be done, of which it would have been necessary to apply to a court of chancery to compel the performance.

If acknowledgment is necessary by statute law, it is the same as if necessary by common law. The one is as binding as the other. They are both derived from the same source, but evidenced in different modes. Signing, sealing and delivery only are necessary by the common law, but acknowledgment also is necessary by the statute.

The deed of land was an act of bankruptcy, and prevented the operation of the deed as a deed of personal estate. The deed for the land and for the chattels was executed *eodem instanti.*

248*] *CHASE, *J.* The effect of an acknowledgment is to prevent the grantor from pleading *non est factum.*

Harper. By the law of England acknowledgment is not necessary. By the law of Maryland it is a necessary part of the conveyance, and can no more be dispensed with than the signing, sealing and delivery. Having signed and sealed, the grantor may refuse to deliver; so, having signed, sealed and delivered, he may refuse to acknowledge, and in either case it is no deed. The deed, therefore, was not made till the 14th of June.

Martin, in reply.

Acknowledgment is absolutely necessary in England, before enrollment. Viner, tit. *Enrollment,* p. 443. "No deed, &c. can be enrolled, unless duly and lawfully acknowledged, cites Co. Litt. 225, b." The acknowledgment is the warrant for the enrollment. An acknowledgment in Maryland has no greater effect than in England.

There was an enrollment at common law, for safe custody, it makes an estoppel, and the party cannot plead *non est factum. Per Holt, Ch. J.* Comb. 248. *Smart v. Williams,* cited in Viner, tit. *Enrollment,* p. 444. And in p. 445, it is said, "Enrollment of a deed is to no other purpose but that the party shall not deny it afterwards," and cites Br. Faits Enrol. pl. 4. And in Sav. 91, *Holland v. Downes,* cited in Viner, tit. *Enrollment,* pp. 446, 447. It is said "the sealing and delivery is the force of such deeds, as deeds of bargain and sale, &c. and not the enrollment." And again, in the same case, "Bonds, indentures and deeds take their force by the delivery; so there is a perfect act before the conusance is taken, and before any enrollment. The enrollment could not be made upon proof by witnesses. The acknowledgment was the only authority.

Harper. The enrollment is the act of the grantee. The acknowledgment is the last act of volition of the grantor. It is wholly voluntary; he may refuse; and if he does, the deed has no effect. In England, the acknowledgment is *a regulation of the courts, not [*249 a provision of the statute of enrollments. That statute is different from the act of Maryland; the latter expressly requires the acknowledgment, and no estate passes at law without it. It therefore becomes as much a requisite of a deed as sealing or delivery. It is not only an absolute requisite that the deed should be acknowledged, but the courts of Maryland have been very strict in requiring it to be done precisely in the mode prescribed. In the case of *Hall v. Gittings,* decided in the court of appeals in Maryland, the case was, that the grantor resided in Anne Arundel county, but the deed described him as a resident of Baltimore county, where the lands were situated. The acknowledgment was made in Prince George's county. This acknowledgment was decided by the court of appeals not to be good, and the cause was lost upon that ground, although the deed was twenty-five years old, and possession had been quietly enjoyed under it. The error was discovered by the court themselves, and had not been suggested by the counsel at the trial.

It has also been decided that the acknowledgment of a feme covert must be precisely in the form prescribed by the act.

This shows the great importance of acknowledgment in Maryland.

Martin, in reply.

The acknowledgment in England is not a regulation of the courts only, but is a principle of the common law relative to enrollment, which existed before the statute of enrollments. It was known, at the time of enacting that statute, that by the common law, an acknowledgment was a prerequisite to enrollment. It was not necessary, therefore, that it should be expressly prescribed by statute. Acknowledgment and enrollment was a proceeding well known and understood, and was not originated by the statute of 27 Hen. VIII. The statute only applies the process to new cases, or makes it necessary where before it was only voluntary.

As to the case of a feme covert, she could not, by the *common law, convey her land, [*250 except by fine and recovery. But the law of Maryland authorized her to do it in a certain mode. That mode must, therefore, be strictly pursued.

March 1st. The *Chief Justice* delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the fourth circuit sitting at Baltimore, in the following case.

On the 30th of May, 1800, William Robb, who was then a merchant, carrying on trade and merchandise, in the state of Maryland, signed, sealed and delivered to Gabriel Wood, an instrument of writing, purporting to convey

to the said Gabriel his real and personal estate, in trust, to secure him from certain notes and acceptances made by him, on account of the said Robb, and afterwards, in trust for other creditors in the deed mentioned. This deed was acknowledged on the 14th of June; and was then enrolled according to the laws of Maryland.

On the 12th of July, 1800, a commission of bankruptcy was sued out, founded on the execution of the deed above mentioned, and the said William Robb being declared a bankrupt, his effects were assigned to William Owings and Job Smith, who brought this suit against Gabriel Wood, to recover the money received by him under the deed aforementioned.

Judgment was confessed by the defendant below, subject to the opinion of the court on a case stated, of which the foregoing were the material facts.

The court gave judgment in favor of the assignees, to which judgment a writ of error was sued out by the present plaintiff.

The only question made by the counsel was, whether the deed stated in the case was an act of bankruptcy.

On the 4th of April, 1800, congress passed an act to establish a uniform system of bank-251*] ruptcy throughout *the United States, which declares, among other things, that any merchant who shall, after the first day of June next succeeding the passage of the act, with intent unlawfully to delay or defraud his creditors, make, or cause to be made, any fraudulent conveyance of his lands or chattels, shall be deemed and adjudged a bankrupt.

It was admitted, in the argument, that this deed, if executed after the 1st day of June, would have been an act of bankruptcy, but that being sealed and delivered on the 30th of May, it was not within the act, which only comprehends conveyances made after the 1st of June.

For the defendants in error it was contended, that, by the laws of Maryland, a deed is not complete until it is acknowledged, and therefore this conveyance was made on the 14th of June, when it was acknowledged; and not on the 30th of May, when it was sealed and delivered.

The Maryland act alluded to was passed in 1766, and declares, "that after the first day of May next, no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance, by which the same shall be intended to pass or take effect, shall be acknowledged in the provincial court, or before one of the justices thereof, in the county court, or before two justices of the same county where the lands, tenements, or hereditaments, conveyed by such deed or conveyance do lie, and be also enrolled, etc. within six months after the date of such deed or conveyance."

The 5th section gives the conveyance, so acknowledged and enrolled, relation to the date thereof.

It is a well established doctrine of the common law, that a deed becomes complete when sealed and delivered. It then becomes the act of the person who has executed it, and whatever its operation may be, it is his deed. The very act of livery, which puts the paper into the possession of the party for whose benefit it is made, seems to require the construction that it has become a deed.

*The question now made to the court [*252 is whether the act of the legislature of Maryland has annexed other requisites to an instrument of writing conveying lands, without the performance of which not only the passing of the estate, intended to be conveyed, is arrested, but the instrument itself is prevented from becoming the deed of the person who has executed it.

Upon the most mature consideration of the subject, the opinion of the Court is, that the words, used in the act of Maryland, which have been recited, consider the instrument as a deed, although inoperative till acknowledged and enrolled.

The words do not apply to the instrument, but to the estate that instrument is intended to convey.

Since, then, the bankrupt law of the United States does not affect deeds made prior to the 1st of June, 1800, and this deed was made on the 30th of May, 1800, the Court is of opinion, that the rights vested by the deed (whatever they may be) are not divested in favor of the assignees of the bankrupt, and, therefore, that they ought not to have recovered in this case.

Judgment reversed, and judgment of non pros to be entered.

UNITED STATES *v.* SIMMS.

The acts of congress of 27th Feb. and 3d of March, 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by congress as the laws of that District, any further than the change of jurisdiction rendered a change of laws unnecessary.

Fines, forfeitures, and penalties arising from a breach of those laws are to be sued for and recovered in the same manner as before the change of jurisdiction, *mutatis mutandis.*

ERROR from the circuit court of the District of Columbia sitting at Alexandria, to reverse a judgment, rendered by that court for the defendant on an indictment for suffering a faro bank to be played in his house, contrary to an act of assembly of Virginia.[1]

The indictment sets forth that Simms, "on the 1st of April, 1801, with force and arms, at the county of Alexandria, did suffer the game called the faro bank to *be played, by [*253 divers persons, in a house of which he, the said Jesse Simms, then and there, at the time of the said play, had the possession and use, contrary to the form of the statute in that case lately made and provided, and against the peace and government of the United States."

The record which came up contains a bill of exceptions, taken by the attorney for the United States, to the opinion of the court; which opinion was, "that the proceeding by indictment to recover the penalty imposed by law for the offense stated in the indictment in this case filed, was improper, illegal, and could not be sustained."

1.—In the case of the *United States v. More,* (*vide post.* v. 3. p. 159,) it was decided that no writ of error will lie in a criminal case.

The act of assembly of Virginia, January 19, 1798, p. 4, c. 2, § 3, upon which the indictment was founded, is in these words: "Any person whatsoever who shall suffer the game of billiards, or any of the games played at the tables commonly called the A. B. C., E. O. or faro bank, or any other gaming table, or bank of the same or the like kind, under any denomination whatever, to be played in his or her house, or in a house of which he or she hath at the time the use or possession, shall, for every such offense, forfeit and pay the sum of one hundred and fifty dollars, to be recovered in any court of record, by any person who will sue for the same."

"§ 8. The presiding justice, as well in the district as in all the inferior courts of law in this commonwealth, shall constantly give this act in charge to the grand juries of their courts, at the times when such grand juries shall be sworn."

Mason, attorney for the United States.

The only question is, whether an indictment was the proper process.

This depends upon the act of assembly of Virginia of the 19th January, 1798, and the acts of congress respecting the District of Columbia.

By the act of congress, 27th February, 1801, v. 5. p. 268. c. 86, § 1, it is enacted that the laws 254*] of Virginia shall *be and continue in force in that part of the district which was ceded by Virginia. And by the act of congress of 3d March, 1801, p. 287, § 2, supplementary to the act of 27th February, it is enacted, "that all indictments shall run in the name of the United States, and conclude against the peace and government thereof; and all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer; one half of which fine shall accrue to the United States, and the other half to the informer; and the said fine, shall be collected by, or paid to the marshal and one-half thereof shall be by him paid over to the board of commissioners hereinafter established, and the other half to the informer."

By the act of Virginia the penalty is to be recovered by any person who will sue for the same. If the question had depended upon this act alone, it would not have been brought before this court. But the act of congress has changed the mode of recovery, and made an indictment necessary.

C. Lee, for the defendant.

"When a statute appoints a penalty for the doing of a thing which was no offense before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment." Cro. Jac. 643, *Castle's Case*, and 2 Burrow. 803, *Rex v. Robinson*.

The statute of Virginia contains in itself the mode of prosecution; and it being such (to wit, an action of debt by an informer) as could not be affected by the transfer of jurisdiction, and the statute being adopted by congress in toto, there is no necessity of resorting to another mode. The supplementary act of congress of the 3d of March, 1801, was intended to operate upon those cases under the laws of Virginia, where it had been necessary to use the name of the commonwealth in the recovery of fines, forfeitures and penalties, and cannot be supposed to intend *to take away a private right, or to alter [*255 the mode of prosecution, unless some alteration had become necessary, in consequence of the change of government. That act must be construed, *reddenda singula singulis;* that is, where the mode of prosecution under the state laws was by indictment, or information in the name of the commonwealth, it should, in future, be by indictment or information in the name of the United States; and where, by the state laws, the mode of prosecution was an action *qui tam*, or an action of debt in the name of the informer, it should, in future, be an action *qui tam* in the name of the United States, and of the informer, or an action of debt in the name of the informer alone.

Mason, in reply.

The legislature of Virginia certainly had the right and power to alter the mode of recovering the penalty, if they thought proper; so had congress as soon as the jurisdiction devolved upon them. The words of the act of congress are sufficiently broad to take in this case. The act says, all fines, penalties and forfeitures shall be recovered by indictment, or information in the name of the United States, or by action of debt in the name of the United States and of the informer, that is, where the penalty is to be recovered without the intervention of an informer, there it shall be by indictment or information in the name of the United States; but where an informer appears and claims the penalty, there it shall be a *qui tam* action of debt; and half the penalty is to go to the United States, and half only to the informer. In this case there was no informer who claimed the penalty. The presentment was made by the grand jury.

Congress did not mean simply to render *singula singulis*. It was found that the criminal code of Virginia could not be carried into effect in this district for want of a penitentiary house. Congress, therefore, took up the criminal system and revised it. They have pointed out both the mode of prosecution and the appropriation of the penalty. They have allowed an informer to come in, in all cases, and claim half of the penalty; and where, by the state laws, the whole went to the informer, they have declared that half shall go to the United States.

*Feb. 23d. The *Chief Justice* delivered the opinion of the court. [*256

This is a writ of error to a judgment of the circuit court of the District of Columbia, sitting in the county of Alexandria, in the following case.

By an act of the legislature of Virginia a penalty of 150 dollars is imposed on any person who permits certain games, enumerated in the act, to be played in a house of which he is the proprietor. The penalty, by that act, is given to any person who will sue for the same.

After the passage of this act, congress assumed the government of the district, and declared the laws of Maryland to remain in force in that part of the district which had been ceded by Maryland; and the laws of Virginia to remain in force in that part of the district which had been ceded by Virginia.

subsequent to the act of assumption an act passed, supplementary to the act entitled "An act concerning the District of Columbia;" the second section of which is in these words: (here the *Chief Justice* read the whole section, and the substance of the indictment.)

It is admitted that, under the laws of Virginia, an indictment for this penalty could not be sustained; but it is contended that the clause in the supplemental act which has been recited, makes a new appropriation of the penalty, and gives a new remedy for its recovery.

It is insisted that the words "all fines, penalties and forfeitures accruing under the laws of Maryland and Virginia," &c., necessarily include this penalty, and by giving a recovery in the name of the United States by indictment, appropriate the penalty to the public treasury. On the part of the defendant in error it is contended, that the words relied on do not change the law further than to substitute in all actions heretofore carried on in the names of the states of Maryland and Virginia respectively, the name of the United States instead of those names; and that the provisions of the act apply 257*] only to *fines, penalties and forfeitures accruing to the government.

This subject will perhaps receive some elucidation from a review of the two acts of congress relative to the District of Columbia.

The first section of the first act declaring that the laws of the two states respectively should remain in force in the parts of the territory ceded by each, was, perhaps, only declaratory of a principle which would have been in full operation without such declaration; yet it manifests very clearly an intention in congress not to take up the subject of a review of the laws of the district at that time, but to leave things as they then were, only adapting the existing laws to the new situation of the people.

Every remaining section of the act to the 16th, is employed on subjects where the mere change of government required the intervention of the general legislature.

The sixteenth section continues still to manifest a solicitude for the preservation of the existing state of things, so far as was compatible with the change of government, by declaring that nothing contained in the act should be construed to affect rights granted by, or derived from, the acts of incorporation of Alexandria and Georgetown, or of any body politic or corporate within the said district, except so far as relates to their judicial powers.

This act had given to the circuit court, which it established, cognizance of all crimes committed in the district, and of all penalties and forfeitures accruing under the laws of the United States.

It was soon perceived that the criminal jurisdiction of the court could not be exercised in one part of the district, because, by the laws of Virginia, persons guilty of any offense, less than murder in the first degree, were only punishable in the penitentiary house, erected in the city of Richmond, which punishment the court of Columbia could not inflict.

258*] *It was also perceived that some embarrassments would arise respecting the style in which suits, theretofore directed to be brought in the names of Maryland and Virginia, should thenceforth be prosecuted. The respective laws authorizing them, and which were considered as having been re-enacted by congress, *totidem verbis*, directed such suits to be prosecuted in the names of Maryland and Virginia, respectively. The continuance of this style in the courts of the United States was glaringly improper, and it was thought necessary to change it by express provision. These objects rendered the supplemental act necessary, which provides, that the criminal law of Virginia, as it existed before the establishment of a penitentiary system, should continue in force, and that all indictments shall run in the name of the United States; and all fines, penalties and forfeitures, accruing under the laws of the states of Maryland and Virginia, shall be recovered with costs, &c.

The residue of this supplemental act changes nothing, and only supplies provisions required by the revolution in government, and which had been omitted in the original act.

This view of the two acts would furnish strong reasons for supposing the object of congress to have been, not to change, in any respect, the existing laws further than the new situation of the district rendered indispensably necessary; and that the fines, penalties and forfeitures alluded to in the act, are those only which accrued by law, in the whole or in part, to government; and for the recovery of which the remedy was by indictment or information, in the name of the state in which the court sat, or by a *qui tam* action in which the name of the state was to be used. It cannot be presumed that congress could have intended to use the words in the unlimited sense contended for.

By the laws of Virginia, an officer is liable to a heavy fine for not returning an execution which came to his hands to be served, or for retaining in his hands money levied on such execution. This goes to the party injured, and on his motion the judgment for the fine is to be rendered. It would be going a great way to construe this act *of congress as making [*259 such a fine recoverable for the use of the United States; and yet, this would be the consequence of construing it to extend to fines and penalties accruing by law, not to government, but to individuals.

If a penalty recoverable by any individual, by action of debt, was to be considered as designed to be embraced by the second section of the supplemental act, still an action of debt in the name of the United States and of the informer, would seem to be the remedy given by the act.

The principal, *reddenda singula singulis*, would be applicable; and it would seem to the court more proper to suppose a *qui tam* action, given in this case, to be the remedy, than an indictment.

The court, therefore, is of opinion, that there is no error in the judgment, and that it be affirmed.[1]

1.—The defendant's counsel prayed that the affirmance might be with costs. It was suggested by some of the gentlemen of the bar, that the question of giving costs against the United States would be fully argued in the case of the *United States v. Hooe*, at this term. The Court, therefore, postponed the subject till that argument should be had. That cause, however, went off upon another ground, without any argument on the question of costs. And the Court did not give any directions respecting the costs in the present case.

FENWICK
v.
SEARS'S ADMINISTRATORS.

An administrator having had letters of administration in Maryland, before the separation of the District of Columbia from the original states, cannot, after the separation, maintain an action in that part of the district ceded by Maryland, by virtue of those letters of administration; but must take out new letters within the district.

Quære, whether the acts of a notary public, who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not actually sworn in due form? (1)

Whether, between contending parties, the certificate of a notary public, that he is "duly commissioned and sworn," can be contradicted?

Whether a protest for non-payment of a bill of exchange must be made on the last day of grace?

Whether the reasonableness of notice be matter of fact or matter of law?

Whether, on a count for money had and received, notice of non-acceptance and of non-payment be necessary to charge an indorser who knew, at the time of indorsement that the drawer had no right to draw?

ERROR from the judgment of the circuit court of the District of Columbia, sitting at Washington, in an action on the case on a foreign bill of exchange, by the administrators of the indorsee against the indorser.

The case, as it appears in the pleadings and bills of exceptions, was as follows:

Francis Lewis Taney, at Paris, in France, drew the following bill of exchange: "Paris, 5th August, 1797, sixty days after sight of this my second of exchange, (first and third not paid,) 260*] pay to the order of Mr. Joseph *Fenwick the sum of three hundred and fifty dollars, for value received in account, which charge as advised by your most obedient servant, Fras. Lew. Taney.

"To Messrs. Ben. Stoddert and John Mason, Georgetown, Maryland."

This bill was indorsed by Fenwick to George Sears, of Baltimore, and, on the 30th of March, 1798, it was presented for acceptance, refused and protested in the useful form for non-acceptance, by Samuel Hanson, of Samuel, styling himself notary public for the county of Montgomery, in the state of Maryland, dwelling in Georgetown, in said county, duly commissioned and sworn.

On the 2d of June, 1798, payment of the bill was demanded of the drawees by the same notary, and refused, whereupon, on the same day, he protested it in the usual form for non-payment. Fenwick, the indorser, was at the time of indorsing, and had been for ten years before, a resident of France, but in the year 1800 he came to this country, and, on the 4th of April, 1801, the plaintiffs below brought suit against him here upon his indorsement. The declaration had two counts, one upon the non-acceptance of the bill, the other for money had and received.

The defendant below pleaded.

1st. Non assumpsit.

2d. That the plaintiffs "have not obtained letters of administration on all and singular the goods and chattels, rights and credits, which were of the said George, at the time of his decease, to wit, at Washington county aforesaid, and this he is ready to verify, wherefore he prays judgment," &c. to which the plaintiffs replied, that the said George Sears, the intestate, departed this life, in the town of Baltimore, in the county of Baltimore, in the state of Maryland, which was at that time his place of residence, on the day of , in the year of our Lord 1800, intestate; and afterwards, to wit, on the 8th day of November, in the year aforesaid, administration of all and singular the goods and chattels, rights and credits of the said intestate, was granted to the said John Stricker and Henry *Payson in due form [*261 of law, by William Buchanan, register of wills for Baltimore county aforesaid; an examplification of the letters of administration granted to the said Stricker and Henry Payson as aforesaid, duly authenticated, is now here to the court produced; and this they are ready to verify; wherefore they pray judgment," &c. To this replication there was a general demurrer and joinder; which demurrer was overruled by the court below.[1]

On the trial of the issue in fact, five bills of exceptions were taken by the defendant's counsel.

The first stated that the defendant objected to the second bill of the set of exchange going in evidence to the jury, unless the plaintiff first

1.—The jurisdiction of the several states of Virginia and Maryland over the territory ceded by them to the United States, for the seat of government, ceased on the first Monday of December, 1800.

1.—NOTE. An officer, duly commissioned, and acting in his office, is presumed to have taken the regular oaths.

2 Gallis. R. 15; M'Gahey v. Alston, 2 Mees. & W. 206.

The certificate of a notary public that he is duly commissioned and sworn is prima facie evidence of those facts.

2 Cow. & Hill's notes to Phil. Ev. 462.

When, by law, certain acts are to be done by a public officer, the law always intends that they have been done, and public officers are presumed duly appointed, until the contrary be shown.

1 Phil. Ev. 450, Rex v. Catesby, 2 Barn. & C. 814.

Rex v. Buckby, 7 East. 45.

Rex v. Hinckley, 12 East. 361.

The certificate should purport, on its face, to have been made by an authorized officer.

Downing v. Gallagher, 2 Serg. & Rawle, 457.

Shield v. Buchanan, 2 Yeates, 220.

Where the officer taking the same, styles himself such an officer as is authorized, that will be prima facie evidence of the fact of his being so:

Rhoades v. Selin, 4 Wash. C. C. 718.

Willink v. Miles, 1 Peters, C. C. 429: even where his title is abbreviated as A. B. Comm'r."

Duval v. Covenhoven, 4 Wend. 561, 563.

Protest and certificate of deceased notary public, are presumptive evidence, in N. Y. of presentment and non-payment of note, and notice to indorser.

McKnight v. Lewis, 5 Barb. (N. Y.) 681.

A certificate, which appears on its face to be in conformity with the statute, is proof of its own genuineness.

Chitty on Bills 642, a.

Where the certificate describes the proper officer, acting in the proper place, it is taken as proof both of his official character, of his signature, and of his local jurisdiction.

Thurman v. Cameron, 24 Wend. 87.

Rhoades v. Selin, 4 Wash. C. C. R. 718.

Willink v. Miles, 1 Pet. C. C. R. 429.

Morris v. Wadsworth, 17 Wend. 103, 112, 113.

The evidence, however, is only prima facie, and may be rebutted and overturned by collateral proof.

Jackson v. Colden, 2 Cowen, 266.

Jackson v. Humphrey, 1 John. R. 498.

A foreign protest, under hand and seal of foreign notary, is evidence to the extent above stated.

Bryden v. Taylor, 2 Harr. & J. 396, 399, 402.

Canne v. Sagery, 4 Mart. Lou. R. 81.

Phillips v. Flint, 3 Mill. Lou. R. 146, 149.

Certificate of notary is evidence of facts stated in it, in the scope of notary's duty.

offered evidence to account for the first and third of exchange, and to show that they or either of them were not paid, or passed in the course of business to some other person who still holds the same, but the court overruled the objection, and suffered the second bill to be read.

The second bill of exceptions stated that the defendant objected to the admission of the two protests in evidence, because, as he alleged, Samuel Hanson, of Samuel, was not a notary public on the 30th of March, 1798, or on the 2d of June, 1798, and to prove this, the defendant offered to give evidence to prove that the said Hanson, previous to the 30th of March, 1798, had been named and appointed by the governor of the state of Maryland, by and with the advice and consent of the council of Maryland, a notary public, but that he never did take the oath or oaths prescribed for a notary public to take, until after the 3d day of June, 1798, but the court were of opinion that the evidence so offered to prove that the said Hanson was not a notary public, was not admissible for that purpose, and refused to let the said evidence be given; and the protests were permitted to be read to the jury.

3d. That the defendant's counsel prayed the Court to direct the jury that the protest for 262*] non-payment is not such *a protest as by the law of merchants is required, and was not made within the time by the law and custom of merchants, required, and, therefore; that the plaintiffs cannot in this case recover of the defendant upon the said bill of exchange; but the court refused to give such instruction.

4th. The fourth bill of exceptions stated at great length the testimony of several witnesses tending to show notice of the non-payment given to the defendant in this country some time in 1800 or 1801, and that the defendant had made some propositions for settling the bill. That the drawees had no funds of the drawer in their hands. That the drawees held a deed from the drawer of certain lands in Georgia and North Carolina, and an assignment of a large demand on the French government, and of another large demand against an individual in France, which they held in trust to pay certain debts due from the drawer, and to pay him the surplus, if any. That they had permitted the drawer to go to France and attend to these claims and sell the lands, but that it was understood between them and the drawer that he should bear his own expenses, but that they did not inform the defendant of that circumstance. That at the time he went they thought favorably of the trust, and wrote by the drawer to the defendant, expressing their opinion of it, and enclosing to the defendant a power of attorney to act for them in the business, and to receive any moneys that might be recovered under the trust, and informing him that the drawer would attend and look after the said concerns. That at the time of presenting the bill they had not received any money under the trust, but were in advance on that account. That the bill was indorsed by the defendant to enable the drawer to raise money in France, for the purpose of supporting his necessary expenses whilst he was prosecuting there those claims in which the drawees were interested as trustees, and that the drawer sold them for that purpose. That the defendant came to this country on business in October, 1800, and returned to France in May, 1802, and during his stay in this country made Georgetown his place of residence.

That after this bill was drawn, the drawer received in France a sum of between 2,000 and 3,000 dollars, in the *beginning of the [*263 year 1798; that during the years 1798, 1799, and 1800, French ships were permitted to sail directly from America to France, for the purpose of carrying Frenchmen home; this happened perhaps twice a year, or oftener. That during these years there was a communication between America and France for letters, &c., through the medium of London and Hamburgh. That after the spring of 1798, American vessels were very often captured by the French armed vessels on the high seas; and that at the time, previous to the year 1798, American ships were embargoed in France.

The defendant then prayed the court to instruct the jury that upon the whole evidence, as stated, the plaintiffs, by their neglect in not giving notice to the defendant, the indorser on the said bill, that it was protested for non-acceptance and for non-payment, sooner than they did, had released the defendant from all responsibility on the same, and could not recover thereon; which direction was not given as prayed, the court being divided in opinion whether, in this case, the question of reasonable notice was a matter of law to be determined by the court, or a matter of fact to be determined by the jury. But the court were of opinion, and so directed the jury, that if they should be of opinion from the evidence, that the defendant who endorsed the bill drawn by F. L. Taney in

Watson v. Brown, 14 Ohio, 473; Treon v. Brown, 14 id. 482; 2 Ohio St. 345; 6 Ohio St. 536; 26 Ohio St. 578; but not in criminal cases, 10 Ohio, 354.

A protest by notary public is the regular evidence of the dishonor of foreign bill. The notarial seal furnishes prima facie evidence that it is in due form. An impression on paper sufficient seal.

Carter v. Burley, 9 N. Hamp. 558; Chanoine v. Fowler, 3 Wend. 173; Conolly v. Goodwin, 5 Cal. 220; Bk. of Man. v. Slasson, 13 Vt. 334; Morris v. Freeman, 1 Dall. 193; Stewart v. Allison, 6 Serg. & R. 324.

Is evidence of non-payment, demand, due notice, and official character.

Jenks v. Doylestown, 4 Watts & S. 505; Brown v. Phila. Bk. 6 Serg. & R. 484; Kase v. Getchel, 21 Pa. St. 503; Hastings v. Barrington, 4 Whart. 486; Britain v. Doyl. Bk. 5 Watts & Serg. 87; Sherer v. East. Bk. 33 Penn. St. 134; 3 Brewst. 154; N. Y. Code of Civil Procedure, §§ 923, 924, 925.

The seal must be an official seal, a scrawl not sufficient.

4 Black. 185; 1 Ala. 127; 6 Black. 356.

(1.) The presentment of the note or bill of exchange must be made upon the third day of grace, at the place of payment, or to the payee, in business hours, in case no place of payment is named in the note.

Griffin v. Goff, 12 Johns. N. Y. 423.

Etheridge v. Ladd, 44 Barb. 69.

(2.) Demand is to be made on third day of grace at any time during business hours.

It is custom, if place of payment is a bank, to leave note there all the business hours of third day of grace, and that is a sufficient demand; but it is not *necessary* that it should remain there all day. A single presentment and demand at any time in business hours is sufficient; v. cases before cited, and,

Merchants' Bk. v. Elderkin, 25 N. Y. 178.

Nichols v. Goldsmith, 7 Wend. 160.

2 Hall (N. Y. Sup. Ct.) 112, Hill & D. Sup. 119.

(3.) Notice of protest *may* be given to indorsers on third day of grace before close of business hours.

Edwards on Bills, 615, 622.

Merchants' Bk. v. Elderkin, 25 N. Y. 178.

this suit, knew, at the time of such indorsement that the said Taney had no effects in the hands of the drawers, on which he could draw, notice of the non-payment, or of the protest therefor, was not necessary to enable the plaintiffs to recover, in this action, on the count for money had and received.

The fifth bill of exceptions, after repeating the evidence at length, stated that the defendant prayed the court to instruct the jury, that although they might be of opinion that Fenwick, the defendant, knew at the time of his indorsement that the drawer had no effects in the hands of the drawees on which he could draw, yet, to support an action, on the bill of exchange, against the defendant, it was necessary for the plaintiffs to give him reasonable notice of the protest of the bill for non-acceptance or non-payment, one or the other; and that, under the circumstances of this case, notice to the said 264*] Fenwick of *such protest for non-acceptance, or non-payment, in October, 1800, was not reasonable notice; whereupon the court were of opinion, and directed the jury, that if they were satisfied from the evidence that the defendant, at the time he indorsed the bill, knew that Taney had no effects in the hands of the drawees, upon which he could draw, still it was necessary for the plaintiffs, in order to support their action against the defendant, upon the first count in the declaration, to give him reasonable notice of the protest for non-acceptance, or for non-payment, one or the other; but whether, under the circumstances of this case, reasonable notice had been given to the said Fenwick, of the said protest, the court gave no opinion; being divided in opinion whether the same was matter of law to be determined by the Court, or matter of fact to be determined by the jury.

Verdict for the plaintiff, 439 dollars and 46 cents, and judgment accordingly; to reverse which the present writ of error was brought by the defendant.

Mason, for the plaintiff in error.

Simms and C. Lee, for the defendants.

Mason now waived the consideration of the first bill of exceptions, and relied upon the following points:

1st. That the protests ought not to have been admitted to be given in evidence, because Hanson, who made them, although he styles himself notary public, was not a notary public.

2d. That the protest for non-payment was not a sufficient protest to charge the indorser, because it was not made within the days of grace, but on the day after the last day of grace.

3d. That the notice of the non-payment given to the defendant, was not given in reasonable time; and did not come from an indorsee, but from Judah Hays, for whose use this suit is brought. The court, and not the jury, are to decide what is reasonable notice.

*4th. The letters of administration [*265 granted in Maryland, before the jurisdiction over the District of Columbia vested in the United States, do not authorize the plaintiffs to maintain an action, as administrators, within the district, after the transfer of the jurisdiction.

1st. That Hanson was not a notary public, and, therefore, the protest void.

A protest by a person having due authority, is the only evidence which can be received of the non-acceptance or non-payment of a foreign bill, to charge the indorser. Kyd, 136, 142. (87, 91.)

The only person who can have such due authority is a notary public. Kyd, 137. (87.)

With regard to inland bills and promissory notes, the statute of Anne, is adopted in Maryland, and the courts of Maryland are governed by the same rules, laws, and authorities as the English courts.

By the constitution of Maryland, § 48, notaries public are to be appointed by the governor and counsel. The 55th section declares, "that any person appointed to any office of profit or trust shall, before he enters on the execution thereof," take the oath therein prescribed, "and shall also subscribe a declaration of his belief in the Christian religion."

The act of assembly of Maryland, Feb. 1777, c. 5, prescribes an oath of office to be taken before the officer enters into the execution of his office.

The act of assembly, Nov. 1779, c. 25, § 2, ascertains his fees, and the 8th section prescribes the form of another oath to be taken, before entering on the duties of his office, under a penalty of 150*l*.

If a man assumes a character which he does not possess, and a seal to which he has no right, his acts are not obligatory. No man can constitute himself a notary public. If not duly appointed and qualified, his protest is not better than the protest of any other person. If *Hanson had not taken the oaths, and [*266 if he could not act until he had taken them,

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Corp. v. McComb, 1 John. Cas. 328.
Manhattan Co. v. Hackley, 3 John. Cas. 563.
Price v. Young, 1 McCord, 339.
Bk. of Alexandria v. Swann, 9 Pet. 33.
Lenox v. Roberts, 2 Wheat. 373.
Coleman v. Carpenter, 9 Barr, Pa., 178.
Ex par. Moline, 19 Ves. 216.
1 Carr & P., 556.

Earliest possible notice not required. General rule is next convenient—next practicable post.
Darbishire v. Parker, 6 East. 3 et seq. and notes.
Mead v. Engs, 5 Cow. 303.
Cuyler v. Stevens, 4 Wend. 566.
Howard v. Ives. 1 Hill 263.

Where party to be notified resides in same place as holder, holder has day after dishonor to give notice at dwelling, and business hours at place of business.
Jameson v. Swinton, 2 Taunt. 224.
Cayuga Bk. Co. v. Hunt, 2 Hill, 635.
Crosse v. Smith, 1 Maule & S. 545.
Parker v. Gordon, 7 East. 385.
Garnett v. Woodcock, 6 Maule & S. 44.

Where party to be notified, resides in different place, notice should be sent by mail of day after dishonor.

If that closes before early business hours, by next mail thereafter.
Fullerton v. Bank U. S., 1 Pet. 605.
V. S. v. Barker, 12 Wheat. 559.
Lenox v. Roberts, 2 id. 373.
4 Wash. C. C. 465.
Lawson v. Farm. Bk. 1 Ohio St. 206.
Carter v. Bailey, 9 N. H. 558.
Burgess v. Vreeland, 4 Zabriskie, N. J., 71.
Hart Bk. v. Stedman, 3 Conn. 489.
Eagle Bk. v. Chapin. 3 Pick. 180.
Story on Bills, § 288.
Harkell v. Boardman, 8 Allen, 40.
Chick v. Pilsbury, 24 Me. 458.
Stephenson v. Dickson, 24 Penn. St. 148.

Notice need not actually be received by indorser, if due diligence to reach him is shown.
Gawtry v. Doane, 51 N. Y. 84, and cases there cited.
Lambert v. Ghiselin, 9 How. U. S. 552.

then the protest is not by a notary; and it was competent to the defendant to give evidence to prove that he had not taken the necessary oaths.

2d. The protest for non-payment was made a day too late. The bill was presented for acceptance on the 30th of March. The last day of grace was the 1st of June. The protest was on the 2d day of June.

The custom as to the days of grace, and the mode of computation of time, is stated in Kyd, 9. (6.)

The bill must be presented for payment within the days of grace, and protested on the last day of grace. Kyd, 136, 142, (87, 97.)

Although the bill be protested for non-acceptance, yet it must be presented for payment at the time it becomes due, and regularly protested for non-payment. And although a right of action accrues upon the protest for non-acceptance, yet the holder is held to have discharged the drawer and indorsers, unless he presents it for payment when due, and regularly protests it for non-payment. Kyd, 117, 120, (76, 79, &c.) 121, 137, 138, 151, 208.

3d. The defendant had not such notice of the protests for non-acceptance and non-payment, as to render him liable.

The case of *Brown v. Barry*, 3 Dallas, 365, has no relation to this case. That was a bill drawn in America upon a person in Europe. This is a bill drawn in Europe on a person in America, and is therefore subject to the laws of the place where drawn and indorsed, as to the liability of the drawer and indorsers. The engagement of Fenwick, the defendant, was made in France, and his liability is to be determined by the laws there. The obligation of the drawer and indorsers is only conditional; the holder must do certain things to entitle him to call upon them. Kyd, 117. (76.) He is bound to give regular notice of non-acceptance to all the preceeding parties to whom he means to resort.

267*] *As to the protest being for want of funds in the hands of the drawees, it goes only to discharge the holder from his obligation to give notice to the drawer, but does not supersede the necessity of notice to the indorser. Kyd, 129, 131, (82, 83.) There is reason for this distinction. A drawer may have a good reason for drawing, although he has no effects in the hands of the drawee, but yet no injury can result to him by want of notice. But the indorser may know that the drawer has been in the habit of drawing; but may not know the exact state of the funds upon which he drew. The indorser indorses on the credit of the drawer; and notice is necessary to enable him to take measures to secure himself from the drawer

As to the time of notice; the non-acceptance was on the 30th of March, 1798, and on that day the holder's obligation to give notice accrued, but he did not give it until January or February, 1801. The act of congress did not stop the intercourse between this country and France, until 1st July, 1798. There is no evidence that any attempt was made during this time to send notice. The bill, in seven months, found its way from France to Georgetown, and what prevented its getting back again in seven months more? The evidence stated in the bill of exceptions shows that there was always a circuitous route by which letters and papers might have got to France. There is also evidence that the drawer was able to pay for some time after the drawing the bill, and that he afterwards left France. Notice must be given by the indorsee himself. Kyd, 126. (79, 80). The only notice which was given in this case was by Judah Hays, who is not a party on the bill.

The court, and not the jury, ought to have decided the question of reasonable notice, or due diligence. It is a question of law. Kyd, 126, 127. (79,80.) Notice must be given by the first post. The courts in Maryland have always so decided. If the court have not decided the question of due diligence, they have erred. They have also erred in the opinion which they did give. They admit that reasonable notice is necessary to enable the plaintiffs to recover upon the bill on the first count, but that, in case the defendant below knew that the drawer had no *funds in the hands of the drawees, it [*268 is not necessary to prove such notice in order to enable the plaintiffs to recover on the count for money had and received. It is not known on what grounds the court below could take such a distinction. There was certainly nothing in the evidence which could support such an opinion. If the holder had been guilty of such negligence as to discharge the indorser from his liability upon the bill, he was not entitled to recover upon either count. It was an objection which went to the whole merits of the case; and it is not like the case where a security or instrument may be vacated, but the debt still remain.

4th. The letters of administration, granted in Maryland, did not authorize the plaintiffs to administer assets in the District of Columbia.

The laws of Maryland, which were adopted

1.—See Evans on Bills, 62. and 67. Amer. edition.

The question of reasonable notice is a question partly of fact, and partly of law. It is a question of fact to be submitted to a jury, where the facts are doubtful, or disputed, contradictory, or complicated; but where they are clear and uncontradicted, or ascertained and established, it is a question of law for the court.

Wallace v. Agry, 4 Mason (U. S. C. C.) 336; Fry v. Hill, 7 Taunt. 397; Goupy v. Harden, 7 id. 159; Mullman v. D'Eguino, 2 H. Black. 565; Fernandez v. Lewis, 1 McCord, (So. Car.) 322; Nichols v. Blackmore, 27 Texas, 586; Chambers v. Hill, 26 Texas, 492; Field v. Nickerson, 13 Mass. 131; Kyd on Bills, 117; Bayley on Bills, 2d Am. Ed. 222 to 224; Edw. on Bills, 648; Rhett v. Poe, 2 How. (U. S.) 457; Bk. Utica v. Bender, 21 Wend. (N. Y.) 643; Walker v. Stetson, 14 Ohio St. 89; Belden v. Lamb, 17 Conn. 442; Wheeler v. Field, 6 Metc. (Mass.) 290; Chitty on Bills, 9 Am. Ed. 366; Taylor v. Bryden, 8 John. (N. Y.) 133; Bryden v. Bryden, 11 id. 187; Hussy v. Freeman, 10 Mass. 84, 86; Prescott v. Caverly, 7 Gray, (Mass.) 217; Darbishire v. Parker, 6 East. 3; Scott v. Lifford, 1 Camp. 248; Parker v. Gordon, 7 East. 386; Bk. of Alex. v. Swan, 9 Pet. 33; Scott v. Lunford, 9 East. 347; Bk. of N. Am. v. McKnight, 2 Dall. 158; Mallory v. Kirwan, 2 Dall. 233; Bk. of N. A. v. Pettit, 4 Dall. 129; Newark Bk. Co. v. Bk. of Erie, 63 Penn. St. 404; Kelsey v. Ross, 6 Blackf. (Ind.) 536; Wheeler v. Field, 6 Metc. 290; Haines v. Robinson, 4 How. (U. S.) 336; Bk. of Col. v. Lawrence, 1 Pet. 578; Ball v. Wardwell, Willes, 204; Aymer v. Beers, 7 Cow. 705; Mullick v. Radakissen, 28 Eng. L. & Eq. 86; Straker v. Graham, 4 M. & W. 721; Shute v. Robins, 3 Car. & P. 80; Wyman v. Adams, 12 Cush. 210; Mellish v. Rawdon, 9 Bing. 416.

If the drawer had no right whatsoever to draw the bill, or no reasonable ground to expect it would be honored, he is not entitled to notice of dishonor. Cranch 1.

by congress for this district, do not authorize an administration of assets under letters of administration granted in another state. And such has been the uniform course of decisions in the courts of Maryland; because, by the testamentary laws of Maryland, the administrator is to give bond, and render an account of his administration; and the assets are to be distributed in the manner prescribed by law.

Although this is the law of Maryland, and the laws of Maryland have been adopted in this district by congress; yet they do not operate as laws of Maryland, but as laws of the United States. And although the law is the same, yet the jurisdiction is different. This district, and the state of Maryland, are to each other as separate states.

Simms, for the defendants in error.

1st. As to the objection that the notary had not taken the necessary oaths.

It is believed that no case can be produced to support this exception. It would be extremely inconvenient if the acts of a commissioned ministerial officer should be considered as invalid, because he had neglected to take an oath prescribed by law.[1]

269*] *By the act of assembly of 1779, c. 25, § 8, a penalty is enacted for not taking the oath there mentioned. This does not make void the acts of the officer, if he neglects to take the oath required, but only subjects him to the penalty for acting without taking it. From this it may be inferred that the legislature considered his acts as valid.

The court did not err in refusing the evidence offered, because it was an attempt to prove a negative. The oath might have been taken before any judge, or justice of the peace, in the state of Maryland, or any alderman in the city of Annapolis. The law does not require such oath to be recorded, or deposited in any particular place. A party can never be called upon to prove that a notary public, who protests a bill of exchange, was duly qualified to make such a protest; consequently, the court ought not to admit evidence that he was not, so as to throw the burden of proof upon the other party. There is no penalty prescribed for not taking the oaths required by the constitution of Maryland, and by the act of 1779, but it does not follow from that circumstance, that the acts of the officer, duly appointed and commissioned, would be void by his not having taken the oaths, because he might be indicted and punished for his contempt of the law, and his neglect of duty. Innocent people ought not to suffer by his negligence, especially as they have no means of knowing whether he had taken the oaths or not. The public commission from the proper authority is all that can be required to protect the rights of third persons.

It is true that in the passage cited from Kyd, 136, (87,) it is said, that "the person whose office it is to do these acts" (that is, make protests, &c.) "is, in common language, termed a public notary;" but it is also said in Evans, 94, that when there is no public notary in the place, the protest may be made by any other person.

2d. As to the time of making the protest for non-payment.

The time when a protest ought to be made depends much on the custom of the place. 4 Bac. Abr. Gwillim's *ed. 687. The time in [*270 England was for a long while unsettled. In Salk. 132, *Hill v. Lewis*, it was determined that, with respect to foreign bills, the drawee had three days of grace to pay them in, and that no demand need be made till the expiration of the three days, consequently, that the protest need not be made till after the third day of grace. But in the case of *Tassel v. Lewis*, Ld. Ray. 743, it was held, that the time of payment is the last of the three days, and that the demand ought to be made on that day. In a late case of *Leftly v. Mills*, 4 Term Rep. 173, Lord Kenyon held, that the acceptor had till the last moment of the last day of grace to pay the bill, consequently, the protest could not be made till the day after. But Buller held that the acceptor was bound to pay the bill, on demand, on any part of the third day of grace, and that the bill ought to be protested on that day, and it is believed that such is now the established custom in England. Kyd, 120, 121, (79, 80.)

But the custom of merchants in the United States differs in some respects from the custom of merchants in England. *Brown v. Barry*, 3 Dall. 365, 368. It is believed that, in the United States, the custom is to protest on the day after the last day of grace. Such is the custom in the banks of Alexandria and Columbia, in the case of promissory notes; and no difference is known in that respect between promissory notes and bills of exchange. There is no reason why a difference should exist, as the three days of grace are allowed in one as well as in the other.

But in this case, the bill was protested for non-acceptance, and the defendant thereupon became liable to the action of the plaintiff. In

1.—Note. See the case of *Thurstan v. Slatford*, in the exchequer, 1 *Latw. Rep.* 377 8*vo.* edition, 1618, where it was held that the town clerk of Oxford was entitled to recover his fees accruing before he had taken the oaths.

Miser v. Torringer, 7 Ohio St. 281; Rogers v. Stephenson, 2 Term, R. 713; Bickerdike v. Bollman, 1 Term R. 405; 12 East. 171; 2 Camp. 217; 16 East. 43; Torry v. Fosse, 40 Maine, 79; Claridge v. Dalton, 4 Maule & S. 226; Warder v. Tucker, 7 Mass. 452; Savage v. Male, 5 Pick. 83; Hopkirk v. Page, 2 Brock. R. 20; Hoffman v. Smith, 1 Caines, 57; Valk v. Simons, 4 Mason, 113; Baker v. Gallinger, 1 Wash. C. C. 461; Ramdrelloliday v. Darieux, 4 Wash. C. C. 61; Waluyn v. St. Quintin, 1 Bos. & P. 652; Dofus v. Frosch, 1 Den. 367; French v. Bk. of Col., 10 Pet. 572; McKae v. Rhodes, 22 Ark. 315; Schuhardt v. Hall, 36 Md. 600; Louis. Bk. v. Buhler, 22 La. An. 83; Farm. Bk. v. VanMeter, 4 Rand. (Va.) 553; Golliday v. Bank, 2 Head. 57; Oliver v. Bank, 11 Humph. 74; Hollenweber v. Ketterlinus, 17 Penn. St. 389.

But the indorsers are entitled to strict notice, whether the drawer had drawn without funds, or had no right to draw.

Ralston v. Bullits, 3 Bibb. 261; Scarborough v. Harris, 1 Bay, 177; 3 Caines, 343; 1 Caines, 157; 16 M. & W. 743; 15 East. 222; Barton v. Baker, 1 Serg. & R. 334; Warder v. Tucker, 7 Mass. 452; Deaniston v. Imbrie, 3 Wash. C. C. 401; 4 Wash. C. C. 161.

If the indorser had funds sufficient to discharge the bill put in his hands by the party for whose accommodation the bill was drawn, or is fully indemnified, he is not entitled to notice.

Farm. Bk. v. VanMeter, 4 Rand. 553; McCoy v. Bk. U. S., 5 Ohio, 548; Kyle v. Green, 14 Ohio, 495; Devilling v. Ferris, 18 Ohio, 170.

Expectation, or knowledge, of the drawer, or indorser, that the bill or note will not be paid, are not excuses for not giving notice.

Brown v. Ferguson, 4 Leigh, 53; Esdale v. Sowerby, 11 East. 117; Staples v. O'Kines, 1 Esp. R. 332; 7 East, 359.

an action brought upon the non-acceptance, it is not necessary to aver a demand or protest for non-payment on the day when the bill becomes due; and what it is not necesary to aver, it is not necessary to prove; Lilly's Ent. 55, *Dunstar v. Pierce*, which was a case on a demurrer to the declaration; demurrer overruled, and judgment affirmed in the exchequer.

But had the bill been accepted, then a protest for non-payment would have been absolutely necessary. Evans, 66. Kyd, 140. Doug. 55. *Mil-*
271*] *ford v. Mayer*, Bull. N. P. *269. *Bright v. Purrier*, Kyd, 110, 111. 3 P. Wms. 16, 17.

3. Under the circumstances of the present case, the plaintiffs were not bound to give the defendant notice at all; the jury having found in substance, that at the time the defendant indorsed the bill, he knew that the drawer had no effects in the hands of the drawees; and was therefore guilty of a fraud on the plaintiff's intestate, in selling him the bill. The plaintiffs, therefore, had a right to recover on the count for money had and received.

Besides, the reason of the rule which dispenses with notice to the drawer, when the drawees have no effects, applies as strongly to the indorser who knows that fact, as to the drawer. Notice to such an indorser can be of no benefit, because he knew, at the time of indorsing, that the bill would not be paid, and, therefore, must have taken security from the drawer; or, if he did not, it was his own fault. By knowing at the time of indorsing that the drawees had no funds of the drawer in their hands, he virtually had notice of the non-acceptance and non-payment. The rule which requires notice to an indorser is made for his protection and benefit; and ought not to be converted into the means of enabling him to practise a fraud.

The opinion of the court below, that although notice might be necessary in order to support an action on the bill upon the first count, yet it was not necessary to maintain the count for money had and received, was certainly correct, and fully warranted by the case of *Bickerdike v. Bollman*, 1 Term Rep. 408, 409, 410. In that case Ashhurst, justice, says, that notice is not necessary to the drawer when he has no effects in the hands of the drawee; "for it is a fraud in itself, and if that can be proved, the notice may be dispensed with." Kyd, 129. (82.) Evans, 59. Every indorser is, to his indorsee, as the drawer of a new bill. Kyd, 113. (72.) 1 Salk. 133. *Harry v. Perrit*, 2 Show. 501. *Claxton v. Swift*, and in *Heylin v. Adamson*, 2 Burr. 674. Lord Mansfield, says, "that when a bill of exchange is indorsed, by the person to whom it was payable; as between the indorser and indorsee, it is a new bill of exchange, and the
272*] indorser *stands in the place of the drawer." If, therefore, the indorser, at the time he transfers a bill, knows that the drawer has no effects in the hands of the drawee, he is as guilty of fraud as the drawer himself; and in all cases where money is obtained from another by fraud of any kind, it may be recovered back in an action for money had and received. 2 Burr. 1012, *Moses v. Macferlan*, Salk. 28, *Hasser v. Wallis*. And in the case before cited, of *Bickerdike v. Bollman*, 1 Term Rep. 410. Buller, Justice, says, "Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this; A. not having any effects in C.'s hands draws a bill of exchange for 100*l.* on him, in favor of B. for value received. Now if C. does not accept, and B. does not give notice to A. there is an end of the bill. Then how does the case stand? A. has 100*l.* of B.'s in his hands, without any consideration, which, therefore, B. may undoubtedly recover in an action for money had and received."

The reasoning in that case applies exactly to the present. Here the defendant Fenwick, by his indorsement of the bill, acknowledges that he has received its amount. He has received of the intestate 350 dollars, without any consideration, and, therefore, even although the remedy on the bill might have been lost, he ought to recover the amount of the consideration on the count for money had and received.

It is true, that in the case of *Goodall v. Dolley*, 1 Term Rep. 712, it is said that the fact of the drawer's having no funds in the hands of the drawee, would not discharge the obligation of the holder to give notice to the indorser, to whom he meant to resort; yet it is also expressly stated that the indorser was ignorant of all the circumstances of the case. That opinion, therefore, cannot affect the present case, in which the indorser knew the circumstances.

As to the question whether reasonable notice is matter of law to be determined by the court, or matter of fact to be determined by the jury; the practice in England, until lately, was for the jury to determine, by the circumstances *of each particular case, what time was [*273 reasonably to be allowed either for making demand, or giving notice. Kyd, 127. (77.) Doug. 515. (497.) *Russel v. Langstaffe*, Doug. 681. *Rushton v. Aspinwall*.

In the case of *Tindall v. Brown*, 1 Term Rep. 167, Lord Mansfield says, that "what is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, &c. But whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty." And Ashhurst, justice, said it was "of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty."

It appears to have been the opinion of both these judges, that there were certain cases in which it was proper for the jury to determine on the reasonableness of notice; but that in cases where a rule can be laid down, the court ought to decide the question. No certain rule can be laid down, except in cases where the parties live in the same place, or where there is a constant and regular communication by post between them.

In a much later case, 2 H. Bl. Rep. 569, it was determined that what was reasonable time must depend on the particular circumstances, and it must be always for the jury to determine whether any laches is to be imputed to the plaintiff.

In the case of *Mackie v. Davis*, 2 Wash, 231,

Carrington, Justice, says, "whether due diligence had been used by the assignee to recover against the obligor would necessarily be a matter in issue between the parties; and would, upon all the circumstances of the case, be decided by the jury."

1 Dall. 252, is to the same effect. A case to 274*] the same *effect also has been mentioned as having been decided in the circuit court of the United States, in Virginia, by Judge Wilson.

The instruction of the court below to the jury, that reasonable notice was necessary to charge the defendant on the first count, was not objected to by the plaintiff's counsel; but the Court not having instructed them whether the notice was or was not reasonable, and a general verdict for the plaintiffs having been given, it is to be presumed that the jury thought the notice was reasonable under all the circumstances; and they were certainly competent to decide that question.

The decisions, that notice must come only from the indorsee or the holder, have been since overruled. Evans, 57.

3. As to the letters of administration.

An administrator, in the United States, ought not to be considered precisely in the same point of view as in England.

In England, he is the servant or agent of the ordinary, and acts in his place and stead.

In the United States, he is the representative of the intestate; and all the rights and credits of the intestate are vested in him.

Formerly, in England, the goods of an intestate were disposed of by the bishop or ordinary to pious uses. It was not until the statute of 13 Edw. I. c. 19, that the bishop or ordinary was compelled to satisfy the debts of the intestate as far as the goods, which came to his hands, would extend.

After this statute, an action might be brought against the ordinary in the same manner as against an executor; but he was not compellable to grant administration until the statute of 31 Edw. III. c. 11.

From this relation between the ordinary and the administrator, the power of the latter was 275*] necessarily limited *by the jurisdiction of the former. But the act of congress concerning the District of Columbia puts the question out of doubt. By that act the laws of Maryland are continued in force in this part of the district; of course, all rights acquired under the laws of Maryland remained valid. It was not the intention of congress to devest any rights which had been acquired under those laws. If the separation of the district from Maryland took away the right which the plaintiffs before possessed of taking possession of the property, and collecting the debts of the intestate, in this part of the district, under their letters of administration granted in Baltimore county, it would have the same effect upon letters granted by the orphans' courts of Montgomery and Prince George's counties, before the separation, to persons resident in the district, so that their acts, done since the separation, are unauthorized, and they cannot lawfully act until new administration has been taken out from the orphans' court within the district. The inconvenience, expense and oppression of such a construction, are too obvious to admit the supposition that it was within the intention of congress.

These letters were taken out from proper authority, and at the time vested a right in the plaintiffs to administer the assets within this part of the district.

C. Lee, on the same side.

1st. As to the letters of administration.

Admitting that letters of administration, granted out of the state of Maryland, will not authorize an administration of assets within the state, yet in this case the letters were granted in Maryland, while this district was part of Maryland, before the first Monday of December, 1800, and did once authorize an administration of the assets here. A right was completely vested in the plaintiffs. The laws of Maryland are as fully in operation in this district as they were or are in the state of Maryland. Congress could not mean to divest rights completely vested.

2d. As to the second bill of exceptions.

It is admitted that Hanson was duly appointed notary, but the objection is, that he had not taken the oath. The *exception is not [*276 the opinion of the Court that he was not duly qualified to act; but simply that it was not competent for the defendant to give the evidence offered to prove that he had not taken the oaths. The intention of an oath is only to impose an additional obligation on the officer. It is a matter between the officer and the government; and generally a penalty is imposed for not taking it; but the not taking the oath does not make the act void. Suppose a member of the legislature should not take the oath prescribed, this would not vacate a law to which he had given his assent. Such a doctrine would produce infinite inconvenience. No time is limited for making the objection; and twenty years after an act has been done, it may be offered to be proved that the officer did not take the oath; if the court would do right in refusing such evidence in that case, they were right in refusing it in the present.

3d. The third bill of exceptions is, that the court admitted the protest for non-payment to go to the jury, when it was not made in due time.

The action being for non-acceptance, and not on the protest for non-payment, it was not necessary to produce that protest at all. The objection is, that it was not made on the last day of grace, but on the day after.

The custom is different in different countries. From the general practice of the banks, it may be considered as the general rule in this country to protest on the day after the last day of grace.

The protest for non-acceptance is not objected to; it was made on the day on which the bill was presented.

The court only refused to give the direction as prayed, but gave no opinion that the protest was a good one.

4th. As to the fourth bill of exceptions.

This record does not state the whole evidence in the cause. It is true it is said that this is all the evidence given of notice; but it does not state what other evidence there might be to excuse the want of notice. This exception *may be divided into three points; 1st. [*277 As to the opinion prayed; 2d. As to the con-

duct of the court in not giving an opinion as to part of the prayer; and, 3d. As to the opinion which the court did give.

The prayer is to instruct the jury that it was necessary to prove notice of non-payment as well as of non-acceptance. The plaintiffs, if any body, had a right to complain of the opinion of the Court, inasmuch as it did not declare notice of non-payment to be unnecessary. But they have waived their right to accept. The opinion given is what is excepted to, and that was given only on the count for money had and received.

The bill and indorsement are stated to have been made in France. The law of France, then, is the *lex loci* by which this cause is to be decided, and by which the liability of the indorser is to be ascertained. By that law no notice is necessary to the drawer or indorser, if there are no effects of the drawer, or of the indorser, in the hands of the drawee. Evans, 60, 62.

And what is meant by funds, is not securities lodged for raising money, upon which the money has not been raised; but is money in account. 2 Esp. Rep. 515. Evans, 62.

As to the ground of fraud, the Court left it to the jury to decide whether the defendant knew that the drawer had no funds in the hands of the drawees. If he did know it, is it not as much a fraud as in the case of a drawer drawing without funds? It is, in fact an accumulated fraud. If, according to Justice Ashhurst, one is a fraud, the other must be a greater fraud.

As to due diligence, the exception is not that no notice was given, but that it was not given in due time. No doubt but that by the laws of England, due notice is necessary as a general rule. But to this there are exceptions.

There is an American law on this subject, which is, that in some cases the jury, and not the court, is to decide what is laches. When a particular case arises, and a variety of circumstances are given in evidence in excuse 278*] *for not giving notice sooner, there by the American practice, the jury are to decide. This appears by the decisions in Pennsylvania down to the year 1795. 1 Dall. *Robertson v. Vogle.* 2 Dall. 158. *Bank of N. America v. M'Knight.* 2 Dall. 192, 233. 1 Call's Rep. 123. *M'Williams v. Smith.*

In this country the line is more distinctly drawn between court and jury than it is in England. By the 9th article of the amendments to the constitution, a matter once tried by a jury shall not be otherwise re-examined than by a jury according to the rules of the common law. If the court now make a rule as to what is due diligence in this case, they will, without a jury, try a fact which has once been decided by the jury in the court below.

If the question involve matter of fact with the law, the jury must decide the facts; and it is no error in the court to suffer them to decide the law also at the same time.

When a rule can be laid down, then the court is to state the rule. But where that cannot be done, then it may be left to the jury. This is all that Lord Mansfield says in the case of *Tindall v. Brown.*

5th. The fifth is an exception to the opinion which the court gave, and not to the conduct of the court in not giving an opinion. The opinion given was against the plaintiffs below, and they alone had a right to except to it.

There was a decision of Chief Justice Jay, given upon the circuit, similar to that given by Judge Wilson, that the jury, and not the court, were to judge of the validity of excuses for giving notice.

The judgment ought not to be reversed because the court below did not give an improper instruction to the jury.

It is hoped that the court will decide the question of notice, as it is of great importance that a general rule should be established and understood.

*Mason, in reply. [*279

1st. As to the letters testamentary.

Antecedent to the revolution, the testamentary affairs in the state of Maryland were under the superintendence of a commissary general, who had a deputy in each county. If there were *bona notabilia* in several counties, the administration was granted by the commissary general. But if the goods of the intestate were all in one county, it might be granted by the deputy commissary of that county. By the new system of testamentary laws, 1798, c. 101, s. 3, the assets in Maryland cannot be administered but by letters of administration granted in Maryland.

In the District of Columbia, if a man now die intestate, the administration must be granted in the district.

The laws of Maryland do not operate in the district as laws of Maryland, but as laws of the United States. Their obligatory force is not derived from the state of Maryland, but from the United States.

Does the fact that the letters were granted before the separation of the district from Maryland, make any difference? If any right had vested, what was it? Was it a right to sue Fenwick who was then in France, and who came to the district after its separation?

But no right at all had vested in the plaintiffs. If the separation had not taken place, and Fenwick had come, they might have sued; but as it had taken place before he came, they cannot.

By the laws of this part of the district, the administrator must give bond duly to administer the estate, and to pay the debts *pari passu.* He must advertise in a certain manner, &c. The only evil resulting from this construction of the law is, that plaintiffs must take out letters of administration here.

2d. As to the second bill of exceptions. The question is, whether Hanson was a notary before he took the oath *prescribed by the [*280 law of 1779. The constitution says, that before he enters upon the execution of the duties of his office, he shall take the oath of allegiance. The law of 1779 says, he shall take the other oath therein prescribed, and if he acts without having taken it, he shall be subject to a penalty. The constitution and the law are to be coupled together, and then the taking the oath prescribed by the act of 1779, becomes a prerequisite to his capacity to act as a notary.

3d. The third bill of exceptions is, that the protest for non-payment was not a proper one to go to the jury. It was not in itself evidence. It is no answer to say that no protest for non-payment was necessary; the counsel below did not choose to risk their cause without it. If

the opinion of the court is erroneous, and if the protest was improperly admitted to go to the jury, the judgment must be reversed. It may be a good reason why the court should refuse to let it go to the jury, that it was not necessary. It is, therefore, unimportant to decide whether it was necessary or not. But that it was necessary appears in Kyd, 120, 137, 138, (77, 87.)

As to the case of the notary who refused sixpence for noting the bill. 4 Term Rep. 173. It is the opinion of Lord Kenyon only, that the acceptor had till the last moment of the last day of grace to pay the bill; and that was the case of an inland bill, and decided expressly upon the statute of William. But Buller states the law to be otherwise on a foreign bill, and that, by the custom, the bill is payable at any reasonable time of the last day of grace when demanded. And the law is so stated in Kyd, 121. (78.) The practice in Alexandria may be as stated, but in Baltimore they protest on the third day, in banking hours. There is a difference between the law respecting inland and foreign bills; and this difference arises from the statute of William, which gives the protest on inland bills, and requires it to be made after the expiration of the three days. Kyd, 151. (91.) It is upon this statute, which is in force in Maryland, that the banks have adopted the practice of protesting promissory notes on the day after the expiration of the three days of grace. A promissory note, as soon as it is indorsed, becomes an inland bill of exchange.

281*] *4th. It is objected to the fourth bill of exceptions that it does not contain the whole evidence. But if a bill of exceptions states evidence, it has been decided by this court that it is presumed to state the whole evidence. 3 Dall. 19, 38. *Bingham v. Cabott.*

It is said that the exception is not to the refusal of the prayer, but to the opinion which was given. If the opinion prayed was correct, and the court refused to give it, or, by being divided failed to give the instruction to the jury as prayed, it is error. The court will disregard the inaccurate form of words, and come at the substance of the exception.

As to the want of funds in the hands of the drawees, the court are to presume that the whole evidence is stated in the exception. We deny the principle that such funds can be only money in account. There was reason for Fenwick to believe that the drawees had funds, and he ought, therefore, certainly to have had notice. There is not the least ground for a suspicion of fraud in Fenwick.

As to the count for money had and received, it is a common law count; but upon that count the plaintiff cannot recover by means of evidence resulting from that bill, unless they have done everything to entitle them to recover upon the bill itself, by using due diligence, giving due notice, &c.

It is said that the indorsement was made in France, and, therefore, the law of France is to decide the responsibility of the indorser; and that by the law notice is not necessary to the indorser, if neither the indorser nor the drawer has funds in the hands of the drawee; and Evans is cited as the authority. It is doubted whether Evans is correct in that position; but whether correct or not, it does not apply, because the money was to be paid here, and the contract is personal. If Fenwick had been sued in France it might have applied, but being sued here, the law of this country must decide his case.

As to the questions what is due notice, and whether it be a matter of fact or of law, the decisions cited from Dallas are no authorities in this case. They all turned *upon the [*282 laws of peculiar states. This court is to be governed by the law of the place where the transaction happened, unless where the laws of the United States apply. The court, in this case, are to decide by the laws as they exist in Maryland; and there the laws of England respecting bills of exchange and promissory notes have always been the rules of decision. We are not in Maryland to be governed by whimsical opinions drawn from either Pennsylvania or Virginia. Virginia has not been remarkable for her progress in commerce; and were I to form a system of commercial law, I should certainly not draw it from the fantastical opinions adopted in either of those states.

In England, what is due notice has been and is settled and determined to be matter of law to be decided by the court.

On the 25th of February, the Court gave the following judgment:

"It is decreed by the court that the defendants Stricker and Payson, not having obtained letters of administration in the District of Columbia, were not competent to maintain this action; and that the circuit court of he United States in and for the said district erred in overruling the demurrer. It is, therefore, considered by the court, that the judgment of the said circuit court, on the said demurrer, be, and the same is hereby reversed, and that judgment thereon be rendered for the defendant in the original action.[1]

THOMPSON *v.* JAMESON.

An action of debt for 860*l.* 12*s.* 1*d.* founded on a decree in chancery, is not supported by a decree for 860*l.* 12*s.* 1*d*, with interest from a certain day to the day of rendering the decree. But the variance is fatal. Upon an attachment in chancery under the laws of Virginia, the record stated that "I.T. in open court became security that I. H. (the absent debtor) shall perform the decree of this court if against him."

Quære, whether an action of debt will lie against I. T. for the amount decreed against I. H.

ERROR from the circuit court of the District of Columbia, sitting in Alexandria.

*Thompson, in the year 1795, being [*283 indebted to Hadfield, a person residing out of the jurisdiction of the commonwealth of Virginia, and Hadfield being indebted to Jameson & Brown as partners in merchandise, the latter obtained from the county court of Fairfax an attachment in chancery, in the nature of a foreign attachment, to stay the effects of Hadfield in the hands of Thompson, under an act of as-

1.—The reporter was not in court when this judgment was entered, but he has understood that the Court did not assign the reasons upon which their opinion was grounded; and gave no opinion upon the other points. *See Evans on Bills*, 67, 68, 69, 70, 71, *as to notice.*

sembly of Virginia, entitled "An act directing the method of proceeding in courts of equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors." Rev. Code, p. 122, c. 78. This act directs, "that if in any suit which hath been or hereafter shall be commenced for relief in equity, in the high court of chancery, or in any other court against any defendant or defendants who are out of this country, and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, and the appearances of such absentees be not entered, and security given, to the satisfaction of the court, for performing the decree; upon affidavit that such defendant or defendants are out of the country, or that upon inquiry at his, her, or their usual place of abode he, she, or they could not be found, so as to be served with process; in all such cases the court may make any order, and require surety, if it shall appear necessary, to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands, of such absent defendant or defendants; and for that purpose may order such debts to be paid, and effects delivered, to the said plaintiff or plaintiffs, upon their giving sufficient security for the return thereof, to such persons, and in such manner, as the court shall direct." It further provides, that the court shall appoint some day in the succeeding term, for the absent defendant to enter his appearance, and give security for performing the decree; and shall order notice to be published, &c.; and if the absent debtor shall not appear and give such security, within the time limited, the court may proceed to take such proof as the complainant shall offer; and if they shall thereupon be satisfied of the justice of the demand, they may order the bill to be taken as confessed, and make such order and decree therein as to them shall seem just, and may enforce due performance thereof, &c.

284*] *In the record of that case in Fairfax county court, it is stated, "that at a court continued and held for the said county, on the 18th day of June, in the year last mentioned, came the complainants aforesaid, by their attorney, and thereupon Jonah Thompson, in open court, became security that the said Joseph Hadfield shall perform the decree of this court, if against him; and on motion of the said defendant, Joseph Hadfield, by his attorney, the attachment is discharged as to the effects in the hands of the other defendants." The court, at a subsequent term, on the 19th of November, 1799, decreed, that "it having appeared to the satisfaction of the court, that the complainant's bill hath been duly taken for confessed, after his appearance by attorney, and giving security for performing the decree against him, the court doth adjudge, order and decree, that the complainants do recover against the said Joseph Hadfield, the sum of eight hundred and sixty pounds twelve shillings and one penny, sterling, (to be settled in Virginia currency, at the rate of twenty per cent. exchange,) together with interest on the same, at the rate of five per cent. per annum, from the 8th day of March, 1795, until the day of pronouncing this decree, and also his costs, by him expended in the prosecution of his bill here."

Hadfield having failed to perform this decree, and Brown, the partner of Jameson, being dead, Jameson brought the present action of debt in the circuit court of the District of Columbia against Thompson, founded upon his responsibility as security for Hadfield's performing the decree. The declaration was "of a plea that he render unto him the sum of eight hundred and sixty pounds twelve shillings and one penny, sterling, of the value of one thousand thirty-two pounds fourteen shillings and sixpence, Virginia currency, equal to three thousand four hundred and forty-two dollars and forty-one cents, United States currency, which to him he owes, and from him unjustly detains; for this, that whereas," &c. setting forth the substance of the proceedings on the attachment in Fairfax county court, "and whereas afterwards, that is to say, at a court held for the said county of Fairfax, on the 18th day of June, 1795, at the county aforesaid, the said Jonah, in open court, became security that the said Joseph would perform the decree of the said court in the said suit, if against him; *in which [*285 said suit such proceedings were had, that the said court of the county of Fairfax, on the 19th day of November, that is to say, at the county of Alexandria aforesaid, did adjudge, order and decree, that the said Robert B. Jameson & Co. should recover from the said Joseph, the said sum of 860*l.* 12*s.* 1*d.* sterling, (to be settled in Virginia currency, at the rate of twenty per cent. exchange,) together with interest on the same, at the rate of 5 per centum per annum, from the 8th day of March, 1795, until the day of pronouncing the said decree, and also their costs by them expended in the prosecution of the said bill. All which by the record thereof, now remaining in the office of the county court of Fairfax, will more fully and at large appear. And the said Robert B. Jameson, in fact avers, that the said Joseph has not in any manner performed the decree of the said court of Fairfax county, in the cause aforesaid made, in this, that he has not paid to the said Jameson & Co. in the lifetime of the said Brown, nor to the said Jameson, who has survived the said Brown, the said sum of 860*l.* 12*s.* 1*d.* sterling, or the value thereof in Virginia currency, at the rate of exchange in the said decree mentioned, with interest thereon as awarded by the said decree; which said decree, in form aforesaid, yet remains in full force and effect, not reversed or satisfied; by reason whereof, action accrued to the said Jameson & Co. to demand and have from the said Jonah; the said sum of 860*l.* 12*s.* 1*d.* sterling, of the value aforesaid. And the said Jameson further avers, that the said Brown, on the day of , in the year departed this life, to wit, at the county of Alexandria aforesaid, whereby the said cause of action survived to the said Jameson. Nevertheless, the said Jonah the said sum of 860*l.* 12*s.* 1*d.* sterling, of the value aforesaid, or any part thereof, to the said Jameson & Co. in the lifetime of the said Brown, or to the said Jameson, since his death, has not paid, &c. to the damage of the said Jameson, five hundred dollars, and therefore he brings suit," &c.

There was an office judgment at the rules in November, 1801, which was not set aside

at the next succeeding court in January, 1802. At April term, 1802, the defendant's counsel moved to set aside the office judgment on 286*] *pleading *nil debet*. The court being divided on the propriety of that plea to an action founded on the record of a court of one of the states, the plea was not received, and a bill of exceptions was taken by the counsel for the defendant, and signed by the judge who was against the admission of the plea. The pleas of *nul tiel* record and payment were then filed, and issues made up on which the cause went to trial. The verdict upon the issue of payment was in these words: "we of the jury find for the plaintiff the debt in the declaration mentioned, and one cent damages, to be discharged by the payment of two thousand and five hundred and forty-four dollars and forty-nine cents.

And the defendant moved in arrest of judgment for the following reasons:

1st. Because the action is brought for sterling money, when it appears by the plaintiff's own showing in the declaration, that the original sterling debt has been changed by the decree of the county court of Fairfax, into the current money of Virginia.

2d. Because the plaintiff, in his declaration, declares for a sterling debt, and lays his damages in current money.

3d. Because the jury have found their damages in current money, and have fixed the sum in current money, at which the said sterling debt might be discharged.

4th. Because it doth not appear by the plaintiff's declaration what was the nature of the defendant's undertaking as security, whether it was by record, by bond, or by parols.

5th. Because the whole proceedings are irregular, informal and erroneous.

These reasons not being deemed sufficient by the court below, judgment was rendered for the plaintiff for "860*l.* 12*s.* 1*d.* sterling of the value of 1,032*l.* 14*s.* 6*d.* Virginia currency, equal to three thousand four hundred and forty-two dollars and forty-one cents, United 287*] *States currency, the debt in the declaration mentioned, and one cent damages, by the jurors aforesaid, in form aforesaid assessed, and also his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be discharged by the payment of 2,544 dollars and 49 cents."

To reverse this judgment, the defendant below sued out the present writ of error.

Swann, for the plaintiff in error.

E. J. Lee and Key, for the defendant.

Swann. 1st. The declaration does not show any obligation on Thompson, upon which this or any other action will lay.

2d. If it does, it is not such a one as will support an action of debt.

3d. If an action of debt will lay, still this action will not, because it is brought for part of the debt only.

4th. The action is brought for sterling money, whereas it ought to have been brought for Virginia currency.

5th. If properly brought for sterling money, the court below ought to have rated the exchange.

1st. The record simply states, that "the said Jonah (Thompson) in open court became security;" but does not state how; whether by bond, by parol, or by matter of record. It is only a record declaration that he became security.

2d. The record states, that he became security that Hadfield would perform the decree of the court, if against him; and not that Thompson would pay the debt, or that he undertook to pay any sum of money whatever. Nor does it state that he became bound in any particular sum. It does not state that he undertook to pay the debt *if Hadfield did not. There [*288 is nothing to support an action of debt. It is, if any thing, a collateral undertaking; and if any action will lay, it must be covenant. To support an action of debt, there must be a direct obligation on the part of the defendant, moving to the plaintiff, to pay a certain sum, or a sum which may be rendered certain.

3d. The declaration is for 860*l.* 12*s.* 1*d.* sterling of the value of 1,032*l.* 14*s.* 6*d.* Virginia currency, equal to 3,442 dollars and 41 cents, United States currency. This is not the whole debt due by the decree. You must sue for the whole debt, or, if you sue for a part, you must state the residue to be satisfied.

The decree of the court of Fairfax was rendered on the 19th of November, 1799, and was, that the complainants recover against Hadfield the sum of 860*l.* 12*s.* 1*d.* sterling, (to be settled in Virginia currency at the rate of 20 per cent. exchange,) together with interest on the same at the rate of 5 per cent. per annum, from the 8th of March, 1795, until the day of pronouncing that decree, (19th November,) 1799, and also his costs by him expended in the prosecution of his bill. The debt was composed of the principal sum reduced to Virginia currency at 20 per cent. exchange, and interest thereon at 5 per cent. per annum, calculated from 8th of March, 1795, to the 19th of November, 1799, and costs. But the declaration is only for the principal. It is, therefore, only for a part of the debt, and does not state the residue to be satisfied. A debt cannot be divided, and the reason of the law is, that a multiplicity of actions may be prevented. 3 Mod. 41, *Marsh v. Cutler*, Cro. Jac. 498, 499, *Pemberton v. Shetton*.

4th. The debt was originally due from Hadfield in sterling money, but the debt due by the decree is a current money debt. The decree has changed it from sterling to currency.

It is an express command that it shall be settled in current money, at a certain rate. It is no longer a sterling debt. If an action of debt will lay for it, it must be laid as a debt due in Virginia currency.

5th. But if it is a sterling debt, then the court below ought, under the act of the Virginia assembly, (Rev. Code, *p. 121, c. 77, s. 6,) [*289 to have fixed the rate of exchange. The verdict ought to have been simply for the sterling debt and damages; but the jury have gone on and said that the debt should be discharged by the payment of 2,544 dollars and 49 cents: and the court have rendered judgment in the same manner, without fixing the rate of exchange.

6th. The declaration states the decree to have been made on the 19th of November, but does not say in what year. This omission was fatal on the plea of *nul tiel* record.

E. J. Lee, for the defendant in error.

1st. The record states the obligation of Thompson in the very words of the act of as-

sembly. It is the highest obligation which he could have entered into. It is an acknowledgment on record, and is stronger than his bond. Its meaning is evident from the intention of the act of assembly; and is simply this, that Hadfield should pay the money decreed to be due, and if he did not, that Thompson would pay it for him.

2d. To the objection that this is not such an obligation as will support an action of debt, the answer is, that it is in the nature of a recognizance in chancery, and an action of debt will lie on such a recognizance. 1 Esp. N. P. 216.

3d. The case in 3 Mod. does not apply to the present. There the action was upon a judgment. Here it is upon the obligation or recognizance of Thompson. We have declared for as much as was due from Hadfield, and no more. The obligation of Thompson was to pay what Hadfield should fail to pay. Our action is for this. The record of Fairfax court, which is made part of the declaration, shows how the residue was discharged.

4th. The court of Fairfax did not convert the debt into Virginia currency. They only fixed the principles on which the exchange should be made. The decree is for sterling, to be discharged in current money at a certain rate of exchange.

290*] *5th. It is the province of the jury, and not of the court, to fix the value of sterling money. 1 Wash. 373, 378. *Barnet et al. v. Watson et al.*

6th. Although the year of the decree is not stated in the declaration, yet enough is stated to render it certain.

Key was to have argued on the same side, but on examination of the record of the decree in Fairfax, and comparing it with the declaration; and finding the decree to be for 860*l.* 12*s.* 1*d.* sterling with interest from a certain day to the day of passing the decree, and the declaration being only for the principal, he considered the variance as fatal. He had not before noticed accurately the words of the decree, but had supposed the interest did not stop at any certain day, but was, by the decree, to run till the time of payment. He did not understand that this point had been made in the court below, and, therefore, had not before examined the record with a view to it.

The Court gave no opinion upon the other points, but, considering this variance as fatal, Reversed the judgment.

The *Chief Justice* observed, that there was no clause in the declaration stating that Thompson undertook to pay if Hadfield did not, and therefore an action of debt would not lay.

MANDEVILLE & JAMESON
v.
JOSEPH RIDDLE & CO.

In Virginia, an indorsee of a promissory note cannot maintain an action against a remote indorser for want of privity.

ERROR from the circuit court of the District of Columbia, sitting at Alexandria, in an action on the case brought by the defendant in error for money had and received, which was the only count in the declaration; and to which the defendant pleaded the general issue.

*The evidence offered and admitted [*291 to support the declaration was a promissory note made by Vincent Gray, dated at Alexandria on the second of March, 1798, by which he promised to pay, sixty days after date, to the order of Mandeville & Jameson, 1,500 dollars for value received, negotiable at the bank of Alexandria. This note was indorsed by Mandeville & Jameson to James M'Clenachan, and by him to Joseph Riddle & Co., the defendants in error. The protest of a notary public, made on the fifth May, 1798, attesting that he had on that day demanded payment of the note of the maker, who refused, and of Mandeville & Jameson, the first indorsers, who also refused, and that James M'Clenachan, the other indorser, did not dwell in his district. The record of a suit on the same note brought by Joseph Riddle & Co., on the 14th of June, 1798, against Vincent Gray, the maker, prosecuted to final judgment and execution, upon which execution he was committed to gaol, and took the oath of an insolvent debtor, and was discharged on the 6th of February, 1799.

The present action was commenced in July, 1801.

A bill of exceptions was taken by the defendants below, stating these facts, and that they prayed the opinion of the Court:

1st. Whether this action could be sustained by the present "plaintiffs against the present defendants, there being an intermediate indorser between them;" and,

2d. "Whether, if the said action is sustainable, the said evidence is admissible upon a single count for money had and received;" and that the opinion of the court below was, that the action might be sustained, notwithstanding the intermediate indorser; and that the evidence was admissible upon the single count for money had and received. Verdict and judgment for the plaintiffs for 1,919 dollars, and costs; to reverse which the defendants below sued out the present writ of error.

E. J. Lee and Swann, for the plaintiffs in error.

Simms, for the defendants.

*E. J. Lee. 1st. The action of *indebitatus assumpsit* will not lay for the holder [*292 against a remote indorser, because there is no privity of estate or privity of contract. It is an action at common law; and by the common law no action of *indebitatus assumpsit* for money had and received will lay except between privies. Kyd, 175, (113, 114.)

2d. There being only one count in the declaration, and that being only for money had and received, the note ought not to have been given in evidence, because it must have been a surprise to the defendants. In England it is usual to give notice of the plaintiff's real ground of action either by a special count, or by a formal notice. The defendants could not come prepared to defend the action. The action for money had and received is said to be in the nature of a suit in equity. But here the defendants were in a worse situation than if a bill in chancery had been filed against them; for in that case the bill must have stated the grounds of the claim, and shown the equitable circumstances which entitled the plaintiffs to recover.

A remote indorser is liable to the holder only upon the custom of merchants, and, therefore, there ought to have been a special count stating the custom.

The English statute of Anne respecting promissory notes is not in force in Virginia; and the act of assembly which supplies its place only allows an assignee to bring an action of debt in his own name against the maker of the note, but gives no remedy against the assignors. Hence it results that the remedy of the assignee against the assignors is either at common law, or under the custom of merchants. By the common law the action of *indebitatus assumpsit* lies only between privies; and here is no privity. And if resort be had to the custom of merchants, that custom must be averred in the declaration.

Simms, contra.

Every indorser is as the maker of a new note. 1 Stra. 479, *Smallwood v. Vernon*, Esp. N. P. 293*] 33. 2 Burr. 674. **Heylin v. Adamson.* He undertakes to pay the sum mentioned in the note, if the original maker does not. As soon as the original maker fails to comply with his engagement, that of the indorser becomes absolute. He then becomes the holder of so much money as is expressed in the note, to the use of his immediate indorsee, or of such person as he shall name.

It is true the plaintiffs below have sought their remedy at common law; and by common law they are entitled to recover. Every man ought to be compelled to pay money which he has in his hands belonging to another, and which in equity and good conscience he has no right to retain. And the principle is now well established, that at common law he may be compelled to pay it by an action for money had and received.

As to the evidence offered on this count, it was long doubted, before the statute of Anne, whether any other than an action of *indebitatus assumpsit* for money had and received, or for money lent, would lay upon a note. This was the ground of contention between Lord Holt and the merchants of Lombard street; he strenuously contending that the action for money had and received, or for money lent, was the only proper remedy; and they endeavoring to bring into use the form of declaring upon a note as a specialty. Although a note may now, under the statute, be declared upon as a specialty, yet the statute has not taken away the common law remedy which existed before.

As to surprise, the objection made would go to almost every case where money had and received is the proper action; such as where the consideration happens to fail, or where money has been paid by mistake, &c.

Indorsement is evidence that the indorser has received money of the indorsee. And at and from the time of the indorsement, the indorser is debtor to the indorsee, and the debt may be proved under a commission of bankruptcy against the indorser before the note is payable.

In this case, however, there could be no surprise; the defendants below had notice of the non-payment of the note, and that they would 294*] be held liable; and it is immaterial* by what means notice is given. Doug. 138. *Longchamp v. Kenny.*

In the case of *Grant v. Vaughan*, 3 Burr. 1516, the cases upon promissory notes before the statute of Anne are taken up and considered with great clearness and ability by the Court. Every principle established in that case furnishes an argument for the original plaintiffs in this. The case there was, that Vaughan drew a check or order on his banker in these words: ("pay ship Fortune or bearer 70*l.*") and gave it to Bicknell, who lost it. It was found by some person and honestly taken in payment for goods by the plaintiff, in his way of trade as a mercer. Payment of the check being stopped at the banker's, the plaintiff brought suit against Vaughan, the drawer, and declared upon an inland bill, and for money had and received to his use. It was held that these notes are, by law, negotiable, and were so before the statute of Anne, and that the bearer of them might maintain an action as bearer, where he could entitle himself to them on a valuable consideration. and for this was cited *Hinton's Case*, 2 Shower, 235, in the reign of Charles II.

Crawley v. Crowther, 2 Freeman, 257, in the year 1702, before the statute of Anne.

1 Salk. 126, pl. 5. *Anonymous*, 10 Wm. III. and *Miller v. Race*, 1 Burr. 452, 31 Geo. II.

That the only dispute before the statute of Anne was as to the mode of declaring; but that it never was disputed "that an action upon an *indebitatus assumpsit* generally for money lent, might be brought upon a note payable to one or order;" and cites 2 Lord Raym. 758, *Clerke v. Martin.* "That upon the second count," Lord Mansfield said, "the present case is quite clear, beyond all dispute. For undoubtedly, an action for money had and received to the plaintiff's use may be brought by the bona fide bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person who has the note as bearer.

And Wilmot, Justice, said, that it was notorious, that such notes were in fact and practice negotiated. "Probably, *the jury [*295 took upon themselves to consider, whether such bills or notes as this is, were in their own nature negotiable; but this is a point of law; and by law, they are negotiable." And again he says, "but this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ*, and a person may take by that description as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it, (whether it be a note or a bill of exchange,) and it is repugnant to the contract, that the drawer should object that the bearer has no right to demand payment from him. The reasons given in the cases that are opposite to this are altogether unsatisfactory." Even before the statute of 3 and 4 *Anne*, Lord Chief Justice Holt himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note."

And Yates, Justice, said, "Nothing can be more peculiarly negotiable than a draught or bill payable to bearer; which is, in its nature,

payable from hand to hand, *toties quoties*." It had been doubted, it is true, whether that species of action, where the plaintiff declares upon the note itself as upon a specialty, was proper; but here is a count upon a general *indebitatus assumpsit*, for money had and received to the plaintiff's use. The question, whether he can maintain this action, depends upon its being assignable, or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer, and, therefore, he was certainly entitled to bring this action. And if he transfers his property to another person, that other person may also maintain the like action. Whoever has money in the hands of another may bring such an action against him. This appears from the determination in the case of *Ward v. Evans*, reported in 2 Lord Raym. 930, where not a shilling of money had passed between the plaintiff and defendant; and yet Holt and Powell both held that an *indebitatus assumpsit* for moneys received to the plaintiff's use properly lay."

This case clearly shows, that actions upon promissory notes payable to bearer, or order, 296*] might have been maintained *before the statute of Anne; and that such actions did not depend upon the privity of contract. There certainly is not more privity of contract between the drawer of a note, and the bearer, (especially after that note has been lost by the lawful owner, and comes to the hands of the plaintiff through the finder,) than between the maker of a note payable to order, and the indorsee. It also shows that there are certain instruments, which are negotiable in their own nature by force of the contract itself, independent of statute law; and that a promisee may as well be described by being the bearer of a certain paper as by being named with his christian and surname. And if he may be designated by the fact of being the bearer of a paper, there is no reason why he may not equally be described by the fact of his being the nominee of a certain other person, and the holder of a certain note.

There is no doubt that before the statute of Anne notes were passed from one to another, and actions for money had and received were, on common law principles, maintained by the bearers and indorsees. The indorsement was considered as conveying or assigning the money of the payee in the hands of the maker; and the original contract of the maker was, to hold the money to the use of the payee, or of such person as he should appoint. Privity of contract is not the ground of the action for money had and received. And among the many cases of that kind, there will be scarcely found one in which such a privity has existed. If I lose money, I may have this action against the finder. If A. delivers money to B. to be paid over to C. the latter may maintain this action against B. If a man, under pretence of authority from me, receive money due to me, I may recover it of him in this form of action. So if I pay money to another by mistake. So if a man obtains money from me by fraud and deceit. So if the consideration of a bargain fail. So if one pretending a right to an office receive fees, the rightful officer may, by an action for money had and received, recover of him the amount of fees so received.

The indorser is a new drawer as to all the subsequent parties. He has received money from his indorsee which he engages to hold to his use, or to the use of such person as he shall appoint, in case the maker does not pay *the note on demand. This principle [*297 results from the custom of merchants; for the moment a promissory note payable to order is indorsed, it becomes, in its nature, independent of any statute, an inland bill of exchange, both in form and substance. The indorser orders the maker to pay to the indorsee, or his order, the sum of money mentioned in the note. The maker by signing the note acknowledges that he has effects of the payee, to the amount of the note, in his hands; and by making the note payable to the order of the payee, he authorises the payee to draw upon him for that amount, and pledges himself to honor the draft. An acceptance may be made before the bill is issued, and is equally binding as if made after. Kyd. 48, 49. The signature of the maker to the note is an acceptance of the payee's bill. No part or circumstance of a bill of exchange is wanting.

The plaintiffs below, therefore, were clearly entitled to recover the money from the defendants; and, therefore, the defendants ought not in justice and good faith to withhold it. In such a case there never has been a doubt but that the bill may be given in evidence on the count for money had and received.

Swann, in reply.

If the indorser is liable, it must be under the act of assembly. But the act of assembly gives an action only against the maker, as is evident from the provision for allowing all just discounts, not only against the holder but against his assignor before notice. No case can be found of an action for money had and received brought by an indorsee against a remote indorser, either before the statute of Anne or after. The cases cited are of a note payable to bearer.

If any action will lay, it must be on the statute of Virginia.

MARSHALL, *Chief Justice:*

It is decided in Virginia that an action is maintainable by the assignee against the assignor, and not under the act of assembly.

*February 26th. The *Chief Justice* [*298 delivered the opinion of the court.

"The only question in this case is, whether an action of *indebitatus assumpsit* can be maintained by the assignee of a promissory note made in Virginia, against a remote assignor.

"The act of the Virginia assembly which makes notes assignable, gives the assignee an action of debt in his own name against the maker of the note, but is silent with respect to the claim of the assignee against the assignor. It was therefore long a doubt whether the assignor became liable on his mere assignment, without any special agreement, for the contents of the note, in the event of the insolvency of the maker. This doubt has at length been settled in Virginia, so far as to declare the liability of the assignor on such assignment; but not the amount for which he is liable. It seems to be yet a question whether he is answerable for the sum mentioned in the note, or for only so much as he received for it, provided he shall be able to prove the sum actually received. It is also a question whether the assignee can have

recourse to any other than his immediate assignor.

"As the act of assembly gives no right to sue the assignor, such an action can only be maintained on the promise which the law implies from the assignment, and, consequently, can only be sustained by and against the persons to and from whom the law implies such a promise to have been made. As the assignment is made to a particular person, the law implies a promise to that person; but it raises no promise to any other. There is no fact on which to imply such promise.

"In the language of the books, there is a privity between the assignor and his immediate assignee; but no privity is perceived between the assignor and his remote assignee. The implied promise growing out of the indorsement, is not considered as having been made assignable by the act of assembly, and, therefore, the assignee of that promise cannot maintain an action of *indebitatus assumpsit* on it.

299*] "'It is, therefore, the opinion of the Court that this action is not maintainable, and that the judgment ought to be reversed.'"[1]

STUART v. LAIRD.

A cause may, by act of congress, be transferred from one inferior tribunal to another.

A contemporary exposition of the constitution, practiced and acquiesced under for a period of years, fixes the construction; and the court will not shake or control it.

ERROR from the 5th circuit in the Virginia district.

An action of covenant was brought in January, 1801, in "the court of the United States for the middle circuit in the Virginia district," by John Laird, a citizen of the state of Maryland, for and on behalf of Laird and Robertson, of Port Glasgow, and subjects of the King of Great Britain, against Hugh Stuart, a citizen and inhabitant of the state of Virginia.

At the rules, in February, 1801, there was an office judgment against the defendant for damages, &c. "which damages," says the record, "are to be inquired of and assessed by a jury to be summoned by the marshal, and impaneled before the next court of the United States for the middle circuit in the Virginia district, which commences on the 22d day of May next ensuing, and so the cause aforesaid stood continued, by virtue of the statute in such case made and provided, until the court of the United States for the fourth circuit in the Virginia district, continued by adjournment and holden at the capitol in the city of Richmond aforesaid, on Thursday, the 17th day of December, 1801; at which day, to wit, at a court of the United States for the fourth circuit in the eastern district of Virginia, continued by adjournment, and holden at the capitol, in the city aforesaid, before the honorable the judges of the said court, came as 300*] well *the plaintiff," &c., and the office judgment being set aside and issue joined upon the plea of covenants performed, there was verdict and judgment for the plaintiff; upon which a *fieri facias* issued, reciting, in the usual form, the judgment recovered "in the court of the United States for the fourth circuit in the eastern Virginia district," and returnable "before the judges of the said court at Richmond, in the eastern Virginia district, on the 26th day of April next." "Witness, *Philip Barton Key*, Esq. chief judge of the said court.

The return on this execution was as follows, viz.:

"Executed on Maria and child, Paul, Jenny, Selah, Kate and Anna, and a bond taken with Charles L. Carter security, for the delivery thereof at the Eagle tavern, in the city of Richmond, on the 20th day of April, 1802, the condition of which was not complied with.

BEN. MOSLEY, D. M. for
JOS. SCOTT, M. E. V. D."

The record then goes on to state, "that heretofore, to wit, at a court of the United States for the fifth circuit, continued by adjournment, and held at the capitol, in the city of Richmond, in the district of Virginia, before the honorable the Chief Justice of the United States, on Thursday, the 2d of December, 1802, came John Laird, on behalf of Laird and Robertson, by Daniel Call, gent. his attorney, and moved the said court for judgment and award of execution against Hugh Stuart and Charles L. Carter, upon a bond entered into by them for the forthcoming and delivery of certain property therein mentioned to the marshal of the eastern Virginia district, on the day and at the place of sale, which was taken by virtue of a writ of *fieri facias* issued from the court of the United States for the fourth circuit in the eastern Virginia district, against the estate of the defendant Hugh Stuart, which bond is in the words and figures following, to wit," &c. the condition of which refers to the *fieri facias* sued out of the court of the United States for the fourth circuit in the eastern Virginia district.

*The defendants appeared and "show- [*301
ed as causes why the said execution should not be awarded.

"1st. That the motion is authorized by no law of the United States, and by no part of the common law, and hath been hitherto in similar instances, or such as are nearly similar, used and admitted, and awards of execution, such as that now prayed for, made in the courts of the United States upon the construction of an act of congress approved on the 24th day of September, 1789, by virtue of which awards of execution in such cases have heretofore been made in the said courts, agreeably to an act of the general assembly of Virginia, passed on the 10th day of December, 1793: and the said defendants do aver that the said act of congress doth not make the laws of the several States rules of decision in the courts of the United States in any case whatever, except in trials at common law; and that no decision which can be given on the said motion will be a decision in a trial at common law.

"2d. That the said act of the general assembly of Virginia is in derogation of the common law, and deprives the citizen of trial by jury, and that the terms in all such acts prescribed should be regularly and strictly observed by all such as would entitle themselves to the benefit thereof, which hath not been done by the plaintiff in the present motion; first, because, agree-

1.—See note (A) in the appendix to this volume of reports.

ably to the said act, on forfeiture of such bond, the officer, who hath taken the same, shall return the same to the office of the court from whence the execution issued, the levying whereof gave him authority to receive the same; and that such court may, upon motion of the person to whom it is payable, after the obligor hath failed in the performance of the condition thereof, award, an execution thereon; but neither the said act of assembly or congress, nor any other act of assembly or congress, or part of the common law, doth give such power to any other court; and the said defendant avers that it appears on the face of the notice grounding the plaintiff's motion, that the execution whereon the same was taken, was issued from the office of the court of the United States for the fourth circuit in the eastern Virginia district, where the judgment grounding the same is there said to have been obtained: and, 2d. Because 302*] *that court doth not now exist, and this honorable court is a different court from that court; 3d. That the act of congress passed on the 29th day of April, 1802, entitled "An act to amend the judicial system of the United States," in so far as it annihilated the court of the United States for the fourth circuit in the eastern Virginia district, wherein the said judgment was rendered, is unconstitutional and void, and doth not authorize this court to award an execution on the said bond on motion..

"All which matters and things the said defendant doth aver as causes why this honorable court ought not to award execution on the said bond on the present motion, and is ready to prove the same as this honorable court shall direct; wherefore they pray judgment whether the Court here will take further cognizance of the said motion."

To this plea there was a general demurrer and joinder; and the Court below being of opinion that the plea was insufficient, gave judgment for the plaintiff.

To reverse that judgment the defendant Stuart sued out the present writ of error; and the errors assigned were in substance similar to those alleged in bar of the motion.

C. Lee, for the plaintiff in error.

The act of assembly of Virginia which gives this summary remedy upon forthcoming bonds, allows the motion for judgment to be made only to the same court from which the execution issued.

In this case the execution issued from the court of the United States for the fourth circuit in the eastern Virginia district, composed of Judges Key, Taylor, and M'Gill.

The motion was made to the court of the United States for the fifth circuit in the Virginia district, holden by the *Chief Justice* of the United States.

This is not the same court from which the execution issued. The motion, therefore, in this court, was not regular, unless it be made so by the acts of congress of March 8th, 1802, c. 8, and 29th April, 1802, c. 31. The process in this case was summary, and the pleadings, al- 303*] though in *this instance they happen to be reduced to writing, are in fact *ore tenus*. A position will be taken the direct reverse of that contained in the second point of the plea mentioned in the transcript of the record.

The court of the fifth circuit ought not to have taken cognizance of the motion; because the court of the fourth circuit did exist, and not because it did not exist, as alleged in the plea.

If the acts of 8th March and 29th April, 1802, are constitutional, then it is admitted there is no error in the judgment; because, in that case, the courts ceased to exist, the judges were constitutionally removed, and the transfer from the one court to the other was legal. But if those acts are unconstitutional, then the court of the fourth circuit still exists, the judges were not removed, and the transfer of jurisdiction did not take place. The legislature did not intend to transfer causes from one existing court to another. If, then, the courts still exist, the causes not being intended to be removed from existing courts, were not removed.

But we contend that those acts were unconstitutional so far as they apply to this cause.

1st. The first act (March 8, 1802) is unconstitutional, inasmuch as it goes to deprive the courts of all their power and jurisdiction, and to displace judges who have been guilty of no misbehavior in their offices.

By the constitution of the judges both of the supreme and the inferior courts, are to hold their offices during good behavior. So much has been recently said, and written, and published upon this subject, that it is irksome to repeat arguments which are now familiar to every one.

There is no difference between the tenure of office of a judge of the Supreme Court and that of a judge of an inferior court. The reason of that tenure, to wit, the independence of the judge, is the same in both cases; indeed the reason applies more strongly to the case of the inferior judges, because to them are exclusively assigned cases of life and death.

*It is admitted that congress have the [*304 power to modify, increase or diminish the power of the courts and the judges. But that is a power totally different from the power to destroy the courts, and to deprive them of all power and jurisdiction. The one is permitted by the constitution, the other is restrained by the regard which the constitution pays to the independence of the judges. They may modify the courts, but they cannot destroy them, if thereby they deprive a judge of his office. This provision of the constitution was intended to place the judges not only beyond the reach of executive power, of which the people are always jealous, but also to shield them from the attack of that party spirit which always predominates in popular assemblies. That this was the principle intended to be guarded by the constitution is evident from the contemporaneous exposition of that instrument, published under the title of *The Federalist*, and written, as we all know, by men high in the esteem of their country. Federalist, vol. 2, No. 78.[1]

Mr. Lee also cited and read the speeches of Mr. Madison, in the convention of Virginia, (Debates, vol. 1, p. 112,) of Mr. Nicholas, (vol.

1.—To show that such writings are to be regarded in forming the true construction of the constitution, he read from a newspaper what was said to be an answer from the President of the United States to an address from sundry inhabitants of Providence, in which the President is supposed to have said, "The constitution on which our union rests, shall be administered by me according to the saf

1, p. 32, and vol. 2, p. 152,) and of Mr. Marshall, (in p. 125.)

The words during good behavior cannot mean during the will of congress. The people have a right of the services of those judges who have been constitutionally appointed, and who have been unconstitutionally removed from office. It is the right of the people that their judges should be independent; that they should not stand in dread of any man who, as Mr. Henry said in the Virginia convention, has the congress at his heels.

305*] *It is admitted that the powers of courts and judges may be altered and modified, but cannot be totally withdrawn. By the repealing law the powers of both are entirely taken away.

But the laws are also unconstitutional, because they impose new duties upon the judges of the Supreme Court, and thereby infringe their independence; and because they are a legislative instead of an executive appointment of judges to certain courts. By the constitution all civil officers of the United States, including judges, are to be nominated and appointed by the President, by and with the advice and consent of the senate, and are to be commissioned by the President.

The act of 29th April, 1802, appoints the "present Chief Justice of the Supreme Court." a judge of the court thereby established. He might as well have been appointed a judge of the circuit court of the District of Columbia, or the Mississippi territory. Besides, as judge of the Supreme Court, he could not exercise the duties or jurisdiction assigned to the court of the fifth circuit, because, by the constitution of the United States, the Supreme Court has only appellate jurisdiction; except in the two cases where a state or a foreign minister shall be a party. The jurisdiction of the Supreme Court, therefore, being appellate only, no judge of that court, as such, is authorized to hold a court of original jurisdiction. No act of congress can extend the original jurisdiction of the Supreme Court beyond the bounds limited by the constitution.

A party in this court has a right to have his cause tried by six judges. He has a right to an unbiased court, whether the whole six sit or not. A judge, having tried the cause in the court below, and given judgment, must be in some measure committed; he feels an anxiety that his judgment should be affirmed. The case of *Clerk and Nightingale*, 3 Dal. will illustrate this principle. The suit was first tried before Chief Justice Ellsworth, whose opinion upon the merits was in favor of the plaintiff A writ of error was brought, and the judgment reversed for error in pleading, and the cause remanded to be again tried. Judge Cushing held the court on the second trial, and his opinion also was in favor of the plaintiff upon the merits. A second writ of error was brought and tried in the Su-

306*] preme *Court before Chief Justice Ellsworth, Judges Cushing, Paterson, Washington, and Chase, and the judgment was reversed by the three last mentioned judges, who made a majority of the court.

A degree of respect is certainly due to precedents and past practice. If it be said that the practice from the year 1789 to 1801 is against us, we answer that the practice was wrong, that it crept in unawares, without consideration and without opposition; congress at last saw the error, and in 1801 they corrected it, and placed the judicial system on that ground upon which it ought always to have stood. By the act of February 13, 1801, the precedent was broken, so that now precedents are both ways. If there are twelve years practice against us, there is one year for us. There has never been a judicial decision upon the subject. The time has now come when the true construction ought to be settled.

If the construction is as we contend, then the court below had no jurisdiction. The power of congress to transfer causes from one court to another is admitted; but if the acts of March and April, 1802, are totally unconstitutional, they are void; the causes have not been transfered, and the court of the fourth circuit still exists, with all its powers and jurisdiction.

Gantt, contra.

This suit was originally instituted in the circuit court which existed under the law of 1789, and was transfered by the act of February 13th, 1801, to the new circuit court by that act established. It was afterwards, by the act of 1802, retransfered to the circuit court under the act of 1789, so that if the transfer by the act of 1801 was constitutional, the retransfer by the act of 1802 must be equally constitutional.

No error is relied on but the want of jurisdiction.

It is admitted that congress have power to transfer the jurisdiction of causes from one inferior court to another; and, therefore, the question whether they have the power to deprive a judge of his office, does not belong to this case. *It has nothing at all to do with it. But [*307 admitting, for the sake of argument, that congress have not the latter power, yet an act may be constitutional in part, and unconstitutional in part.

Congress have an express power by the constitution to constitute, and, from time to time to ordain and establish tribunals inferior to the Supreme Court. The tenure of office may be a restraint in part to the exercise of this power, but cannot take away altogether the right to alter and modify existing courts.

There are not more instances of independent decisions by the judges in England, since they have become independent of the crown, than before; for before that time, we find that judges have been sent to the tower for the independence of their opinions.

The provision of the constitution respecting tenure by good behavior was not intended to protect the judge; but for the benefit of the people, that judges might, by the permanence of their offices, be always men of experience and learning. It is admitted by Mr. Lee, that if any power remained in the circuit court of the fourth

and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption; a meaning to be found in the explanations of those who advocated, not of those who opposed it; and who opposed it merely lest the construction should be applied which they denounced as possible. These explanations are preserved in publications of the time, and are too recent in the memories of most men to admit of question."

circuit, the act was constitutional. But even if the whole powers were taken away, yet new powers and new duties might have been given. It does not follow that because the court is abolished, the office of the judge is taken away. And if the act of 1802 is unconstitutional, because it abolishes the circuit courts then existing, the act of 1801 is equally so by abolishing the old circuit courts.

But, as was before observed, there is no necessity or wish to go into this argument; it is not pertinent to the present cause; for the only question here is, whether congress had power to transfer the cause from the fourth to the fifth circuit court, and not whether the fourth circuit court or its judges are still in existence.

As to the objection that the law of 1789 is unconstitutional, inasmuch as it gives circuit powers, or original jurisdiction, to judges of the Supreme Court; it is most probable that the members of the first congress, many of them having been members of the convention which 308*] formed *the constitution, best knew its meaning and true construction. But if they were mistaken, yet the acquiescence of the judges, and of the people, under that construction, has given it a sanction which ought not now to be questioned.

Lee, in reply.

The acts of 1801 and 1802, were not alike in abolishing the circuit courts. The former, in abolishing the then existing courts, did not turn the judges out of office, or in any degree affect their independence; but the act of 1802 strikes off sixteen judges at a stroke, drives them from their offices, and assigns their duties to others.

An error was committed in 1789. That act was unconstitutional, but the act of 1801 restored the system to its constitutional limits. We now contend for the pure construction of the constitution, and hope it will be established, notwithstanding the precedent to the contrary.

March 2d. The *Chief Justice*, having tried the cause in the court below, declined giving an opinion.

PATERSON, *J.*, (Judge Cushing being absent on account of ill health,) delivered the opinion of the court.

On an action instituted by John Laird against Hugh Stuart, a judgment was entered in a court for the fourth circuit in the eastern district of Virginia, in December term, 1801. On this judgment, an execution was issued, returnable to April term, 1802, in the same court. In the term of December, 1802, John Laird obtained judgment at a court for the fifth circuit in the Virginia district, against Hugh Stuart and Charles L. Carter, upon their bond for the forthcoming and delivery of certain property therein mentioned, which had been levied upon by virtue of the above execution against the said Hugh Stuart.

Two reasons have been assigned by counsel for reversing the judgment on the forthcoming bond; 1. That as the bond was given for the delivery of property levied on by virtue of an execution issuing out of, and returnable to, a court for the fourth circuit, no other court could 309*] legally *proceed upon the said bond. This is true, if there be no statutable provision to direct and authorize such proceeding. Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.

The present is a case of this kind. It is nothing more than the removal of the suit brought by Stuart against Laird from the court of the fourth circuit to the court of the fifth circuit, which is authorized to proceed upon and carry it into full effect. This is apparent from the ninth section of the act entitled, "An act to amend the judicial system of the United States," passed the 29th of April, 1802. The forthcoming bond is an appendage to the cause, or rather a component part of the proceedings.

2d. Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Judgment affirmed.

THOMAS HAMILTON
v.
JAMES RUSSELL.

An absolute bill of sale of goods, is fraudulent as to creditors, unless possession accompanies and follows the deed.

The want of possession is not merely evidence of fraud but is a circumstance *per se*, which makes the transaction fraudulent in point of law. The court are not bound to give an opinion on an abstract point of law, unless it be so stated as to show its connection with the cause.

ERROR from the circuit court of the District of Columbia, sitting at Alexandria.

*James Russell, the defendant, hav- [*310 ing obtained a judgment against Robert Hamilton, brother of the plaintiff in error, ordered the marshal to levy the *fieri facias* upon sundry goods and chattels in the possession of Robert, the debtor; which was done accordingly; whereupon the present plaintiff, Thomas Hamilton, brought an action of trespass against Russell, claiming the goods by virtue of an absolute bill of sale from his brother Robert, dated the 4th of January, 1800, and acknowledged and recorded in the circuit court of the District of Columbia, for the county of Alexandria, on the 14th of April, 1801. Notwithstanding which bill of sale, Robert, the vendor, continued in possession, and exercised acts of ownership over the property. There was a general verdict in the court below, and judgment for the defendant, upon the general issue.

The transcript of the record contained two bills of exceptions.

The first stated that the defendant "prayed the court to instruct the jury, that if they

NOTE.—*Fraud to be inferred from want of change of possession of goods*—see note, 6 L. ed. U. S. 423.

should be of opinion, from the evidence, that the plaintiff, who claims the slave George, in the declaration mentioned, under an absolute bill of sale, for a valuable consideration," (which bill of sale, recorded before the issuing for the *fieri facias* upon which the property was seized, is set forth in the bill of exceptions,) "permitted the vendor, Robert Hamilton, to continue in possession of the slave, and to exercise acts of ownership over the same, he the said plaintiff has not a good title to the said slave against the execution of the defendant, who was a bona fide creditor of Robert Hamilton;" which execution the defendant directed to be served "on the said slave. And the court so instructed the jury;" to which the plaintiff excepted.

The second bill of exceptions stated that the plaintiff prayed the court to instruct the jury, "that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession at the time it is seized by a sheriff in virtue of an execution against the person so in possession, can sustain an action of trespass for a seizure upon such possession;" but the court, being divided in opinion, did not give the instruction as prayed.

311*] *Swann, for the plaintiff in error, contended that,

1st. The bill of sale being acknowledged and recorded according to the act of assembly of Virginia, respecting frauds and perjuries, (Rev. Code, p. 18,) is valid, and not fraudulent as to creditors.

That act of assembly contains provisions similar to those in the English statutes of 29 Car, II. c. 3, s. 4, 13 Eliz., c. 5, s. 2, and 27 Eliz., c. 4, s. 2, and has moreover a clause in the following words, viz.:

"If a conveyance be of goods and chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged and proved, (if the same deed include lands also,) in such manner as conveyances of land are by law directed to be acknowledged or proved, or if it be of goods and chattels only, then acknowledged, or proved by two witnesses in the general court, or court of the county, wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall really and bona fide remain with the donee."

"This act shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common or profit, out of the same, which shall be upon good consideration, and bona fide, lawfully conveyed or assured to any person or persons, bodies politic or corporate." Under this act he contended the deed would be good against creditors, notwithstanding that the possession did not accompany the deed. And although the deed was not acknowledged within eight months after its execution, yet being acknowledged and recorded before the *fieri facias* issued upon which the goods were seized, it was good against that execution; and for this he cited the case of *Eppes v. Randolph*, 2 Call's Reports.

2d. The court ought to have instructed the jury, as prayed in the second bill of exceptions.

The law is well established that he who has the general property of goods may maintain trespass against him who *tortiously [*312 takes them out of the possession of the owner's bailee. 5 Bac. Abr., Gwillim's edit., 164.

Simms, for the defendant in error.

As to the first bill of exceptions: This deed is clearly fraudulent as to creditors. In the case of *Lavender v. Blackstone*, 2 Levinz, 147, Lord Hale said, that "every conveyance shall be esteemed prima facie fraudulent against a purchaser." And in *Edwards and Harben*, 2 Term Rep., 594, it is said by Buller, Justice, to have been the unanimous opinion of all the judges in England, "that unless possession accompanies and follows the deed, it is fraudulent and void." If the possession be inconsistent with the deed, it is clear and conclusive evidence of fraud. *Haselinton v. Gill*, cited in *Jarman v. Woolloton*, 3 Term Rep., 620. *Cadogan v. Kennet*, Cowp., 434.

The act of assembly of Virginia has similar provisions with the statutes of 13th and 27th Eliz., and nearly in the same words. Those provisions, however, were nothing more than a declaration of the principles of the common law.

But this act of assembly, by making deeds absolutely void which are not for a valuable consideration, unless acknowledged, cannot be construed to make good, as against creditors, a deed purporting to be for a valuable consideration. The act makes the deeds therein mentioned, which are not for valuable consideration, absolutely void even between the parties themselves; and it cannot be pretended that the acknowledgment according to that act would set up such a deed against bona fide creditors. The act was intended to suppress, and not promote or conceal fraud. If such a construction could be put upon the act as is contended for, it would make valid deeds which would before have been void as being fraudulent against creditors. But the act takes no notice at all of such a deed as this, except in the second section of the law, where deeds made with the intent to defraud creditors are expressly declared to be void. So anxious is the act to suppress fraud that in the case of a loan, if the lender does not demand the property lent in five years, and follow up that demand with a prosecution at law to recover possession *of his goods, the pos- [*313 session becomes conclusive evidence of property.

2d. As to the second bill of exceptions, the court did right in not giving instruction as prayed.

Possession is necessary to support an action of trespass. Bull N. P., 79. This ought to have been an action on the case, and not trespass. 1 Stra. 635, *Reynolds v. Clark*, 4 Term Rep., 489, *Ward v. Macauley*.

C. Lee, on the same side.

The Case of Ward and Macauley has overruled all the cases cited from Bacon's Abridgment, and has been recognized in the case of *Gordon v. Harper*, 7 Term Rep. 9, where the doctrine has been carried even farther, and held that neither trespass nor trover would lie unless the possession, or right of possession, was in the plaintiff. In that case the goods of the landlord had been leased to the tenant, and during the lease were taken in execution for the debt of a third person. The court held that

during the lease the landlord had neither the possession nor the right of possession, and therefore he could maintain neither trespass nor trover. Now in the case made by the second bill of exceptions, it is not stated whether the loan was for a time certain, or at the will of the lender.

If the loan was for a time certain, there is no difference between that case and a lease for a time certain. In neither case is the possession, or the right of possession, in the plaintiff. The bailee by loan for a time certain, has an equal right to the possession, during that time, with a bailee for hire: and either may maintain trespass against him who violates that possession, whether it be a stranger or the owner.

CHASE, *Justice:* There is here no exception applicable to this case. The bill of exceptions states only an abstract question. It is not whether the plaintiff in this case can maintain an action of trespass, but whether any plaintiff can maintain trespass for property loaned to a friend.

314*] *Swann, in reply,

Relied on the act of assembly of Virginia. The English cases do not apply; for in England they have no such statute authorizing the recording of deeds of personal property; nor any substitute for the actual delivery of possession of goods in any case whatever.

Even a mortgage of personal property is there deemed fraudulent as to creditors, unless possession accompanies the deed; and the reason given, in all the books, is, that it gives a false credit to the mortgagor, enables him to impose upon the world, and gives him a power to deceive and defraud those who deal with him. 1 Wils. 260. *Ryall v. Rolle.* But when such a deed is publicly made and exposed to view upon the public records, as this was, such reason must fail; and with the reason, the law must fail also.

As to the second bill of exceptions.

There is certainly a difference between a loan and a lease. In a loan the lender does not part with the right of possession, nor, in law, does he part with the actual possession; for the bailee's possession is the possession of the lender, who has a right to resume the thing into his own hands at any moment. There is no adverse possession, nor adverse claim, as there is in the case of a lease.

Fraud or no fraud, is a point to be decided by the jury, and not by the court. It is a question of fact; and the court have instructed the jury as if it were a matter of law. The possession of the vendor is not in itself a fraud, but only a circumstance from which, connected with others, the jury may presume the fact of a fraudulent intent.

February 28th. The *Chief Justice* delivered the opinion of the Court.

On the 4th January, 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale for a slave in the bill mentioned, which, on the 14th of April, 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession 315*] *of the vendor; and some short time after the bill of sale was recorded, an execution on a judgment obtained against the vendor was levied on the slave and on some other personal property also in possession of the vendor. In July, 1801, Thomas Hamilton, the vendee, brought trespass against the defendant Russel, by whose execution, and by whose direction, the property had been seized; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if the slave, George, remained in the possession of the vendor, by the consent and permission of the vendee; and if by such consent and permission the vendor continued to exercise acts of ownership over him, the vendee, under such circumstances, could not protect such slave from the execution of the defendant.

The Court gave the instruction required, to which a bill of exceptions was taken.

The counsel for the plaintiff then moved the Court to instruct the jury that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession at the time it is seized by a sheriff in virute of an execution against the person so in possession, can sustain an action of trespass for a seizure upon such possession.

The Court, being divided, refused to give the instruction required, and the jury found a verdict for the defendant. Judgment was accordingly rendered for the defendant, to which a writ of error has been sued out, and the question is, whether the court below has erred in the instructions given or refused.

In the opinion to which the first bill of exceptions was taken, it is contended on two grounds, that the circuit court has erred.

1st. Because this sale is, under the act of the Virginia assembly against fraudulent sales, protected by being recorded.

2d. That if it be not protected by that act, still it is only evidence of fraud, and not in itself a fraud.

*On examining the act of assembly [*316 alluded to, the Court is of opinion that it does not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be a valid one, if recorded within eight months. On this point one judge doubted, but he is of opinion that this bill of sale was not recorded within the time required by the act, and that the decision in the case of *Eppes v. Randolph*, which was made by the court of appeals of Virginia, on a different act of assembly, would not apply to this act.

On this second point there was more difficulty. The act of assembly, which governs the case, appears, as far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th of Eliz., and those acts are considered as only declaratory of the principles of the common law. The decisions of the English judges, therefore, apply to this case.

In some cases a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence, or a badge, of fraud, to be submitted to the jury, under the direction of the court, and not as constituting in itself, in point of law, an actual fraud which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale, where the possession does not "accompany and follow the deed," is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and

should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition which does not entitle the vendor to the immediate possession. The case of *Edwards v. Harbin Ex'r of Tempest Mercer*, 2 Term Rep. 587, turns on this distinction, and is a very strong case.

William Tempest Mercer, on the 27th of March, 1786, offered to the defendant Harbin, a bill of sale of sundry chattels as a security for a debt due by Mercer to Harbin. This Harbin refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt 317*] should *remain unpaid, to take possession of the goods and sell them, in satisfaction of the debt; the surplus money to be returned to Mercer. To this Mercer agreed, and a bill of sale, purporting on the face of it to be absolute, was executed, and a corkscrew delivered in the name of the whole. Mercer died within the fourteen days, and immediately after their expiration Harbin took possession of the goods specified in the bill of sale, and sold them. A suit was then brought against him by Edwards, who was also a creditor of Mercer, charging Harbin as executor in his own wrong, and the question was, whether this bill of sale was fraudulent and void as being on its face absolute, and being unaccompanied by the delivery of possession. It was determined to be fraudulent; and in that case it is said that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford v. Baron*, and were unanimously of opinion that "unless possession accompanies and follows the deed, it is fraudulent and void;" that is, that unless the possession remain with the person shown by the deed to be entitled to it, such deed is void as to creditors within the statutes. This principle is said, by Judge Buller, to have been long settled, and never to have been seriously questioned. He states it to have been established by Lord Coke, in 2 Bulstrode, so far as to declare that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent. "But if the deed or conveyance be conditional, there the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition." "And that case," continues Judge Buller, "makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since." "This," continues the Judge, "has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transactions fraudulent in point 318*] of *law; that is, the point which we have considered, and we are all of opinion, that if there is nothing but the absolute conveyance, without possession, that in point of law is fraudulent."

This court is of the same opinion. We think that the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies, and follows the deed." This construction, too, comports with the words of the act. Such a deed must be considered as made with an intent "to delay, hinder, or defraud creditors."

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question not belonging to the cause.

Judgment affirmed with costs.

UNITED STATES
v.
R. T. HOOE and others.

Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript.

This provision was revived by the repeal of the act of February, 1801.

THIS was a writ of error to a decree of the circuit court of the District of Columbia, sitting as a court of chancery.

The case was, that Colonel Fitzgerald, in the year 1794, was appointed collector of the customs for the port of Alexandria, and gave bond to the United States in the penalty of 10,000 dollars, with R. T. Hooe as his surety, for the faithful performance of the duties of the office. In consequence of misapplication of large sums of money by the chief clerk, who was intrusted with almost the whole management *of [*319 the business, Col. Fitzgerald became deficient in his accounts with the United States to the amount of 57,000 dollars. After this fact was discovered he executed a deed of trust of part of his real estate to trustees, to be sold to indemnify Hooe from the demands of the United States against him, as security of Fitzgerald, and also to secure him against sundry notes which he had indorsed for him at the bank of Alexandria, as well as to enable him to take up further sums at the bank, as his exigencies might require. After the death of Col. Fitzgerald, the trustees advertised the property for sale, and the United States obtained an injunction to stay the sale, alleging that by the acts of congress, they were entitled to a prior lien upon the estate of their debtor; and that the deed, as to them, was fraudulent. In the court below, the claim of the United States was rested altogether upon the prior lien created by the act of congress; and the court being of opinion that the act did not create a lien on the real estate, and that there did not appear to be any fraud in the transaction, dissolved the injunction, with costs, and ordered 10,000 dollars, part

of the proceeds of the sale, to be paid into the treasury of the United States, in satisfaction of the bond in which Hooe was the surety, and the residue, after paying the notes due at bank, to be paid into the treasury of the United States, in part satisfaction of the balance due from the estate of Fitzgerald; it having been proved to the satisfaction of the court, that the money, arising from the notes discounted at the bank, had been before paid by Fitzgerald to the United States.

To reverse this decree, the present writ of error was sued out by the attorney for the United States.

The decree of the court below did not state the facts upon which the decree was founded; and although the record contained the bill, answers, exhibits, and all the evidence which was before the court below, yet no statement of facts, according to the provision of the judiciary act of 1789, c. 20, s. 19, was made by the parties or by the court.

The attorney general[1] opened the cause on the 320*] part of *the United States, and was going on to show that the deed was fraudulent, as to creditors, upon general principles of law, (a ground not taken in the court below,) when he was stopped by an inquiry from the court, whether there was any provision in the act concerning the District of Columbia, by which the case was taken out of the operation of the nineteenth section of the judiciary act of 1789, which required a statement of the facts to accompany the record. Upon recurring to the act of congress, 27th February, 1801, concerning the District of Columbia, c. 86, s. 8, it was found that writs of error were to "be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be, provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States." Upon which the Court said, that the decisions on the act of 1789, s. 19, had been, that unless a statement of facts appeared upon the record, they could not say there was error. 3 Dallas, 336, *Jennings v. Brig Perseverance*. It is true that the act of February 13, 1801, c. 75, s. 33, remedied the evil, but that act was repealed in 1802, so that the law now stands as it did before the act of 1801. And the act concerning the District of Columbia, by saying that writs of error shall be prosecuted in the same manner as is, or shall be, provided, &c. places this case under the law of 1789. Whatever might be the present opinion of the court, if this were the first time of being called upon to give a construction to that clause of the act, yet the question has been solemnly settled. One legislature has taken cognizance of the construction given by the court, and has provided for the case, but another legislature has repealed that provision and thereby given a subsequent legislative construction, or at least shown such a legislative acquiescence under the construction which this court formerly gave to the act, as is now conclusive.

At the request of the attorney general, the writ of error was dismissed.[2]

*HEPBURN AND DUNDAS v. COLIN AULD. [*321

A tender, on condition that a release of all demands, should be first delivered, is not good; unless such prior delivery is expressly stipulated in the contract.

THIS was an action of debt brought by Hepburn & Dundas against Colin Auld in the circuit court of the District of Columbia, for the penalty of an agreement dated 27th September, 1799, between the plaintiffs, merchants of Alexandria, and the defendant, as agent for John Dunlop & Co. merchants in Glasgow.

The agreement recites, that whereas the plaintiffs have had extensive dealings with Dunlop & Co. in the course of which the former appear to have fallen in debt to the latter, by the accounts by them exhibited, some articles of which accounts having been objected to by the plaintiffs, they had agreed with the said agent to submit all matters in dispute to arbitration. And whereas the plaintiffs, by an article of agreement between them and a certain William Graham, dated 12th March, 1796, did covenant with him (for the consideration of 18,000 dollars to be by him paid to them at certain times in the said article expressed) to convey to him the said Graham, his heirs and assigns 6,000 acres of land on the Ohio; but the said Graham failing to make the first payment upon the day stipulated, the plaintiffs considered the said contract as thereby annulled, and, in consequence thereof, brought an ejectment to recover possession of the land, which they had permitted Graham to occupy, which ejectment had been abated by his death, and another ejectment had been, or was about to be, commenced.

The indenture then witnesseth, that each party covenanted to furnish their accounts to the arbitrators so as to enable them to make their award by the 1st day of January then next, being the time stipulated by the arbitration bonds. That Auld covenanted that he, or the agent of Dunlop & Co. would, on the 2d day of January then next, accept and take of the plaintiffs, the amount *which should be [*322 awarded to Dunlop & Co. in bills of exchange of a certain description, or in any money which might by law be a legal tender; and on such payment being made in either way, give the plaintiffs a full receipt and discharge of all claims and demands of Dunlop & Co. against them. That the plaintiffs covenanted, that in case they did not on the 2d of January then next, pay to the defendant, or the then agent of Dunlop & Co. the amount of the award, in bills or money, they would, on that day, assign and transfer to the defendant, or the then agent of Dunlop & Co. in the fullest manner, the aforesaid contract entered into by them with Graham for the sale of the land, and all and every interest, right and claim, of whatever kind, of the plaintiffs arising out of and from the said contract; with full power to proceed

1.—Mr. Lincoln.

2.—Congress being in session at this time, an act was introduced and passed, containing a clause similar to the 33d section of the act of 13th February, 1801, respecting writs of error and appeals in cases of equity and maritime jurisdiction, &c. Laws of U. S. vol. 6, p. 315, c. 93, 3d March, 1803.

and act thereupon and therein as the defendant or the then agent of Dunlop & Co. should think proper; and that they would for that purpose give him a full and ample power of attorney irrevocable to pursue in their names, if necessary, all legal ways and means, either to recover the possession of the land, or to enforce payment of the 18,000 dollars and interest, whichever of the measures he might be inclined to pursue; and that in case they should so assign the said contract, they would not thereafter in any manner interfere with the measures he might choose to pursue, either for the recovery of the lands, or to enforce the payment of the purchase money. And that whenever the ejectment should be judicially determined, or settled by compromise, they would convey the lands to the person who by such determination or compromise should be acknowledged to be entitled to them. And that in case the said purchase money, which, with interest to the said 2d day of January, would amount to 21,112 dollars should not prove sufficient to satisfy the award, they would on that day pay the balance to the defendant, or the then agent of Dunlop & Co.

And the defendant covenanted that in case it should not be convenient for the plaintiffs to pay the amount of the award in bills, or money, on the 2d day of January, he would accept and take an assignment of the said Graham's contract, at 21,112 dollars towards the discharge of the said award; and that in case it should exceed the amount of the award, he would, at 323*] the time of making the said *assignment, pay them the excess. For the faithful performance of these articles, the parties bound themselves to each other in the penal sum of 45,000 dollars. The sum of 21,112 dollars exceeded the amount of the award, by the sum of 494*l.* 6*s.* 7*d.* Virginia currency. For the nonpayment of this excess the present action was brought by the plaintiffs, after having tendered an assignment of Graham's contract and a power of attorney, which was refused by the defendant. There were four issues in fact, but to the 5th plea there was a general demurrer and joinder. Judgment below being in favor of the defendant upon this demurrer, the issues in fact were not tried, and the plaintiffs sued out the present writ of error.

The fifth plea was as follows: "And the said defendant by virtue of the act, &c. and by leave of the court, for further plea, protesting that the said deed of assignment of the contract aforesaid, with the said William Graham, so as aforesaid pretended to have been executed, sealed and tendered by the plaintiffs on the 2d day of January in the year 1800, was not a good, lawful and sufficient assignment thereof, according to the true intent and meaning of the said articles of agreement between the plaintiffs and defendant, he, the defendant, saith, that the said deed of assignment was not tendered to him unconditionally, but upon the condition that the said John Dunlop & Co. should first sign, seal and deliver, by the said Colin Auld, their attorney, on the same day, unto the plaintiffs, a release and acquittance of all the claims and demands of the said John Dunlop & Co. against the said plaintiffs; and the said defendant then and there refused to comply with the said condition, and the said plaintiffs then and there refused to deliver the aforesaid deed of assignment to the said defendant, unless he complied with the condition aforesaid; and this he is ready to verify; wherefore he prays judgment, whether the plaintiffs their action aforesaid against him ought to have and maintain," &c.

Swann, for the plaintiffs in error.

It will be perceived by the agreement, that the plaintiffs had the choice of three modes of paying the award; *1. By bills of ex- [*324 change; 2. By cash; and, 3. By an assignment of Graham's contract.

It is true, that the words are, that the defendant will take the assignment "towards" the discharge of the award. But the reason of using the word "towards" is plainly, because the amount of the award not being then known, it remained an uncertainty, whether the 21,112 dollars of Graham's purchase money would be sufficient in amount to meet and satisfy the award. The word towards, therefore, was not used to exclude the idea that the assignment should be a complete discharge of the award in case the award did not exceed the purchase money; but only to prevent Auld from being compelled to accept the assignment in full discharge of the award, if the purchase money should fall short of the sum awarded.

1st. We contend that the assignment was a good and sufficient assignment within the meaning and intention of the agreement.

2d. That the plaintiffs had a right to a release of all demands upon tender of the assignment.

3d. That the plaintiffs had a right to make such release a condition of their tender.

1st. It is no objection to the assignment that it expresses the consideration to be a release of all demands from Dunlop & Co.; for if the plaintiffs had a right to such a release, it was proper to state it as a part of the consideration. 2. The preamble of the assignment states the defendant to be agent of Dunlop & Co. and the *habendum* is to the said Colin Auld, which refers to the premises where he is styled agent; so that it is, in fact, as it ought to be, to Colin Auld, agent of Dunlop & Co.

2d. As to the right of the plaintiffs to insist upon a release of all demands.

1st. It is due by the terms of the contract.

2d. If not due by the terms of the contract, yet it was due of common right.

*1st. It is due by the contract. [*325

Every contract ought to have a reasonable construction according to the intention of the parties. Such a release is expressly agreed to be given in case of payment by bills or cash. A payment by the assignment was as complete a discharge of the award, as payment in either of the other modes. The discharge of the amount of the award, and not of the particular mode of discharge, was to be the consideration of the release: and having stipulated to give it in the one case, it ought to be presumed to be the intention of the parties, that it should be given in the other, unless there can be shown some difference in the consideration, or some reason operating upon the mind of the defendant which might have induced the omission of an express agreement to that effect. By agreeing to give it in case of payment by cash or bills, he allows

that the plaintiffs have a right to such a release upon discharge of the award. The submission was of all demands; a discharge of the award, then, was a discharge of all demands; and, therefore,

2d. Such a release was due of common right. A man has a right to demand evidence of his payment, and of the claims which are thereby satisfied. It is true he may call witnesses, but they may die. If a man pay money upon a specialty, he has a right to written evidence of the payment. Shep. Touch. 348.

3d. The plaintiffs had a right to make the release a condition of the tender. All things were to be done on the same day. They were concurrent conditions, to be performed at the same time. If one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part, and may maintain an action against the other. 4 Term Rep. 761, *Goodison v. Nunn*, Doug. 684, *Jones v. Barkley*.

Such a release could not operate to the injury of the defendant, or of Dunlop & Co. It would not have released any right accruing under the agreement, as was decided in the case of *Thorpe v. Thorpe*, Lord Raym. 235. The covenants of the plaintiffs respecting the lands and the ejectment are all future and contingent, and, there-
326*] fore, *could not have been released by a release of all demands. Nor was the penalty a present duty. It could only be incurred by a future breach, and, therefore, is not like a bond to pay a smaller sum at a future day. Shep. Touch. 339, 340. Buller, 160. 2 Show. 90, *Carthage v. Manby*. Esp. N. P. 307. Cro. Jac. 170, *Hancock v. Field*, Cro. Jac. 623, *Porter v. Philips*. Cro. Eliz. 580, *Hoe v. Marshall*. 5 Co. 70. b. Hoe's Case.

E. J. Lee, contra.

The assignment, in this case tendered, was not good, because it stated part of the consideration to be a release of all demands, which the defendant was not bound to give; and if he had accepted of the assignment in that form, it would have been an acknowledgment that he was bound to give it.

Whether Auld might with safety have given such a release, is not now the question; he has not contracted to give it, and it is not for us to inquire why he did not. He was unskilled in the law, and he might have supposed that in some way or other it would embarrass the claims of Dunlop & Co. against the plaintiffs for a future performance of their covenants respecting the land.

2d. The assignment is made to the use of Colin Auld, and not to the use of Dunlop & Co. The rents and profits are to be received to his use, and not to that of his constituents. In the operative parts of the assignment he is not named as agent.

3d. The power of attorney is insufficient, because it does not give full power to act therein. as the defendant should think proper, and does not authorize him to compromise the ejectment.

But the principal question is, whether the defendant was bound to give a release of all demands.

The plaintiffs only tendered the papers, but did not deliver them, so that the defendant could not see whether they were correct. They were to do the first act. They were first to make and deliver the assignment before they *were [*327 entitled to the balance. The words of the agreement plainly show this.

The agreement does not require him to give such a receipt in the case of payment by the assignment of Graham's contract. It would certainly have been as easy to have covenanted to give such a release in that case, as in the event of payment by bills or cash. The not doing so, in the former case, and the express agreement for it in the latter cases, creates the strongest presumption that it was not intended by the parties to be given in the former case; and the intention of the parties constitutes the agreement.

Admitting that by common right they were entitled to a receipt, it could only be a receipt for the assignment itself.

There was at least a doubt whether such a release as was demanded would not have discharged the penalty annexed to the contract, or at least the covenants respecting the land.

A release of all demands is certainly a release of all present duties, and it is said in *Altham's Case*, 8 Co. 154. a. that a release of all demands is a release of all causes of demand.

As the plaintiffs have demurred to our plea, we have a right to look into their declaration; to which there are two objections.

1st. That it contains no profert of the award which is the foundation of their action; and,

2d. That it does not aver the difference between the amount of the award and the purchase-money due upon the contract tendered. The declaration only states that the arbitrators awarded the sum of 4,379*l.* 9*s.* 0*d.* 3-4 sterling, to be due from the plaintiffs to Dunlop & Co., and that the plaintiffs having elected to assign Graham's contract in discharge of the award, tendered an assignment thereof, together with a power of attorney, according to the true intent and meaning of the agreement, in consequence whereof the plaintiffs then and there became entitled *to have and receive of the said [*328 defendant the sum of 494*l.* 6*s.* 7*d.* Virginia currency, which said sum the defendant, although required, had not paid, whereby action accrued to the plaintiffs to have 45,000 dollars, the penalty of the articles of agreement.

C. Lee, on the same side.

The *protestando* in the plea saves all objections to the sufficiency of the assignment; and we conceive the objections which have been stated are substantial.

But the principal question is, whether any release at all could be demanded. The contract does not, in any of the cases of payment of the award, require a release; which is a technical word, and means an instrument under seal. But we do not insist upon this distinction, as the law is full in our favor upon the other points. We might safely admit that the defendant was bound to give a receipt for the assignment; but even that is not due under the contract, nor of common right. However, such a receipt was not demanded, and, therefore, it is unnecessary to inquire whether the defendant was, or was not, bound to give it.

The release required would have discharged the penalty of this agreement. Viner, tit. Release, P. pl. 18.

It is not contended that a release contained in an instrument will release demands growing

out of that instrument; this was the case of Thorpe and Thorpe, Hoe's Case does not apply to the present; that was a case of mere possibility of a demand. The covenant of the plaintiffs not to interfere with the ejectment, was a present duty.

This is a case of construction only, and the only question is, what was the intention of the parties. If the deed of assignment was not a proper one, or the release demanded was such a one as the defendant was not bound to give, the plea is good, and the judgment must be affirmed.

Mason, in reply.

All the instruments are to be taken together. 2 Atk. *Crop v. Norton*. Through the whole it 329*] appears that what *the plaintiffs are bound to do, the defendant was bound to receive. The payment by the assignment was not more for the benefit of the plaintiffs than of the defendant. If they did not on the 2d of January pay in bills or cash, they were absolutely bound to assign Graham's contract; and the defendant might then refuse the bills, or cash, and insist on the assignment; and a court of chancery would have compelled a specific assignment, if they had refused. The discharge of the award by the assignment was the same thing as the discharge by bills of exchange or cash. It would have been a complete discharge of the award, and there is no reason why he should not give a release as well in the one case as the other.

It is alleged that the release would have discharged the other covenants, and the penalty of the agreement. But the case cited from *Viner* shows that the covenants would not have been discharged by the release, nor would it have discharged the penalty. The covenant not to interfere was not a present duty. The covenant of the plaintiffs is, that after the assignment, they would not interfere. But a release of all demands does not discharge a covenant before it is broken; until that time it is no demand. The same observation applies to the penalty; it is not a present duty until a breach of the covenant. A bond in the penalty of 200*l.* to pay 100*l.* at a future day, is a present duty. But in a bill penal, the penalty is not a duty till after the day appointed for the payment of the smaller sum. The difference in declaring upon the two instruments shows their different nature. On a bond you only declare that he bound himself in the penalty; and you take no notice of the condition. But on a bill penal you declare that the defendant having failed to pay the smaller sum, an action has accrued to recover the penalty. To support these positions he cited Esp. N. P. 307. Buller, 166. Cro. Jac. 170, *Hancock v. Field*. Cro. Jac. 300, *Tyman v. Bridges*. Cro Jac. 623, *Porter v. Philips*. 1 Lord Raym. 662, *Thorpe v. Thorpe*, and Cro. Eliz. 579, *Hoe v. Marshall*.

The plaintiffs having offered to perform their part of the agreement, are entitled to their 330*] action. Esp. N. P. *284. Doug. 684, *Jones v. Barkley*. 4 Term Rep. 761, *Goodison v. Nunn*.

As to the *protestando*, it is only an estoppel, or, as Lord Coke says, it is an exclusion of a conclusion. It does not put in issue the validity of the assignment. But if it did, the objections are not well grounded. Whether the release ought to have been mentioned as part of the consideration depends upon the question whether the defendant was bound to give such a release; and the objection, that the assignment is made to Colin Auld, and not to Colin Auld as agent of Dunlop & Co. is not grounded in fact; for in the preamble of the assignment he is named as agent for Dunlop & Co. and throughout the residue of the instrument he is called the said Colin Auld, which refers back to the premises to show in what capacity he was to take the assignment.

In the premises a complete interest is conveyed to Auld as attorney in fact of Dunlop & Co. and the *habendum* cannot, in this case, control the premises. 2 Bl. Com. 298.

February 28. The *Chief Justice*, after stating the case, delivered the opinion of the Court.

To entitle themselves to the money for which this suit was instituted, it is incumbent on the plaintiffs to show that they have performed the very act, on the performance of which the money became payable; or that they are excused by the conduct of the defendant for its non-performance. The act itself has not been performed: but a tender and refusal is equal to a performance; and it is contended that there has been such a tender and refusal in this case.

The pleadings show that the tender was not unconditional; but the plaintiffs insist that the condition, annexed to the tender, was such as they had a right to annex to it, and on their correctness in this opinion, depends the judgment now to be rendered.

The plea does not contest the sufficiency of the deed of assignment and power of attorney which were tendered; *and, conse- [*331 quently, no question concerning their sufficiency can arise in the present case.

The only cause relied on, as doing away the operation of the tender, is, that it was made on condition that a release of all the claims and demands of the said John Dunlop & Co. on the said Hepburn and Dundas, should first be signed, sealed and delivered to them by Colin Auld.

The only question in the case is, whether Hepburn and Dundas had a right to insist on this previous condition; and it is admitted that this question depends entirely on the agreement of the 27th of September, 1799.

That an acquittance should be signed, sealed and delivered before the act itself was performed, which entitled the party to such acquittance, is a mode of proceeding very unusual, and which certainly could only be rendered indispensable by express stipulation.

There is in this case no such express stipulation. If the payment had been made in bills or money, the release of all the claims and demands of John Dunlop & Co. against them was to have been given, not previous thereto, but upon receiving such payment. If, then, as has been argued, the deed of assignment and power of attorney are substituted for the payment in money, or in bills, and to be made on the same conditions on which payment in either of those articles was to have been made, yet there could exist no right to demand a delivery of the receipt for the payment.

If we inspect those covenants which relate to the deed of assignment of Graham's contract, we find no stipulation respecting a release of any sort. The agreement is, that he will re-

ceive the said deed of assignment at 21,112 dollars, towards the discharge of the award, but he does not engage to give any release whatever.

It is contended that upon the general principles of justice and of law, Hepburn and Dundas had a right to the evidence of the payment they had made without expressly contracting for such evidence; and this is true, so far 332*] *as to entitle them to a receipt for the deed and power delivered; but neither the general principles of justice nor of law, give Hepburn and Dundas a right to insist upon any release as a previous condition.

The case has been argued at bar as if the condition of the tender of the deed of assignment and power of attorney had been a release of all claims and demands to be given at one and the same time with the delivery of such deed and power, but this is not the case as presented in the pleadings. According to the plea, Hepburn and Dundas required the delivery of the release as a condition precedent to their delivery of the deed of assignment.

This demand seems not to have been countenanced by the contract; and of consequence the tender was not such as it was incumbent on Hepburn and Dundas to have made, in order to entitle themselves to the money for which they have brought this suit.

Judgment affirmed with costs.

MARINE INSURANCE COMPANY OF ALEXANDRIA
v.
JAMES YOUNG.

Assumpsit will not lie upon a policy of insurance under the corporate seal, unless a new consideration be averred.

Quære, whether an aggregate corporation can make an express assumpsit, unless specially authorised by statute?

Whether an action on a policy will lie against this company in their corporate name? Or whether the declaration must not be against the president alone?

A verdict will not cure a mistake in the nature of the action.

A judgment in assumpsit upon a policy is a bar to a subsequent action of covenant on the same policy.

After verdict every assumpsit in the declaration is to be taken as an express assumpsit.

THIS was an action brought in the circuit court of the District of Columbia, by James Young against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brigantine Liberty at and from Anacabessa, in Jamaica, to a port in the United States. The declaration stated, that "James Young complained of the Marine Insurance Company of Alexandria in custody, &c. of a plea, for that whereas," &c. setting forth the policy in the usual form. "In witness whereof the President and directors of the said Marine Insurance 333*] Company of *Alexandria, by William Hartshorne, their President, subscribed the sum assured, and caused the common seal, and the attestation of their Secretary, to be affixed to the said presents."

It then alleged the property of the vessel to be in the plaintiff, and that it was of the value of 5,000 dollars, the sum insured. That the said Marine Insurance Company, in consideration of the premium to be paid by the plaintiff, "did undertake and agree, by their policy aforesaid, subscribed by their President aforesaid, with the proper hand and name of the said President thereto affixed, to assure the said vessel, &c. at the said sum of 5,000 dollars against the risks specified in the said policy." That the plaintiff had paid the premium; and that the vessel was totally lost, of which loss the company had notice; "By means of which said premises, the said Marine Insurance Company of Alexandria became liable to pay to the said plaintiff said sum of 5,000 dollars, and being so liable, the said Marine Insurance Company, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, assumed upon themselves, and to the said plaintiff then and there faithfully promised," to pay him the said sum of money when thereunto afterwards required.

There was another count, stating, generally, that in consideration that the plaintiff would pay the premium of four per cent. upon the value of the vessel, the Insurance Company "undertook and agreed" to insure, &c. at the sum of 5,000 dollars, against sea risks only, at and from Anacabessa, in Jamaica, &c. to a port in the United States; that he had paid the premium, and that the vessel was stranded and lost, of which the Insurance Company had notice; by means of which said premises the said company became liable, &c. and so being liable, assumed upon themselves, and promised to pay, &c. Nevertheless, the said defendants, not regarding their several promises and undertakings aforesaid, but contriving, &c. refused to pay, to the damage of the plaintiff 10,000 dollars. Plea *non assumpserunt* and issue. Verdict for the plaintiff on the first count, and for defendant on the other count.

Motion in arrest of judgment; "because the first count is in assumpsit upon a sealed instrument set forth in the said count, as containing the contract whereupon *the action [*334 aforesaid is brought." Judgment for the plaintiff; to reverse which judgment the Insurance Company obtained the present writ of error; and the errors assigned were,

1. "That assumpsit is brought upon a sealed contract."

2. "That the Marine Insurance Company of Alexandria, being an aggregate corporation, is sued upon assumpsit instead of upon covenant."

3. "That the judgment upon the verdict aforesaid ought to have been arrested."

4. "That according to the act of incorporation, the action aforesaid, if maintainable at all, should have been commenced and prosecuted against William Hartshorne, President of the Marine Insurance Company."

E. J. Lee and C. Lee, for the plaintiffs in error.

Simms and Swann, for the defendant.

For the plaintiffs in error, it was said,

1st. That the declaration states the policy to be under the common seal, and the law is clear that assumpsit will not lie upon a sealed instrument. The action ought to have been covenant

and not case. The difference is, that when the specialty is only inducement to the promise, and a new consideration intervenes, assumpsit will lie; but where the only contract, which is stated as the cause of liability of the defendant, is fully and entirely contained in the specialty. and no circumstance is added but such as is provided for by the specialty, there it will not maintain a general *indebitatus assumpsit*, which is the present form of action.

The declaration states that the Insurance Company, by their policy, under the common seal, insured 5,000 dollars on the brig, and that the vessel was lost, whereby the company became liable, and, being so liable, assumed to 335*] pay. *This is the whole substance of the declaration. No new consideration is alleged. The whole ground of liability of the plaintiffs in error is their policy under their common seal. And in such a case the action must be covenant or debt. Marshall on Insurance, 596. Park, 396. "The act of Parliament, 6 Geo. I. c. 18, by which the two Insurance Companies" (of England) "were erected, ordered that they should have a common seal, by affixing which all corporate bodies ratify and confirm their contracts. Hence, a policy made by either of those companies is a contract under seal; and if the contract is broken, the action must be debt or covenant."[1] 2 Term Rep. 479, *Foster v. Allanson*, and the cases there cited. In that case there was a new cause of action, and a separate, independent consideration.

Cro. Car. 343, *Brett v. Read*. 1 Bac. Abr. 164. In the case of *Baird and Brigs v. Blaigrove*, in the court of appeals of Virginia, 1 Wash. Rep. 170, there was a subsequent new consideration and parol agreement expressly proved, and upon that ground the court decided that assumpsit would lie. See 2 Call's Rep. 258, *Taliaferro v. Robb*. The case of *Pelly v. Governor and Company of the Royal Exchange Assurance*, 1 Burr. 341. is an action of covenant upon a policy; so is the case of *Worsley v. Wood*, 6 Term Rep. 710, and *Tarleton v. Stainforth*, 5 Term Rep. 695. Assumpsit will not lie upon a specialty. 1 Esp. N. P. 95. Doug. 6, *Walker v. Witter*. Cro. Jac. 213. *Buckingham v. Costendine*. 2 Strange, 1027, 1028, *Bulstrode v. Gilburn*. Cro. Jac. 505, *Bennus v. Guyldley*. Cro. Jac. 598, *Dartnal v. Morgan*. Cro. Car. 6, *Holme v. Lucas*. Cro. Car. 31, *Foster v. Smith*. Cro. Eliz. 242, *Reade v. Johnson*. 1 Roll. Abr. 8. Hutt. 34, *Green v. Harrington*. Cro. Eliz. 283, *Pyers v. Turner*.

If this action is sustainable in law, then the rule requiring a plaintiff to state in his declaration his cause of action will be useless. The reason of that rule is, to ascertain whether the contract is under seal or not. Bull. N. P. 128. And if the judgment of the court below is 336*] *correct, an action of assumpsit may be maintained upon a bond, or any other sealed instrument. The notice stated in the declaration is what the plaintiff below was bound to give, because the company were not liable, by their covenant, to pay until proof of the loss was produced, and adjustment thereof made. This is only one of the facts necessary to produce a liability under the covenant itself, and not any new consideration, nor is it stated as such in the declaration. The declaration does not say, "in consideration whereof," but, simply, "so being liable," assumed to pay; so that the assumpsit alleged, is nothing more than the very agreement contained in the policy.

2d. An action of assumpsit upon an express contract, will not lie against an aggregate corporation.

They can do no valid act but by their common seal, by which alone the union of the wills of the several members can be testified; and the affixing of the seal makes it a covenant. Perhaps an exception to this rule might be made by the act which creates such an aggregate body politic; but here is no such exception made as will apply to the present case. *Marshall on Insurance*, 596.

3d. If any action is maintainable upon this policy, it ought to have been brought and prosecuted against the president of the company, and not against the body politic.[1]

The words of the act, which incorporates the company (Acts of Assembly of Virginia, 1797, c. 20, s. 9 and 11) are, "That all policies shall be signed by the president, or in case of his inability to attend, by the president *pro tempore*, and countersigned by the secretary." S. 11. "That in case any action shall be prosecuted upon any policy so subscribed, the same shall be brought against *the president sub- [*337 scribing the same, or his successor in office; and all recoveries had in such action or actions shall be conclusive on the company, so far as to render the stock of the company liable, and no further."

Although the sixth section of the same act enables the company to sue and be sued by their corporate name, yet, as the subsequent sections prescribe the manner of making policies, and the mode of proceeding in actions upon them, the latter sections must be considered as so far restricting the general expressions of the former. General words in one clause of a statute may be restrained by particular words in a subsequent clause of the same statute, and the whole ought to be so construed, that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. 4 Bac. Abr. 645.

The declaration is bad in stating the body politic to be in custody of the marshal. 1 Bac. Abr. 507.

4th. If it should be said, that this declaration is good after verdict; the answer is, that the verdict will not cure a declaration which shows that the plaintiff is entitled only to an action of a different nature. The title is not defectively set forth, because every fact is stated which

1.—By the 11 *Geo. I. c.* 30, *s.* 43, which recites the inconveniences resulting from the necessity of the policies of these two companies being under seal, by reason of their being corporate bodies, they are authorised to plead generally *nil debent*, and to give the special matter in evidence, &c.

1.—The *capias ad resp.* in this case was against William Hartshorne, President of the Marine Insurance Company of Alexandria.

The declaration was against the company in their corporate name.

This form of proceeding, by the better opinion, seemed to be correct.

By the form of proceedings in Virginia, which are in some respects similar to those in the king's bench in England, the *capias* is not considered as any part of the record of the action, which is supposed to commence upon the filing of the bill, or declaration.

shows that the plaintiff is entitled to an action of covenant. A mistake in the nature of the action is not cured by the statute of jeofails. In all the cases before cited, the question as to the form of action came on upon motion in arrest of judgment, and it is not even hinted that the error was cured by verdict. 2 Term Rep. 479, *Foster v. Allanson.* 1 Wash. Rep. 170, *Baird v. Blaigrove.*

No assumpsit can be presumed, after verdict, to have been proved on the trial, but that which is alleged in the declaration. 1 Term Rep. 141, *Spieres v. Parker.*

A verdict will not aid a case where the gist of the action is omitted. Cowp. 825, *Avery v. Hoole.* Nor does the clause of the Virginia statute of jeofails, which states that a verdict shall cure the omission of the averment of any matter without proving which the jury ought not to have given such a verdict, extend to a case where the declaration omits to state the 338*] ground of the assumpsit. 2 Wash. *Rep. 187, *Winston v. Francisco.* 1 Call's Rep. 98, 101, 102, *Chichester v. Vas.* 4 Burr. 2455, Doug. 654 (679,) *Rushton v. Aspinal.* A recovery in this action would be no bar to a recovery in an action of covenant for the same loss. 1 Call. 102, *Chichester v. Vass.* 4 Bac. Abr. 14, Cro. Car. 6, *Holme v. Lucas.*

For the defendant in error it was contended,

1st. That this policy is not a specialty.

2d. If it is a specialty, yet there was a subsequent assumpsit upon a new consideration.

3d. That if it be a specialty, and no new promise sufficient to support an action of assumpsit, yet the declaration is a good declaration in covenant, especially after verdict.

1st. The declaration does not declare on this policy as upon a deed. It does not say that the company covenanted by their deed; but only that Young did, by a policy of insurance, subscribed and attested as hereinafter mentioned, make insurance, and cause himself to be insured, lost or not lost, &c. upon the body, &c. of the brigantine Liberty, &c. And so they, the assurers, were contented, and did thereby promise and bind themselves to the assured for the true performance of the premises, confessing themselves paid the consideration, &c. In witness whereof the President and directors of the said Marine Insurance Company of Alexandria, by William Hartshorne, their President, subscribed the sum assured, and caused the common seal and the attestation of their Secretary to be affixed to the said presents, in the town of Alexandria, on the said 17th day of December, 1800. The plaintiff then avers, that in consideration of the premium, &c. they did undertake and agree by their policy aforesaid, subscribed by their President aforesaid, with the proper hand and name of the said President thereto affixed, to assure the said vessel, at the sum of 5,000 dollars, &c. There is no profert of the policy, as of a deed. In fact, it is not a deed. To make it a deed, it must be sealed with the intent to make a deed, which would be contrary to their act of incorporation. The company had no power to make a policy under seal. The act prescribes the mode by which they shall make 339*] policies; *which is only by the signing of the President and countersigning by the Secretary. Although there are not negative words by which other modes are expressly prohibited, yet the saying that a thing shall be done in one manner is an implied negative of all others. The President and three of the directors are empowered by the act to make insurance, but the policies must be certified in a certain manner. They have no right to bind the company by a policy under seal. They have no right to use the common seal for any purpose, unless particularly empowered by the constitution or by-laws of the company. If the company have improperly put a seal to the instrument, which the act of incorporation intended should be a simple contract, and not a specialty, it is their own act, and they have no right to complain. But shall it be permitted for the Marine Insurance Company to say, that by their own act, contrary to law, they have deceived the plaintiff below, and, therefore, he shall not recover in this form of action? After having defeated him in this action, and driven him to bring an action of covenant, what will prevent their turning round, and saying that this policy is not a specialty? The company had no power to make a policy under seal, or if they had, the seal has been affixed by persons having no authority from the company, or perhaps by mistake. The objection does not go to the merits of the cause. If there was an error it was beneficial to the company, inasmuch as it was a relinquishment of strict right on the part of the plaintiff below, and enabled the company to make their defense with much less risk, as it enabled them to give in evidence, on the plea of *non assumpsit* those facts which must have been specially pleaded to an action of covenant. The intention of the legislature in prescribing the mode of making policies evidently was, that they should not be specialties, but only simple contracts, so as to avoid the necessity of special pleading. If the principle be correct, that the company cannot make a policy but under seal, the consequence will be extremely mischievous to their interests. They will be always involved in the intricacies of special pleading, and the merits of the case will be often lost in the subtlety of legal distinctions.

Who has the power of using the common seal? Not the President alone, nor any number of the directors, but *the company only. [*340 But the declaration does not state this to be the seal of the company, but the seal of the Secretary; the words are, "have caused the common seal and attestation of the Secretary to be affixed."

2d. But if the policy is a specialty, yet there is a sufficient assumpsit alleged in the declaration to support this action.

The action does not depend only upon the facts set forth in the policy. The declaration states other facts, such as the notice to the company, the proof of the loss, and an express assumpsit to pay. These are considerations abundantly sufficient to support the action. If the plaintiff has two remedies, he may take which he pleases. A judgment in this case would be a bar to an action upon the covenant.[1]

It is a strange position that assumpsit will not lie in any case against an aggregate body politic, upon an express contract. Such a corporation cannot act in any case but by the in-

1.—The court said there could be no doubt of that, if the declaration sufficiently showed it to be the same cause of action.

tervention of agents. But by those, it may contract debts by simple contract as well as by specialty. The East India Company have their agents all over the world, and there never was a question, whether such agents could make promises binding on the company pursuant to powers given by the company for that purpose. By what law are the banks authorized to bind themselves by promissory notes? Yet the gentlemen will not say that they are not liable upon their notes. 3 P. Wms. 419, *Rex v. Bigg.* 1 Stra. 18. S. C. 2 Burr. 1216, *Edie v. E. I. Company.* Where the specialty is only inducement to the action, and upon facts growing out of the specialty an assumpsit is made, the action of assumpsit will lie. 2 Term Rep. 483, *Moravia v. Levy.* The declaration states the policy, the sailing of the vessel, the loss, notice to the insurers, and thereupon an express assumpsit to pay the sum of 500 dollars. These new facts bring the case within the reason of the decision in 341*] the case of *Moravia v. Levy,* After *verdict, every assumpsit alleged in the declaration is to be taken as an express assumpsit.[1]

3d. But if this policy is to be considered as a specialty, and there is no new consideration sufficient to support the assumpsit, yet this is a good declaration in covenant.

It states the policy, and the facts which constitute a breach of the agreement and create a liability on the defendants below. That part which states an assumpsit may be rejected as surplusage, and the residue will make a good declaration in covenant. The want of profert is cured by the verdict. 2 Wils. 362. (*Quære.*) Nor will the issue of *non assumpsit* render the judgment erroneous. It has been held that in an action of assumpsit, and not guilty pleaded, and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. 4 Bac. Abr. 84.

It is not necessary that the action should be prosecuted against the President of the company. It could not be the intention of the legislature, that the private property of the President should be liable to satisfy a judgment upon a policy made on account of the company, and that he should be left to get his money back again from the company. By the act of incorporation, the joint stock only is liable. The expressions of the act warrant the practice in this case, of bringing the *capias* only against the president, and then declaring against the company: for it only says, that the action shall be brought against the President, and not that it shall be prosecuted against him to final judgment. The intention of the act could only be to compel an appearance, and to give the President the power of entering an appearance in the name of the company. The act says that all such recoveries shall be conclusive on the company, so far as to render the joint stock liable, and no further.

The sixth section of the act renders the company liable to actions in their corporate name; and as the writ is no part of the record, and the company have appeared and pleaded, it is now too late for them to allege this for error. 342*] *They ought not to be permitted to take the chance of a trial, and when the merits have been found against them, come forward, and say they are not the proper persons against whom the suit ought to have been brought.

In reply, it was said, that the policy is in the usual form: a form which is generally used, whether the policy be under seal or not: and, therefore, no argument can be drawn from the peculiar expressions of the instrument. The declaration states it to be under the common seal, which is a technical name for the seal of a corporation. The act which creates this company has no negative words by which they are forbidden to make policies under seal if they think proper. The clause which authorizes them to make a policy by the signature of the President, without the common seal, was introduced for their benefit, so as to enable them to defend actions without the necessity of that special pleading which often attends actions of covenant. The general maxim of law is, that every one may waive a provision introduced for his benefit.

The act of incorporation says, that when any action shall be prosecuted upon such policy, the same shall be brought against the President who subscribed the same, or his successor in office, and all recoveries in such actions shall be conclusive on the company. Not only the capias must be against the President, but the declaration and judgment. How the judgment is to be satisfied is not for us now to determine, nor is it important. The mode of recovery prescribed by the law must be pursued.

March 1st, 1803. *The Court* reversed the judgment, and ordered it to be arrested, because the action is a special action upon the case on the policy, and the declaration shows that the policy is a specialty.

The Court seemed to be of opinion that an action of covenant would lie upon it against the company in their corporate name.

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*ABERCROMBIE v. DUPUIS AND ANOTHER. [*343

To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien. It is not sufficient to say that they reside in different states.

ERROR to a judgment of the circuit court for the district of Georgia. The plaintiffs below (or petitioners as they are called in the record) "aver, that they do severally reside without the limits of the district of Georgia aforesaid, to wit, in the state of Kentucky, therefore, they have the right to commence their said action in this honorable court," &c.[2] The defendant is called Charles Abercrombie, Esq., of the district of Georgia.

It was assigned for error that the circuit court had not jurisdiction of the cause, because it does not appear upon the record that either of the parties is an alien, nor that the parties are citizens of different states. And for this error the judgment was reversed without argument.

The Court said that the question had been decided, after full argument, in the case of *Bingham v. Cabot,* 3 Dall. 382, and they did not think proper to overrule that case.

1.—This was admitted by the *Chief Justice.*

2.—This averment follows immediately after the *ad damnum,* at the foot of the declaration.

The *Chief Justice* said he did not know how his opinion might be if the question were a new one.

LINDO *v.* GARDNER.

Debt will not lie in Maryland, upon a promissory note.

Quære, whether the statute of limitations can be given in evidence on *nil debet?*

THIS was an action of debt brought by the administrators of Archibald Gardner against Abraham Lindo, upon a promissory note, in the circuit court of the District of Columbia, sitting in Washington. The act of congress respecting the District of Columbia had adopted the laws of Maryland as the law of this part of the district. In Maryland the statute of 3 and 4 Anne, c. 9, respecting promissory notes, had been "introduced, used and practiced by the 344*] courts of law," and thereby, and *by virtue of the declaration of rights, section 3d, it became the law of the land; and the courts of Maryland, in their construction of that statute, have always respected the adjudications of English courts. In the court below there was a verdict and judgment for the plaintiffs; to reverse which judgment the defendant sued out the present writ of error.

The declaration is, of a plea that he render to them 336 dollars and 97 cents, money of account of the United States of America, for that the defendant, on the 5th of October, 1795, at, &c. by his certain note in writing of that date, subscribed with his proper manuscription, and now here shown to the court, acknowledged himself to owe to Archibald Gardner the said sum of 336 dollars and 97 cents, which the said defendant promised to pay the said Gardner, and to the order of the said Gardner, at sixty days after the date of the said note in writing, it being in consideration of value received." It then avers the non-payment, &c. and makes a profert of the letters of administration which are averred to be "in due form." The defendant in the court below pleaded *nil debet;* and after verdict against him, moved in arrest of judgment, because,

1. An action of debt cannot be maintained upon the promissory note set forth in the declaration.

2. It does not appear that the plaintiffs had obtained such letters of administration, as to entitle them to maintain an action upon the said note.

3. The declaration is in the *debet and detinet*, and ought to be in the *detinet* only.[1]

There was also a bill of exceptions stating the refusal of the court to suffer the defendant to give the statute of limitations in evidence on the plea of *nil debet*.

The note was in these words: "Philadelphia, October 5, 1795. At sixty days, I promise to 345*] pay to the order *of Mr. Archibald Gardner, three hundred and thirty-six dollars and ninety-seven cents, value received.

"A. LINDO."

Peacock, for the plaintiff in error, was about to produce authorities on the first point, when he was stopped by Chase, J. who said, that an action of debt will not lie in Maryland upon a promissory note.

No opposition being made on the part of the defendant in error, judgment was afterwards reversed without argument.[2]

HODGSON *v.* DEXTER.

A public agent of the government, contracting for the use of government, is not personally liable, although the contract be under his seal. Quære, what shall be said to be the act of God; and what inevitable casualty?

THIS was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late Secretary of War, for not keeping in good repair, and for not delivering up in like good repair at the end of the term, certain premises which had been leased by the plaintiff to the defendant, for the purpose of officers for the war department; the buildings having been destroyed by fire during the term.

The lease was in these words:

"This indenture, made the 14th day of August, in the year of our Lord one thousand eight hundred, between Joseph Hodgson, of the city of Washington, and territory of Columbia, of the one part, and Samuel Dexter, of the same place, Secretary of War, of the other part, witnesseth, that the said Joseph Hodgson, for and in consideration of the sum of four hundred dollars, current money of the United States, to him in hand paid by the said Samuel Dexter, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath demised, granted, and to farm let, and by these presents, doth demise, grant and to farm let, to the said Samuel Dexter and his successors, all that the three story messuage or tenement, erected and built *on part of lot number 14, in square num-[*346 ber 75, situate on the Pennsylvania Avenue in the city of Washington aforesaid, together with the background and improvements; running from the said messuage (fronting 26 feet) in parallel lines down to lot number 12, on said square, being the premises next adjoining the messuage or tenement now in the occupation of Mr. Jonathan Jackson, with the improvements and appurtenances thereto belonging, or appertaining, to have and to hold the said demised premises unto him, the said Samuel Dexter and his successors, from the day of the date hereof, for and during, and unto the full end and term of eight calendar months from thence next ensuing and fully to be complete and ended. And the said Joseph Hodgson for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said Samuel Dexter and his successors, that he, the said Samuel Dexter and his successors, shall and may peaceably and quietly have, hold, use, occupy, possess and enjoy the above demised premises for and during the term granted thereof, without the let, suit, trouble, molestation or eviction of him the said Joseph Hodgson, or his heirs or assigns, or of any other person or persons whatsoever lawfully claiming, or to claim by, from, under, or in trust for him or them. And the said Samuel Dexter for himself and his successors, doth hereby covenant, promise and agree to and with

1.—The caplas, which, in Maryland, is considered as part of the record, was in the detinent only. The declaration was in neither the debet nor detinet, having omitted those words altogether.

2.—See note (B.) in the Appendix.

the said Joseph Hodgson, his heirs and assigns, that he the said Samuel Dexter and his successors, shall and will at all times during the said term, keep, or cause to be kept, in good and sufficient repair, the said demised premises, inevitable casualties and ordinary decay excepted; and the same, so well and sufficiently kept in repair, shall and will at the end of the said term, yield and surrender up to him the said Joseph Hodgson, his heirs and assigns. In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the day and year first above written.

"SAMUEL DEXTER, Seal.
"JOSEPH HODGSON, Seal.

"Signed, sealed and delivered
in the presence of
"*John Goulding.*
"*S. Lewis, Jun.*"

347*] *The declaration contained two counts. The first alleged the breach thus: "but hath broken the same in this, to wit, that during the said term of eight calendar months, he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted; and that he hath not, at the end of the said term, yielded and surrendered up to the plaintiff the same, so well and sufficiently kept in repair." The second count alleged that the defendant hath not observed and kept his covenant aforesaid, in this, to wit, "that he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted, but that the same, by evitable casualty, to wit, by fire, were destroyed, consumed and burnt, during the said term of eight calendar months, to wit, on or about the eighth day of November, 1800, and that the said fire, and evitable casualty, was occasioned and took place from negligence, and from the act or acts of one or more evil disposed persons." "And after the said fire, and after the expiration of the said term, the said defendant did not so yield and surrender up the said premises according to the tenor and effect of his said covenant." To the plaintiff's damage 10,000 dollars.

The defendant, after oyer, pleaded in bar, 1st. "That before the expiration of the said term of eight calendar months in the said writing mentioned, viz., on the 8th of November, 1800, the said demised premises, against the will, and without the negligence, or other default of him the said Dexter, were burnt and consumed by fire, happening from some cause to the said Dexter then and yet wholly unknown. And the said Dexter further saith, that saving and excepting only the damage occasioned by the same burning and consuming, he the said Dexter hath, at all times, during the said term of eight calendar months, kept, and caused to be kept, in good and sufficient repair the said and demised premises; and that he hath, at the end of the said term, yielded and surrendered up to the plaintiff the said demised premises, so well and sufficiently kept in repair, saving and excepting only the damage occasioned by the burning and consuming aforesaid; and this the said Dexter is ready to verify," &c.

348*] *To this plea there was a general demurrer, and joinder.

To the second, third and fifth pleas, there were issues in fact. The fourth plea was as follows: "That on the 15th of May, 1800, the President of the United States, for the time then being, in pursuance of authority given to him by law, did order and direct the various offices belonging to the several executive departments of the United States, of which the department of war then was, and yet is, one, to be removed to the city of Washington on the first day of June then next ensuing; and that in obedience to the same order and direction, the various offices of the department of war aforesaid were removed to the said city of Washington on the said first day of June and that thereby it became proper and necessary, that a suitable building should be hired, in which the said offices of the said department of war might be holden and kept, and for this purpose, and for no other purpose whatever, the building, mentioned in the indenture aforesaid, was, by the said indenture, leased to the said Dexter; and that, at the time of executing the writing aforesaid, he was Secretary of the department of War, and in that capacity did make and execute the same, and that before the expiration of the said term of eight calendar months, viz., on the 1st day of January, 1801, he, the said Dexter, at Washington aforesaid, resigned the office of Secretary of the department of War, and from and after that time ceased to hold the same office, and until this time he hath never holden the same; and further, that on the 5th day of March, in the year last mentioned, Henry Dearborn, Esq. was there duly appointed and commissioned as Secretary of the department of War, and then and there accepted of the same office, and hath ever since held the same; and he, the said Dearborn, now is, and ever since his acceptance of the said office of Secretary of War as aforesaid, hath been, the lawful successor of him, the said Dexter, in the said office; and this the said Dexter is ready to verify," &c.

To which plea the plaintiff replied, "protesting that the said Dexter did not, in his capacity of Secretary of War, sign, seal, execute and deliver the indenture of lease aforesaid exhibited, yet, by way of replication, he *saith [*349 that although the said Dexter ceased to be Secretary of War on the 1st day of January, 1801, and that on the 5th day of March, in the same year, a certain Henry Dearborn became his successor, duly appointed Secretary of the department of War, and still remains such, yet that the house and premises, in the lease aforesaid mentioned, were burnt down and consumed by fire arising from within the same, from the negligence or default, not of the said Dexter, but of some person unknown, during the term aforesaid, viz., on the 8th of November, 1800, while the said Dexter was Secretary of War, and whilst he had possession of the said premises, and before the appointment of the said Dearborn; and that neither the said Dexter, nor any other person, hath, during the continuance of the said lease, or at any time, built up and repaired the said premises; and this the said Hodgson is ready to verify." &c.

To this replication there was a general demurrer and joinder.

The 6th plea was, "that on the 15th day of May, 1800, the President of the United States,

for the time then being, in pursuance of authority given to him by law," ordered the executive offices to be removed to Washington, &c. as stated in the fourth plea, "and that it became proper and necessary that a suitable building should be hired in which the several offices of the department of war aforesaid might be holden and kept, and that for these purposes, and for no other purpose whatever," the buildings, &c. "were by the said indenture leased to the said Dexter by the said Hodgson; and that at the time when the said Dexter executed the indenture aforesaid, he was Secretary of the said department of War; and this he is ready to verify," &c.

To this there was a general demurrer and joinder.

Upon these demurrers the judgment below was against the plaintiff, who thereupon sued out the present writ of error.

Martin, attorney general of Maryland, and Key, for plaintiff in error.

350*] *Dexter, and Mason, attorney of United States for the District of Columbia, for defendant.

Key made three points.

1st. That the defendant is individually and personally liable and bound to the performance of the covenant in the indenture contained, by him executed, and on which the suit is brought.

2d. That the defendant's first plea is bad in law, is argumentative, and does not put in issue matters competent to bar the plaintiff's action.

3d. That the defendant's fourth plea is bad in substance, is no bar, and wants form.

1st. The sixth plea and demurrer are calculated to bring into view the question whether the defendant has bound himself personally to the performance of the covenant.

Although a public agent is not generally liable for contracts made by him in that capacity; still he is capable of binding himself as well as his government, by using apt words for that purpose.

This case is not of importance from any general principles which it will establish. The decision must depend upon the expressions, and operation of the indenture of lease.

The defendant has used strong obligatory expressions, of plain unequivocal import. "And the said Samuel Dexter for himself, and his successors, doth hereby covenant, promise and agree to and with the said Joseph Hodgson, his heirs and assigns." To weaken the force of these expressions, it is said that he only intended to bind himself in his official character as Secretary of War, 1st. Because he is styled in the premises Secretary of War; 2d. Because the term successors is used throughout the instrument; 3. Because the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals," refer to Samuel Dexter in the official character in which he is first named in the premises.

351*] * 1st. As to the styling him Secretary of War, in the premises, it is only a description of the person, *designatio personæ*.

It is the office of the premises to identify the contracting parties, and it is most common to use any honorable title which they may enjoy. It is not in the preamble that we are to look for the force of the expressions of the covenant, but in the covenant itself. It is a rule of construction that when obligatory words, of plain unequivocal meaning, are used, you cannot resort to other parts of the instrument to contradict them. But when equivocal or doubtful words are used, you may. A party using expressions that legally bind him, is estopped to say he did not intend to be bound in his individual capacity.

The word "himself," is to be taken separately from the words "his successors," and each is to be applied to the obligatory words of the covenant; *reddenda singula singulis*. The said Samuel Dexter covenants for himself and for his successors. He covenants that he will surrender the premises in good repair; and if he does not so surrender them, he covenants that they, his successors, will. Words cannot be stronger than those which he has used.

2d. As to the words "successors," Mr. Dexter can have no successors in the legal sense of the word. It is true that Mr. Dearborn filled the office posterior to Mr. Dexter, and hence, in point of time, succeeded him, and was in that sense his successor; but he is not his successor in any known legal sense of the word. There is no legal connection between them. Mr. Dexter was not competent to bind his successor in any manner. He was not a corporation sole; and there is no law of the United States which authorizes him to bind his successor. The word "successors," has no operation whatever. Mr. Dearborn was not obliged to occupy the house, nor would an action have been maintainable against him for the rent. If he had been disturbed in the possession, he could have had no action upon the covenant; if he had been ousted, he could not have supported an ejectment. Even if Mr. Dexter had been a corporation sole, his successors would not be bound. No chattel can be limited to the successors of a corporation sole; but it will go to the executor, and not to the successor.

*If these observations are correct, then[*352 the word "successors," is surplusage, and the lease enured to Mr. Dexter in his individual capacity; but this point will be resumed.

3d. As to the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals;" they can have no operation to let in Mr. Dexter's official character. Either he bound himself in his official capacity, or as an individual.

Nothing can be inferred from the word "said," but that it related to him in one capacity or the other; and in which, is the very question before the court.

Let us now examine this instrument upon principle.

1st. With reference to the person executing it; 2d. As to the legal operation of its expressions.

All agents, acting as such, for avowed principals, only bind their principals; but it must be admitted that they are competent to bind themselves, as well as their principals, if they use apt and adequate words.

Government cannot carry on its operations but through agents, who are distinguished as its officers. I admit that an officer of government, contracting as such, for government, is not personally liable. The law neither creates nor implies any liability on the officer; but he

may make himself individually liable by his express promise and contract. 1 Term Rep. 181, *Macbeath v. Haldimand*. There is nothing, then, in the character of Secretary of War, that prevents him from using words that will render him liable. This leads to the second question, which is, whether he has used such words.

This lease is for eight months; but if for eight years, the same law must govern its construction. I hold it an undeniable position, that Mr. Dexter was not competent to bind his successors in office. If he could not, then the lease must have some operation. It cannot be intended to be a void lease. If not void, then it enures to Mr. Dexter and his executors. If 353*] it enures to them, they *only are liable on the covenant, that is, he in his life time, and they after him. A much stronger case exists in the books. A bishop is a corporation sole; he has successors, technically speaking. Here, then, is a person who has a double capacity, competent to contract in either. So had Mr. Dexter. But, say the books, if a lease be made to a bishop and his successors, it enures to him and his executors. 1 Bac. Abr. 508. Corporation, E. 4. Co. Litt. 46, b. 12 Co. 105, *Corven's Case*. The word "bishop" in such a case is as much the description of his politic capacity, as the word Secretary of War in the present case. A bishop has legal "successors;" and is not a *habendum* "to a bishop and his successors," as strong as the words "to the said Samuel Dexter and his successors?" If in the case of the bishop such a lease would enure to him in his individual capacity, *a fortiori* in the case of Mr. Dexter, who has no legal successors.

Again. The covenant to leave the demised premises in good repair, is a covenant real. 1 Bac. Abr. 534, 536. If it be a covenant real, and runs with the estate and interest, then, as the estate and interest passes to Mr. Dexter and his executors, he and they only can be bound. Suppose the lease had been for five years, and a stranger had taken possession; who could support an ejectment? Not the lessor, because he had parted with his interest: not the successor of Mr. Dexter, because he is neither a party nor a privy. Mr. Dexter only could have maintained the action, the estate and interest being in him. It never was out of him during the term. If the operation of law casts this lease upon Mr. Dexter, he who has the benefit must bear the burden; and he must be bound by this covenant to repair which runs with the estate.

The defendant's ideas violate all the rules of construction.

1st. In a deed, when words of a precise import are used, you cannot resort to other expressions for a supposed intent. The word "himself," in the covenant, is too plain to admit of doubt.

2d. No words shall be rejected which can be made to operate. By their construction, the 354*] word "himself," *which has a definite meaning, must be rejected, and give way to the word "successors," which, in this instrument, can have no meaning.

3d. Such construction shall be given *ut res magis valeat quam pereat*.

According to our construction the deed is operative; but according to theirs it is mere waste paper.

1st. They say that Mr. Dexter is not bound.

2d. All must agree that his successor is not bound.

3d. *Ex consequenti*, nobody is bound.

The case of *Unwin v. Wolsely*, 1 Term Rep. 674, is clearly in our favor. In that case the contract was by an officer of government who expressly contracted "on account of his majesty," and covenanted "on account of the king," that "government should be answerable." In our case there are no such words, nor anything except the styling himself Secretary of War, and using the term successors, which can possibly indicate any intention to bind the government.

2d point.

The first plea in bar is bad. The matter is insufficient to bar the plaintiff from this action. The substance of it is, that the house was burnt without the negligence or other default of the defendant. This is no answer to an express covenant. Due care and diligence is nothing more than every bailee for hire, where there is no express agreement, is bound to use. The plea puts in issue the negligence or default of the defendant, and throws the *onus probandi* on the plaintiff to show actual negligence; whereas the defendant ought to show such an inevitable casualty as to bring himself within the benefit of the exception. He states that the fire happened without his default, from some cause to him unknown; but it does not thence follow that the destruction of the house was inevitable. It is immaterial whether it happened with his knowledge and will, or without. The plea does not *bring in issue the fact whether the [*355 destruction was inevitable, or not; but only whether it happened with his knowledge and by his default.

Default or negligence means the want of ordinary care.

3d point.

The merits of this plea have already been discussed in speaking of the word "successors," in the lease. The demurrer here is not by the plaintiff to the defendant's plea; but by the defendant to the plaintiff's replication; but if the replication is bad, yet if the plea is bad, judgment must be for the plaintiff, unless the Court should be of opinion that the declaration also is bad, inasmuch as it is not supported by the indenture of which a profert is made, whereby it becomes part of the declaration. In that case the fate of this demurrer must depend upon the question of personal liability of the defendant.

Dexter, contra.

1st. It is admitted by Mr. Key, that the defendant had a right to make a public contract, and thereby to bind the government; and we admit that he was also competent to bind himself. The question then is, whether this is a public contract; or whether the defendant has bound himself personally. In addition to the internal evidence of the deed itself, the plea states other material facts which are admitted by the demurrer, and which tend to prove the intention and understanding of the parties at the time of contracting. These facts are, 1st. The order of the President, pursuant to law, to remove the offices to Washington; 2d. Their consequent removal; 3d. The necessity of providing a house in which they might be held; 4th. That for these purposes, and for no other purpose whatever, the buildings were, by the plaintiff, leased to the defendant; 5th. That

the defendant was at that time Secretary of the department of War. These facts show the authority which the defendant had to bind the government, and the purpose for which the contract was made. The contract, then, being made by a public officer of the government, having authority therefor, and for the use of 356*] the government, is prima *facie a public, and not an individual, contract. The question then is, whether the defendant has pledged his individual credit, in addition to that of his government. This depends upon the intention of the parties; for the intention of the parties in all cases constitutes the contract. This intention is to be known by the words they have used; but if those words are doubtful, resort may be had to other facts, such as the subject matter of the agreement, the purpose for which it was made, and the official character of the parties, or either of them. But in the present case the words of the instrument itself seem to leave no room to doubt. In the premises, the defendant is styled Secretary of War, and throughout the whole deed, when he is mentioned, he is called the said Samuel Dexter, referring to the official description contained in the premises; and in the conclusion it is said that the said parties have thereunto set their hands and seals. The word "successors" also is used wherever the name of the defendant occurs in the instrument; and, whether he was competent to bind his successors or not, yet it shows the intention of the parties, and the character in which the defendant meant to contract. It shows also who was to occupy the premises after the defendant should cease to be Secretary of War. The plaintiff himself also has clearly shown what his understanding was at the time by covenanting on his part that the successors of the defendant should quietly occupy and enjoy the premises during the term. This shows that the plaintiff understood he was contracting with a public officer, for public purposes. But great stress is laid upon the word "himself." The said Samuel Dexter, for himself and his successors, covenants to keep the premises in repair. How does he covenant for himself? Clearly for himself while in office, and as the representative of the government, his principal. The same arguments which show this to be a public contract, explain and limit the meaning of the word himself. Who is "himself?" The said Samuel Dexter. Who is the said Samuel Dexter? The premises say, Samuel Dexter, Secretary of War.

The case of *Macbeath v. Haldimand*, 1 Term Rep. 172, is a much stronger case against the individual than the present, and yet the Court had no hesitation in declaring it to be a public contract, and that the individual was 357*] *not liable. In that case nothing was said expressly of contracting on account of the government, or for himself and his successors. In order to show that the defendant meant to pledge his individual credit in addition to that of his government, the plaintiff ought to make out a very strong case, in express terms; for if public agents are to be made liable upon presumptions arising from equivocal expressions, no prudent man will undertake to conduct the public business, where, of necessity, contracts must be made to an immense amount. If a doubt exists, the construction ought certainly to be in favor of the agent. The case of *Unwin v. Wolsely*, 1 Term Rep. 674, clearly shows that no difference, in the construction of the contract, can arise from the circumstance of its being under seal.

The intention of the contract being to bind the government, it shall not, by reason of the seal, become the contract of the individual who did not mean to bind himself. The only operation of the seal is to raise the agreement from a simple contract to a specialty. The seal, therefore, does not make it the deed of the individual. It is immaterial whether the words "on account of his majesty," make the case of *Unwin v. Wolsely*, a stronger case in favor of that defendant than the present. The case is not cited to compare those facts with these, but to show that the seal makes no difference between that case and the case of *Macbeath v. Haldimand*.

2d. point. Inevitable casualty.

The objections to this plea seem to be, that it throws the *onus probandi* upon the plaintiff; and that the facts do not show an inevitable casualty.

The plea has stated all that was possible to state; all that was within our knowledge; and if they do not show the case to be prima facie within the exception of the covenant, the plea is bad. No form of plea which the defendant could have pleaded, as to this point, would have laid the *onus probandi* on him.

The exception of inevitable casualties is in its nature a negative. One of the counts in the declaration avers the *destruction of [*358 the buildings to have been by an evitable casualty. Upon this averment the defendant might have taken issue, and said it was not by an evitable casualty, or, in the words of the lease, that it was by an inevitable casualty, which is equally a negative proposition; and in either case the proof would lay on the plaintiff. So if the defendant had pleaded that the accident happened notwithstanding he had used the utmost care and diligence to prevent it; the plaintiff must have replied some act of negligence. For it cannot be supposed that the defendant should show particular instances of his care for every moment of his occupation during the whole term. Suppose the defendant had pleaded that the fire arose by accident in the adjoining house, and communicated to the house in question; (this example is assumed under an impression that such was the fact;) would that have been more satisfactory to the plaintiff than the present plea? He would still have to show that the defendant had not used reasonable means to avoid its effects.

In the case of *Monk v. Cooper*, 2 Lord Raym. 1477, the form of pleading is not more certain than the present; and is the form which has been ever since used in cases of destruction by fire. It is understood that the learned gentleman who is to close this argument has given an opinion, and means to contend, that inevitable casualty means the act of God.

But surely it cannot mean an accident only evitable by the power of the Supreme Being. Death is usually termed the act of God; but death may be by human means, which may often be avoided; as in the case of murder. So death may be the consequences of unskillfulness of the physician, and might have been avoided

by employing a man of more skill. So a man by exposing himself to a storm may take cold, and death may ensue; which might have been avoided by not exposing himself to the storm. Yet in all these cases the death is said to be the act of God. An inevitable casualty, therefore, is not always the act of God; but must mean, in the present case, a casualty inevitable by the defendant. It cannot mean a casualty evitable only by the united exertions of the whole human 359*] race. A whirlwind is said to be the *act of God, yet its effects may be prevented by building a wall of brass about the house of sufficient strength. So the effects of lightning may be prevented by proper conductors; and the ravages of enemies may be impeded by a sufficient human force. These examples are cited to show that the term inevitable casualty cannot be confined to those accidents which are usually termed the acts of God; nor to such as are inevitable notwithstanding the united exertions of all the world. Where, then, is the line to be drawn?

It is believed that the true meaning of the expression is, such accidents as cannot be prevented by reasonable care and diligence.

But even taking the expression to be confined only to those accidents which are called the act of God, yet there are not wanting old authorities which expressly call a sudden fire the act of God, although more modern writers have very properly termed it an inevitable accident. 1 Roll. Abr. 808, pl. 6, under the head of "what acts shall excuse an escape," says, "so if the prisoners escape by sudden fire, this shall excuse the escape, for this is the act of God." And in Dyer, 66, b. 15, it is said, "if he plead that the prison was broken by enemies of the king, or by sudden fire, which is the act of God, or by such force or vehement power that he could not resist, this is good matter."

The case of *Forward v. Pittard*, 1 Term Rep. 27, is a very strong one upon this point. There was a verdict for the plaintiff, subject to the opinion of the court upon the following case: That the defendant was a common carrier from London to Shaftesbury. That on Thursday, the 14th October, 1784, the plaintiff delivered to him, on Weyhill, twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftesbury by his public road wagon, which travels from London, through Andover, to Shaftesbury. That by the course of traveling, such wagon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth, at the distance of about 100 yards from the booth in which the defendant had deposited the 360*] hops, *which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

The counsel for the plaintiff in that case contended that a carrier is liable in all cases except the loss be occasioned by the act of God or the king's enemies: and a distinction is taken between the act of God and inevitable accident.

The counsel for the defendant insisted that he was not liable for accidents happening without any default or negligence of the carrier.

Lord Mansfield said there was "a nice distinction between the act of God, and inevitable necessity. In these cases (of common carriers) actual negligence is not necessary to support the action."

Afterwards, Lord Mansfield delivered the unanimous opinion of the court. "It is laid down that a carrier is liable for every accident, except by the act of God, or the king's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempest."

"If an armed force comes to rob the carrier of the goods, he is liable; and the true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

"In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case is liable, inasmuch as he is liable for inevitable accident."

*The court in that case call a fire aris- [*361 ing from the act of man an inevitable accident, but decide, that the carrier is liable, inasmuch as he is liable for inevitable accident; being considered as an insurer. There the case shows that the fire arose from the act of man; but inasmuch as it was without any default of the carrier, the court called it an inevitable accident. In the present case, the plea states, that against the will, and without the negligence, or other default of the defendant, the building was consumed by fire arising from some cause then and yet wholly unknown to the defendant. The only difference in the two cases is, that in the case of the carrier, the fire appeared to have arisen from the act of man, but in the present case, the cause of the fire is wholly unknown. If the former was justly called an inevitable accident, *a fortiori*, the latter ought to be so called.

In Comyns' Rep. 631, destruction by fire is admitted by the counsel on both sides to be an unavoidable accident.

In Jones on Bailment, a work remarkable for the correctness and precision of its language, p. 90, Amer. ed. (p. 49, English ed.) is this expression: "If they be destroyed by wreck, pillage, fire, or other inevitable misfortune." In page 93, (51,) he cites a paragraph from Puffendorf, "that the borrower ought to indemnify the lender, if the goods lent be destroyed by fire, shipwreck, or other inevitable accident." In page 97, (53,) he says, "there are other cases, in which a borrower is chargeable for inevitable mischance; for example, if the house of Caius be in flames, and he be able to secure one thing only,"&c. And in p. 142, (78,) "there is no obligation in the bailee to suggest wise precautions against inevitable accident, and he cannot, therefore, be obliged to advise insurance from

fire." In page 146, (79, 80,) he says, "although the act of God be an expression which too long custom has rendered familiar to us, yet, perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place inevitable accident." See also p. 135, (73,) 146, (79, 80,) 149, (81, 82,) 32, (18,) as to the peculiar law respecting innkeepers and common carriers, and as to the general principle that the bailee is liable only for negligence, the degree of which is regulated by the nature of the bailment.

362*] *The authorities thus cited show that fire in former times was called the act of God, but in latter days it is termed, in the very expressions of the lease, an inevitable accident, an inevitable casualty, an inevitable mischance, or an unavoidable accident, by lawyers, by judges, and by elementary writers. The presumption, therefore, is strong, that the case of fire was the very case of inevitable casualty, which the exception in the lease was intended to guard against.

3d. As to the third point.

It is immaterial whether this be considered as the contract of the officer in his official capacity, or of the government, and whether an action will or will not lay against the successor. That question can only be of importance as it concerns the mode of the remedy, but does not affect the point of personal liability. It would be ruinous not only to the agent, but to the government itself, if this doctrine of individual responsibility is to be established. Suppose the defendant or his successor had been dispossessed by the plaintiff during the term, who would have the right of action? If the defendant, after he was out of office, had the sole right to sue, the office must be at his mercy. He might release the contract. Suppose a contract made by the Secretary of War, for supplying the army, and advances as usual made to the contractor. Suppose the sum advanced to be 50,000 dollars, which in such cases is not a large sum,) and the contractor pockets the money, and refuses to make the supplies. The secretary becomes bankrupt, or refuses to bring suit, or dies, and his executors refuse to sue. How are the public to compel them? Is it consistent with the dignity of the United States to ask their leave to bring suit? There is now existing a contract for the casting of cannon, made by the defendant while in office. Can the Secretary out of office release this contract? Can he give a valid release of the contract for supplies to the army?

These examples show that the ex-secretary is not the person contracting, and that the suit is brought against the wrong person.

Mason, on the same side, was stopped by the Court, who said they were satisfied with the 363*] argument on the *part of the defendant, upon the first point, and wished to hear the counsel in reply. Mr. Martin observed, that he did not suppose that any thing he had to offer would shake the opinion which the Court seemed to have formed, and should not insist upon replying.

March 2d. The *Chief Justice*, after stating the terms of the lease, and the pleadings, delivered the unanimous opinion of the Court.

The plaintiff in error has made two points.

1st. That under this contract, the defendant was bound in his private capacity.

2d. That the matter pleaded in his plea, did not show the casualty, by which the buildings were destroyed, to have been inevitable.

This Court give no opinion on the second point, being unanimous in favor of the defendant on the first.

It appears, from the pleadings, that congress had passed a law authorizing and requiring the President to cause the public offices to be removed from Philadelphia to Washington; in pursuance of which law, instructions, by the President, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war office, and that for this purpose, and no other, the agreement was entered into by the defendant, who was then at the head of this department. During he lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the government, are public and not personal.

They enure to the benefit of, and are obligatory on, the government; not the officer.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become *a public agent, if he should be made [*364 personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macbeath v. Haldimand*, cited from 1 Term Reports; and this court considers the principles laid down in that case as consonant to policy, justice and law.

The plaintiff has not controverted the general principle, but has insisted, that, in this case, the defendant has, by the terms of his contract, bound himself personally.

It is admitted that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department, for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government; or that he was unwilling to contract on the faith of government. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The Court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government.

The official character of the defendant is stated in the description of the parties. This, it has been said, might be occasioned by a willingness in the defendant to describe himself by the high and honorable office he then filled. This, unquestionably, is possible, but is not the fair construction to be placed on this part of the contract, because it is not usual for gentlemen, in their private concerns, to exhibit themselves in their official character.

The tenement is let to "the said Samuel Dexter and his successors;" an expression plainly evidencing that it was not for himself, other-

wise than as Secretary of War; and that the lessor so understood the contract. It is also evincive of the correctness of the observation of the defendant, that the words "said Samuel Dexter" refer to him in his official character, as described in the premises. The *habendum* is "to 365*] have and to hold the said demised *premises to him the said Samuel Dexter and his successors," &c., showing, that to the knowledge of the lessor, if Mr. Dexter should go out of office the next day, the successor to the war department would succeed also to the occupancy of the office.

The covenant for quiet enjoyment during the term is with the said Samuel Dexter and his successors, and is, that they, as well as he, shall enjoy.

The covenant on the part of Mr. Dexter, on which the suit is brought, is for himself and his successors.

The whole face of the agreement, then, manifests very clearly a contract made entirely on public account, without a view, on the part of either the lessor or lessee, to the private advantage or responsibility of Mr. Dexter.

The only circumstance which could excite a doubt was produced by the technical operation of the seal. This, in plain reason and common sense, can make no difference in designating the person to be responsible for the contract; and so it has been determined in the case cited from 1 Term Rep. 674, (*Unwin v. Wolseley.*)

The Court is unanimously and clearly of opinion, that this contract was entered into entirely on behalf of government, by a person properly authorized to make it, and that its obligation is on the government only.

Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he must resort to have them satisfied.

Judgment affirmed with costs.

LLOYD *v.* ALEXANDER *et al.*

A citation must accompany the writ of error.

THE writ of error in this case was quashed because it was not accompanied by a citation.

MARSHALL, *Ch. J.* The law respect- [*366 ing the thirty days' notice on a writ of error, and the ten days allowed for filing it, was predicated upon the existing state of things at the time of passing the act; at which time there was no circuit court whose term would not be finished more than forty days before the setting of the Supreme Court.

The times of the session of the courts have been altered, but no alteration has been made in the law respecting the thirty days' notice, which makes it difficult to form a rule in the case.

At present, if the citation has not been served thirty days, the court will not take up the cause until the thirty days have expired, unless the defendant in error shall appear.

A citation not served is as no citation.

APPENDIX.

NOTE (A.)

THE question of liability of a remote indorser of a promissory note, in Virginia, came before the court below about a year before their decision in the present case. It was in the case of *Dunlop v. Silver and others*, argued at July term, 1801, in Alexandria. The court took the vacation to consider the case, and examine the law, and at the succeeding term, judgment was rendered for the plaintiff by Kilty, Chief Judge, and Cranch, Assistant Judge, contrary to the opinion of Judge Marshall.

The case was this; James Cavan made a promissory note, by which he promised to pay to Silver et al. or order, sixty days after date, 600 dollars for value received, negotiable at the bank of Alexandria. Silver et al. indorsed the note to Downing and Dowell in these words, "pay the contents to Downing and Dowell," who indorsed, "pay the contents to John Dunlop or order." Dunlop had obtained judgment on the note against Cavan, the maker, who was taken upon the execution, and took the oath of an insolvent debtor.

The declaration had two counts. 1st. A special count stating the making and indorsing the note, the suit, judgment, execution and insolvency of Cavan, by reason whereof the defendant became liable, &c. 2d. *Indebitatus assumpsit* for money had and received.

The plea was *non assumpsit*, and a verdict was taken for the plaintiff, subject to the opinion of the court upon the point, whether the holder can maintain an action against the remote indorser of a promissory note.

The statute 3 & 4 Ann. c. 9, respecting promissory notes is not in force in Virginia; but there is an act of assembly, 1786, c. 29, by which it is enacted, that "an action of debt may be maintained upon a note or writing, by which the person signing the same shall promise or oblige himself to pay a sum of money, or quan-
368*] tity of tobacco, to *another;" and that "assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt in his own name; but shall allow all just discounts, not only against himself but against the assignor, before notice of the assignment was given to the defendant."

It will be observed that this act gives no action against the indorser, or assignor, nor does it make any distinction between notes payable to order, and those payable only to the payee. Hence, perhaps, it may be inferred that it left such instruments as the parties themselves by the original contract had made (or intended to make) negotiable, to be governed by such principles of law as may be applicable to those instruments. At any rate, it seemed to be admitted that the act did not affect the present case.

The principal question, then, is, whether this action could have been supported in England before the statute of Anne.

I. In order to ascertain how the law stood before that statute it may be necessary to examine how far the custom of merchants, or the *lex mercatoria*, was recognized by the courts of justice, and by what means the common law forms of judicial proceedings were adapted to its principles.

A distinction seems to have been made very early between the contracts of merchants, (especially of foreign merchants,) and those of other people. Nearly six hundred years ago, we find their "old and rightful customs" protected by the great charter of English liberties. (Magna Charta, c. 30.) Peculiar privileges were also granted them more than 500 years ago, by the statute of Acton Burnel *de mercatoribus*, 11 Edw. I. and the statute of merchants, 13 Edw. 1. And in the reign of Edw. III. many statutes were made for their encouragement, in some of which, particularly 27 Edw. III. c. 19 & 20, the law merchant is expressly recognized. In the 13 Edw. VI. 9, 10, (cited by Molloy, book 3, c. 7, § 15,) it is said that "a merchant stranger made suit before the king's privy council, for certain bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the Lord Chancellor answered, that this suit is brought by a merchant who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men."

The custom of merchants is mentioned in 34 H. VIII. cited in Bro. Abr. tit. Customs, pl. 59, where it was pleaded as a custom between merchants *throughout the whole realm, and [*369 the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among merchants residing in London and merchants in Hamburgh, &c. By degrees, however, the courts began to consider it as a general custom. Co. Litt. 182, 2 Inst. 404. And in the time of James I. Ch. J. Hobart, in the case of *Vanheath v. Turner*, Winch, 24, said, that "the custom of merchants is part of the common law, of which the judges ought to take notice." It was still, however, deemed necessary to set forth the custom specially; and in that form the precedents continued for some time after. Indeed the pleadings continued in that form long after the courts had decided it to be unnecessary. Lord Coke, in his Commentary on Littleton, (first published in 1628,) folio 182, a. speaking of the *lex mercatoria*, says, "which, as hath been said, is part of the laws of this realm." See also 2 Inst. 404.

But after this, in the year 1640, in Eagle-

child's Case, reported in Hetly, 167 and Lit. Rep. 363. 6 Car. I. it was said to have been ruled in B. R. "that upon a bill of exchange between party and party who were not merchants, there cannot be a declaration upon the law merchant; but there may be a declaration upon as sumpsit, and give the acceptance of the bill in evidence."

This decision seemed to confine the operation of the law merchant, not to contracts of a certain description, but to the persons of merchants: whereas the custom of merchants is nothing more than a rule of construction of certain contracts. Jac. Law Dict. Toml. edit. tit. *Custom of Merchants. Eaglechild's Case*, however, was overruled in the 18 Car. II. B. R. (1666,) in the case of *Woodward v. Rowe*, 2 Keb. 105, 132, which was an action by the indorsee against the drawer of a bill of exchange. "The plaintiff counted on the custom and law of the realm, that if any man writes a bill to another, then if he to whom the bill is directed, do not pay for the value received by the maker, the maker of such bill should pay." "It was moved in arrest of judgment, that this count is ill, the general custom being the law; and it doth not appear to the court that there is any such law. *Sed curia contra*, that by the common law a man may resort to him that received the money, if he to whom the bill was directed, refuse." It was afterwards moved again that this "is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough generally for any man, without naming him merchant; judgment pro plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant was the plaintiff's servant."

370*] *The same principle was, two years afterwards, recognized in an anonymous case (but believed to be *Milton's Case*, vide 1 Mod. 286) in the exchequer, reported in Hardres, 485, Mich. 20 Car. II. (1668,) where the plaintiff declared on the custom of England, and after verdict, Offley moved in arrest of judgment, because the "plaintiff had declared that *per consuetudinem Angliæ*, &c. which he said was naught, because the custom of England is the law of England, and what the judges are bound to take notice of; and that therefore the *consuetudo Angliæ* ought to have been omitted."

But the chief baron said, "But for the plaintiff's inserting the custom of the realm into his declaration here, I hold that to be mere surplusage and redundancy, which does not vitiate the declaration." And again he says, "It were worth while to inquire what the course has been amongst merchants; or to direct an issue for trial of the custom among merchants in this case; for although we must in general take notice of the law of merchants; yet all their customs we cannot know but by information." Afterwards, in declaring their opinions, the Court said "that this course of accepting bills being a general custom amongst all traders both within and without the realm, and having everywhere that effect to make the acceptor subject to pay the contents, the court must take notice of that custom."

Notwithstanding these decisions, the question was again made about twenty years afterwards, in the case of *Carter v. Downish*, 1 W. & M. anno 1688, 1 Shower, 127, in the exchequer, on a writ of error from the king's bench. The defendant had covenanted to pay all bills which should be drawn on him in favor of the plaintiff on account of 1,000 kentles of fish, and the breach assigned was the non-payment of a certain bill. The defendants pleaded that the plaintiff by indorsement on the bill, according to the custom of merchants, appointed the payment to Herbert Aylwin or his order, who indorsed it to Tassel, to whom the defendant paid it. To this plea there was a demurrer, and joinder. One of the errors assigned was, that the defendant had not set forth a particular custom to warrant the indorsement. To which it was answered, "that the law and custom of merchants warrant the indorsement of foreign bills of exchange, and for that all the book cases on foreign bills are a proof; and that such indorsement doth really transfer the property of the money, or contents in such bills to the indorsee, and that all this law of merchants is part of the law of the land, and the judges are obliged to take notice of that as well as of any other law." And the following cases were cited: 1 Inst. 182, a. 2 Inst. 58, 204. F. N. B. 117. Reg. 135. 13 Edw. IV. 9. 4 Rep. 76, *Holland's Case*. Fitz. Abr. tit. *Account*, 127.

*Lord Chief Justice Pollexfen. "As to [*371 that of the law of merchants, I think we are bound to take notice of it, as we do of that of survivorship and account, and this is as well known."

Ventris concurred, and they all inclined to reverse the judgment; but upon Tremayne's importunity, *adjornatur*.

Three years after this, however, the point was again made, in the case of *Mogadara v. Holt*, 3 W. & M. 1 Show. 318, and 12 Mod. 15, 16, anno 1699, where it was held by Holt, Chief Justice, and the whole court, "that the law of merchants is *jus gentium*, and part of common law, and *ergo*, we ought to take notice of it, when set forth in pleading." And "though the plaintiff hath alleged a custom contrary to fact, yet that is but surplusage; and he needed not to have alleged a custom." Jud. pro quer.

Not satisfied with these adjudications, the question was again agitated, two years afterwards, in the exchequer, on a writ of error from the king's bench, in the case of *Williams v. Williams*, Carth. 269. Pasch. 5 W. & M. anno 1693, where "the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place, (as the usual way is,) but had declared on a custom through all England, and if so, 'tis the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place from whence a venue might arise to try it. To which it was answered, that this custom of merchants, concerning bills of exchange, is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter v. Downish*, and therefore it is needless to set forth the custom specially in the declaration, for it is sufficient to say that such a person, *secundum usum et consuetudinem mercatorum*, drew the bill, therefore, all the matter in the declaration concerning the special custom was merely surplusage,

and the declaration good without it. The judgment was affirmed."

Similar doctrine was also held by Lord Holt, in the same term, in the case of *Hodges v. Steward*, 12 Mod. 37. Pasch. 5 W. & M. anno 1693.

Again in Hilary term, B. R. 8 & 9 W. III. anno 1697, *Pinkney v. Hall*, 1 Ld. Raym. 175, the exception was taken, "that the declaration being *per consuetudinem Angliæ*, &c. was ill, because the custom of England is the law of England, of which the judges ought to take notice without pleading. *Sed non allocatur.* 372*] For though heretofore *this has been allowed, yet of late time it has always been overruled." And another exception was "that though *lex mercatoria* is part of the law of England, yet it is but a particular custom among merchants; and, therefore, it ought to be shown in London, or some other particular place. *Sed non allocatur.* For the custom is not restrained to any particular place."

The same principles were, in the same term, in the common pleas, held in the case of *Bromwich v. Loyd*, Hilary term, 8 W. III. 2 Lutw. 1585, where Treby, Chief Justice, said, "That bills of exchange at first were extended only to merchant strangers, and afterwards to inland bills between merchants trading one with another here in England; and after that to all traders and dealers, and of late to all persons, trading or not: and there was no occasion to allege any custom; and that was not denied by any of the other justices."

In 10 Wm. III. anno 1698, B. R. 1 Ld. Raym. 360. *Hawkins v. Cardo*, an action was brought on a promissory note made by the defendant and indorsed by the payee to the plaintiff for part only, who declared on the custom of merchants for such an indorsement. But on demurrer it was adjudged ill. "For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by contract he is liable but to one." And Holt, Chief Justice, said, "This is not a particular local custom, but the custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so."

Judgment for defendant.

Four years after this, in the case of *Buller v. Crips*, 2 Anne, B. R. 6 Mod. 29, anno 1702, Lord Holt said, "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which Hale, who tried it, laughed and said, "they had a hopeful case on't." And in my Lord North's time it was said, that the custom in that case was part of the common law of England, and the actions since became frequent as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest."

In the year 1760, in the case of *Edie v. The East India Company*, 1 Geo. III. 2 Burr. 1226, Mr. Justice Foster said, "Much has been said 373*] about the *custom of merchants; but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law) and local customs, (which are not so.) This custom of merchants is the general law of the kingdom, part of the common law, and, therefore, ought not to have been left to the jury, after it has been already settled by judicial determinations." And in the same case, p. 1228, Mr. Justice Wilmot says, "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may indeed be some questions, depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. And even there the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law."

In the case of *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1669, Lord Mansfield says, "The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law."

Sir Matthew Hale, in his History of the Common Law of England, first published in 1713, 3d edit. pp. 24, 25, speaking of the common law, as it is taken in its proper and usual acceptation, says, "And besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment; and though by reason of that application, the said common law assumes diverse denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name from the province, shire, island, or county to which it is contiguous, yet these are but parts of the same ocean.

"Thus the common law includes *lex prerogativa*, as it is applied with certain rules to that great business the king's prerogative; so it is called *lex forestæ*, as it is applied under its special and proper rules to the business of forests; so it is called *lex mercatoria*, as it is applied under its proper rules, to the business of trade and commerce."

To these authorities will be added only that of Christian, in his note to 1 Bl. Com. 75. "The *lex mercatoria*, or custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, *and all mercantile contracts are as [*374 much the general laws of the land, as the laws relating to marriage, or murder."

This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land; and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority as far as subjects existed for it to act upon. The reason why it was not recognized by the courts, and reduced to a regular system as soon as the laws relating to real estate, and the pleas of the crown, seems to be, that in ancient times the questions of a mercantile nature, in the courts of justice, bore no proportion to those relating

to the former subjects. Before the time of James I. we have scarcely a mercantile case in the books; and yet long before that time, the laws respecting real estates and the criminal code were nearly as well understood as they are at this day. Hence it cannot be a matter of great surprise, that the principles of commercial law which have been developed by the exigencies of modern times, should have been, by some, considered as exceptions from the general principles of the common law. The truth seems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books, is, that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right that established forms should be respected, yet it must be acknowledged that they have in some measure obstructed that gradual amelioration of the jurisprudence of the country which the progressive improvement of the state of civil society demanded. It required the transcendent talents, and the confidence in those talents, which were possessed by Lord Mansfield, to remove those obstructions. When he ascended the bench he found justice fettered in the forms of law. It was his task to burst those fetters, and to transform the chains into instruments of substantial justice. 375*] *From that time a new era commenced in the history of English jurisprudence. His sagacity discovered those intermediate terms, those minor propositions, which seemed wanting to connect the newly developed principles of commercial law, with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions.

II. Forms of pleading often tend to elucidate the law. By observing the forms of declarations which have from time to time been adopted in actions upon bills of exchange, we may perhaps discover the steps by which the courts allowed actions to be brought upon them as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used take no notice of the custom of merchants as creating a liability distinct from that which arises at common law; but, by making use of several fictions, bring the case within the general principles of actions of assumpsit. The oldest form, which is recollected, is to be found in Rastell's Entries, fol. 10, (*a.*) under the head "action on the case upon promise to pay money." Rastell finished his book, as appears by his preface, on the 28th of March, 1564, and gathered his forms from four old books of precedents then existing. This declaration sets forth that A. complains of B., &c. for that whereas the said A. by a certain I. C. his sufficient attorney, factor and deputy in this behalf, on such a day and year at L. at the special instance and request of the said B. had delivered to the said B. by the hands of the said I. C. to the proper use of the said B. 110*l.* 8*s.* 4*d.* lawful money of England; for which said 110*l.* 8*s.* 4*d.* so to the said B. delivered, he the said B. then and there to the said I. C. (then being the sufficient attorney, factor and deputy of the said A. in this behalf) faithfully promised and undertook, that a certain John of G. well and faithfully would content and pay to Reginald S. (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor and attorney of the said A. in this behalf,) 443 2-3 ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G. should not pay and content the said Reginald S. the said 443 2-3 ducats, at the time above limited, that then the said B. would well and faithfully pay and content the said A. 110*l.* 8*s.* 4*d.* lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A. requested. It then avers that the said 443 2-3 ducats were of the value of 110*l.* 8*s.* 4*d.* lawful money of England, that John of G. had not paid the ducats to Reginald S., and that if he had paid them "to the said R., I. B. and their associates, or to either of them, then the said 443 2-3 ducats would have come to the benefit and profit of the said A. Yet the said B. contriving the aforesaid A. of the said 110*l.* 8*s.* 4*d.* and of *the damages and interest thereof, [*376 falsely and subtly to deceive and defraud, the same or any part thereof, to the said A. although often thereunto required, according to his promise and undertaking aforesaid, had not paid or in any manner contented, whereby the said A. not only the profit and gain which he, the said A. with the said 110*l.* 8*s.* 4*d.* in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A. in his credit towards diverse subjects of our Lord the King, (especially towards R. H. and I. A. to whom the said A. was indebted in the sum of 110*l.* 8*s.* 4*d.* and to whom the said A. had promised to pay the same 110*l.* 8*s.* 4*d.* at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid,) is much injured, to his damage," &c. This declaration seems to have been by the indorsee of a bill of exchange against the drawer. For although nothing is said of a bill of exchange, or of the custom of merchants, yet the facts stated will apply to no other transaction. It appears that ducats were to be given for pounds sterling; this was in fact an exchange. Again, the defendant promised to repay the original money advanced with all damages and interest; this is the precise obligation of the drawer of a bill of exchange, according to the law merchant. Besides, the transaction, if literally true as set forth in the declaration, was at least a very uncommon one. A. is supposed to make I. C. his attorney for the purpose of paying 110*l.* to B. and to receive a promise from B. that John of G. should pay to Reginald S. 443 ducats. And A. is also supposed to have made Reginald S. his attorney for the purpose of re-

ceiving the ducats. Such a transaction must certainly be very rare, especially as it was so much easier to have done the same thing in substance by a simple bill of exchange.

In the oldest books extant in the English language on the subject of the law merchant, viz., Malynes' Lex Mercatoria written in 1622, and Marius's Advice, which appeared in 1651, it is said that regularly there are four persons concerned in the negotiating a bill of exchange. A., a merchant in Hamburgh, wanting to remit money to D. in England, pays his money to B., a banker in Hamburgh, who draws a bill on C. his correspondent or factor in England, payable to D. in England, for value received of A. But in the declaration above recited, there are five persons concerned; and if, as is supposed, that transaction was upon a bill of exchange, the fifth person must have been an indorsee, or assignee of the bill. Another reason for supposing this to be the case, is, that Rastell has no other form of a declaration by an indorsee, although he has two by the payee, viz., one against an acceptor and one against a drawer. 377*] *In the declaration of *Payee v. Acceptor*, fol. 338, (*a*.) the foreign merchant who paid the 1,400 crowns to the drawer of the bill in France, to be remitted to the plaintiff (the payee) in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant, (the acceptor,) so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1,400 crowns in consideration of which it is averred that the defendant in England promised the plaintiff to pay him 414*l.* 3*s.* 4*d.* lawful money of England.

This declaration sets forth that whereas the plaintiff on the 10th of June, 37 Eliz., at Rochelle, in France, in parts beyond seas, by the hands of a certain T. S., then the factor of the plaintiff, at the request of a certain R. W., then the factor of the defendant, delivered and paid to the said R. W., then the factor of the defendant, to the use of the defendant, as much ready money as amounted to 1,400 French crowns, of the money of France, in parts beyond seas, at the rate of 5*s.* 11*d.* lawful money of England for each French crown: And thereupon the said R. W., at Rochelle aforesaid, then delivered to the said T. S. three bills of exchange, viz., first, second and third. In the first of which bills of exchange the said R. W. requested the defendant to pay to the plaintiff at L. 414*l.* 3*s.* 4*d.* lawful money of England, at the end of thirty days next after sight of that bill of exchange (the second and third bills of exchange to the plaintiff not paid.) It then sets forth the tenor of the second and third bills, and then avers that the defendant, on the day and year first aforesaid, at the city of E. in the county of the said city, in consideration thereof, undertook, and to the plaintiff then and there and faithfully promised, that he the defendant, well and faithfully would pay to the plaintiff, to the plaintiff's use, at the city of E. aforesaid, in the county of the said city, by way of exchange, according to the usage of merchants, the aforesaid 414*l.* 3*s.* 4*d.* lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith, that afterwards, viz., on the 1st of September, in the year aforesaid, at, &c., the first of the said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant, not regarding, &c., but contriving, &c., did not pay the said 414*l.* 3*s.* 4*d.* &c., at the end of the said thirty days, &c. Whereby the defendant lost the benefit of trading with the said 414*l.* 3*s.* 4*d.* &c. to his damage 600*l.*

In this declaration it will be perceived that the custom of merchants is not alleged as the foundation of the action, or the cause of liability of the defendant. Nor is it stated that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to *pay the amount mentioned [*378 in the bill, in consideration of 1,400 crowns paid to his use in France; and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction introduced for the purpose of adapting the custom of merchants to the common law forms, and to show a sufficient consideration for the assumpsit. The question of factorage was not traversable; as the facts of drawing the bill, and the drawee's acceptance, were sufficient evidence of the drawer's being the acceptor's factor *quoad hoc*. This fiction might perhaps be considered as part of the custom of merchants; but, at any rate, it seems to have been considered necessary in order to create that degree of privity between the payee and the acceptor, which at that time was supposed necessary to support the action of assumpsit.

Both his and the former are declarations of common law; that is, neither of them is aided by the custom of merchants, unless the custom may be considered as supporting the fiction of factorage. They show also that if privity of contract was necessary at common law to support the action of assumpsit, the law would presume a privity, or at least would presume facts which constituted a privity, between the payee and acceptor, or between an indorsee and a drawer of a bill of exchange.

As in the latter declaration, the original advancer of the money to the drawer in France is presumed to be the factor of the payee, (the plaintiff,) so in the former, Reginald S., (the payee,) and I. C., the original advancer of the money, are presumed to be the factors of the plaintiff, (the indorsee.)

In 1 Brownloe's Declarations, printed in 1652, p. 267, is a declaration by the payee against the acceptor, in which the acceptor is alleged to be the factor of the drawer but the original advancer of the money is not stated to be the factor of the plaintiff, as in the declarations in Rastell; although it is averred that the original advancer of the money paid it to the drawer with intent that it should be paid in England by the drawer's factor (the drawee) to the plaintiff, (the payee,) which is the same thing; for if he paid with that intent, it was paid for the benefit of the payee.

In the same volume, p. 269, is a declaration by payee v. drawer, in which the advancer of the money is expressly stated to be the factor of the plaintiff; but the drawee is not alleged to be the factor of the drawer. In both cases the custom is stated to be between English

merchants and foreigners, and their factors or servants.

379*] *Probably at this time it began to be considered as unnecessary to allege the intermediate parties on the bill to be the factors of the parties to the action, inasmuch as it was a mere fiction, the want of which was considered as supplied by an allegation of the custom.

But in his second volume, printed in 1654, p. 58, there is another declaration by the payee v. acceptor of a bill of exchange, in which the payee is called the factor of the advancer of the money, and the drawee the factor of the drawer. There is also an averment of the custom. This declaration refers to Hilary term, 4 Jac. Roll. 155, from whence it was probably taken.

In Browne's Vade Mecum, (2d. edit., 1695,) p. 12, is a declaration by payee v. acceptor, alleging that the plaintiff himself paid the money to the drawer, who was the defendant's factor. It also sets forth the custom.

In p. 16 is another by payee against acceptor, like that in Rastell, fol. 338, (*a.*) alleging that the plaintiff's factor beyond sea, paid the money to the defendant's factor, who drew a bill on the defendant, (his master,) payable to the plaintiff, who showed and delivered it to the defendant, who, in consideration thereof, promised to pay, &c.

This is a declaration at common law, and not on the custom. The date of the bill mentioned in the declaration is Sept. 10, 1584, (26th of Eliz.) one year before the date of that in Rastell.

In p. 18 is another declaration at common law by payee v. acceptor of a foreign bill, in the case of *Williamson v. Holiday*, Trin. 9 Jac. Rot. 712, in which it is alleged that the plaintiff by his factor paid the money to the defendant's factor, for which he drew on the defendant payable to the plaintiff, who showed it to the defendant, who accepted it, and, in consideration of the premises, promised to pay, &c.

In p. 19 is a declaration by payee v. drawer, in which the plaintiff declares that he paid the defendant 45*l.*, for which the defendant drew and delivered to the plaintiff a bill of exchange on a certain Thomas Cole, at Venice, requiring him to pay to the plaintiff for the defendant 200 ducats, at 2 days sight; and in consideration of the premises undertook and promised that he would, by the hands of the said Thomas Cole, in Venice, pay to the plaintiff the said 200 ducats. He then avers that he showed the bill to Cole, who refused to pay, yet the defendant had not, by the hands of the said Cole, nor in any other manner, paid the ducats, &c.

380*] *In p. 21 is a declaration at common law by the original advancer of the money, to whose use the money was to be paid by way of exchange, against the drawer. It alleges that the plaintiff paid the defendant at his request, 100*l.* lawful money of England, for which the defendant drew a bill on I. W. at Middleburgh, requiring him to pay at usance, to one George Chandler, or bearer, to the use of the plaintiff, 174*l.* 11*s.* Flemish; and that in consideration of the premises the defendant undertook, &c. that if the said I. W. should not accept the bill, nor pay the 174*l.* 11*s.* Flemish, according to the tenor of the bill, then the defendant would pay the plaintiff the original sum advanced, viz. 100*l.* lawful money of England. It then avers, that I. W. did not accept nor pay; and a protest for non-acceptance and notice to defendant; yet he has not paid the 100*l.* &c.

These are the greater part of the precedents of declarations on bills of exchange, to be found in the printed books before the statute of Anne; and in all of them those facts are stated which bring the case within the principles which were considered as necessary to support the action of assumpsit in general cases at common law. In the more modern forms the liability of the defendant under the custom, is considered as a sufficient consideration to raise an assumpsit without averring those intermediate steps which may be considered as the links of the chain of privity which connects the plaintiff with the defendant. The reason of this change of form was probably the consideration that those intermediate links were only fictions, or presumptions of law, which were never necessary to be stated.

These authorities tend to show that, in mercantile transactions, privity is not necessary to the foundation of an action; or that if it is, the law will presume a privity. It will be seen in the course of these observations that privity is not necessary to support the action for money had and received, in any case.

III. Having thus seen how the law merchant was understood at the time of the statute of Anne, and the manner in which it was applied to the forms of judicial process, it will now be necessary to inquire at what time the law merchant was considered as applicable to inland bills, and what was the law respecting such bills and promissory notes, prior to the statutes of 9 & 10 Wm. III. c. 17, and 3 & 4 Ann. c 9.

It is not ascertained exactly at what time inland bills first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange under the law merchant. But there was a time when the law merchant was considered as "confined *to cases where one of the parties [***381** was a merchant stranger," 3 Wooddeson, 109, and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. This seems to have been the case at the time when Malynes wrote his Lex Mercatoria, in the 4th page of which he says, "He that continually dealeth in buying and selling of commodities, or by the way of permutation of wares, both at home and abroad in foreign parts, is a merchant." It may be observed also that Malynes takes no notice of inland bills; hence we may presume that they were not in use in his time. He dates his preface to the Lex Mercatoria, on the 25th of November, 1622, and speaks of his book (p. 5.) as the fruit of 50 years' experience. Marius (p. 2.) says, that "Mr. John Trenchant, in his book of arithmetic, printed at Lyons, in anno 1608, observes, that an exchange made in the same realm is not real." In the case of *Bromwich v. Loyd*, 2 Lutw. 1585. (Hill. 8 Wm. III. C. B.) Chief Justice Treby said, "that bills of exchange at first were extended only to merchant strangers trading with English merchants; and afterwards to inland bills between merchants trading one with another here in England; and after that to all traders and dealers, and of late to all persons trading or

not." And in *Buller v. Crips*, 6 Mod. 29 (2 Ann.) Lord Chief Justice Holt said, he remembered "when actions upon inland bills of exchange first began.

Perhaps Lord Holt might have been correct as to the time when actions upon inland bills first began, or rather when the first notice was taken of a difference between inland and foreign bills; but it appears probable that inland bills were in use much before Lord Holt's remembrance. Marius first published his Advice concerning bills of exchange in 1651, half a century before Lord Holt sat in the case of *Buller v. Crips*, as appears by Marius's preface to his second edition; and he there says he has been 24 years a notary public, and in the practice of protesting "inland instruments and outland instruments." In p. 2. speaking of a bill between merchants in England, he says, it is "in all things as effectual and binding as any bill of exchange made beyond seas and payable here in England, which we use to call an outland bill, and the other an inland bill." If we go back 24 years from 1651, the time when Marius first published his Advice, it will bring us to the year 1627; but if we go back 24 years from 1670, the probable date of his second edition, (which was probably his meaning,) it will give us the year 1646, as the earliest date to which we can trace them. As Malynes, in his Lex Mercatoria, of 1622, does not notice them, and as Marius mentions them as existing in 1646, it seems probable that they began to be in use between those two periods. Kyd, in his Treatise on Bills, p. 13. (Dublin edition, 1791,) speak-
382*] ing of promissory *notes, says, "the period of their introduction appears to have been about 30 years before the reign of Queen Anne;" but the only authority he cites is 6 Mod. 30. (2 Ann.) the case of *Buller v. Crips*, above mentioned, in which Lord Holt says, he had consulted two of the most famous merchants in London, who informed him that "it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of 30 years." This expression, it will be observed does not restrict the period to that limit, and it is probable that 30 years was a loose expression, and as far back perhaps as those merchants could carry their recollection of any mercantile transaction. It is certain that promissory notes were in use upon the continent in those commercial cities and towns with which England carried on the greatest trade, long before that period, and were negotiable under the custom of merchants in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his Lex Mercatoria, p. 71, 72, &c. where he gives the form of such a bill, which is copied by Molloy, in p. 447, (7th edition, London, 1722,) and will be found in substance exactly like a modern promissory note. "I. A. B., merchant of Amsterdam, do by these presents, acknowledge to be indebted to the honest C. D. English merchant dwelling at Middleborough, in the sum of 500*l.* current money, for merchandise, which is for commodities received of him to my content; which sum of 500*l.* as aforesaid, I do hereby promise to pay unto the said C. D. (or the bringer hereof) within six months after the date of these presents. In witness whereof, I have subscribed the same at Amsterdam, this day of July, ."

This is nothing more than a verbose promissory note, which, stripped of its redundancies, is simply this—For value received, I promise to pay to C. D. or bearer. 500*l.* in six months after date.

In p. 72, speaking of these bills obligatory, he says, "The sincerity of plain dealing hath been hitherto inviolable in the making of the said bills, which every man of credit and reputation giveth of his own hand-writing, or made by his servant, and subscribed by him, without any seal or witness thereto; and is made payable to such a merchant or person, or to the bearer of the bill, at such times of payment as is agreed."

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity *of the latter is greater than that of the [*383 former, and that they were more certainly within the custom of merchants. Indeed there is a case prior to any in the books upon inland bills, which is believed to have been brought upon such a promissory note, or bill obligatory, as is described by Malynes. It is in Godbolt, 49. (Mich. 28 and 29 Eliz. anno 1586,) "An action of debt was brought upon a *concessit solvere*, according to the law merchant, and the custom of the city of Bristow, and an exception was taken, because the plaintiff did not make mention in the declaration of the custom; but because in the end of his plea he said '*protestando, se sequi querelam secundum consuetudinem civitatis Bristow*,' the same was awarded to be good; and the exception disallowed."

Lord Ch. Baron Comyns, in his Digest, tit. Merchant, F. 1, F. 2, in abridging the substance of what Malynes had said upon this subject of bills of debt, or bills obligatory, does not hesitate to state the law to be, that "payment by a merchant shall be made in money or by bill. Payment by bill is by bill of debt, bill of credit, or bill of exchange. A bill of debt, or bill obligatory is, when a merchant by his writing acknowledges himself in debt to another in such a sum, to be paid at such a day, and subscribes it at a day and place certain. Sometimes a seal is put to it. But such bill binds by the custom of merchants, without seal, witness or delivery. So it may be made payable to bearer, and upon demand. So it is sufficient if it be made and subscribed by the merchant's servant. So a bill of debt may be assigned to another *toties quoties*. And now by the stat. 3 and 4 Anne, 9, all notes in writing made and signed by any person, or the servant or agent," &c. (reciting the terms of the statute.) By thus arranging his quotations from Malynes under the same head with the statute of Anne respecting promissory notes, it is to be inferred that he considered the custom of merchants, respecting bills of debt, as stated by Malynes, to be the cause or origin of the statute respecting promissory notes; and by connecting the former with the latter by the conjunction "and," it seems to be strongly implied, that he considered the statute only as a confirmation of what was law before. That he was correct in this opin-

ion, and that the foreign custom of merchants respecting promissory notes mentioned by Malynes, was gradually and imperceptibly engrafted into the English law merchant at the same time, and under the same sanction with inland bills, and that that custom was acknowledged repeatedly by solemn legal adjudications in the English courts before the statute of Anne, will probably be admitted when the authorities are examined which will be presented in the following pages. A greater degree of weight will be attached to the opinion of Comyns, when it is recollected that he was either at the bar or on the bench during the 384*] reigns of *King William III. Queen Anne. Geo. I. and Geo. II. and must therefore have known how the law stood before the statute, what motives produced it, and what was the true intent of the parliament in passing it.

Anderson, in his History of Commerce, relates a number of facts which may throw some light upon this subject.

In vol. 1, p. 171, speaking of the great antiquity of bills of exchange, he mentions a charter granted by the emperor Barbarossa to the city of Hamburgh, anno 1189, in which one of their rights is "to negotiate money by exchange." He observes, also, that bills of exchange were very new at this time in Europe, and were then in use only in the most considerable commercial cities. In p. 204, he says, that re-exchange, by way of damages, was first invented by the Ghibelines, when driven out of Italy by the Guelphs; and in p. 274, bills of exchange were known in England anno 1307, about the last year of the reign of Edw. I., and are alluded to in the statutes of 5th R. II. c. 3, anno 1381, and 14 R. II. c. 2, anno 1390. They are also mentioned anno 1406, and are called *literæ Cambii*. Hence it appears that for a period of nearly 350 years the custom of merchants respecting bills of exchange was considered as confined to foreign bills, and it is now upwards of 150 years since it has been allowed to extend to inland bills.

The time when inland bills and promissory notes began to be in general use in England was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, p. 386, 402, 484, 492, 493, 519 and 520.

In the year 1638, or 1640, King Charles forcibly borrowed 200,000*l.* of the merchants of London, "who had lodged their money in the Kings's mint in the tower, which place, before banking with goldsmiths came into use in London, was made a kind of bank, or repository, for merchants therein safely to lodge their money; but which, after this compulsory loan, was never trusted in that way any more.

"Afterwards they generally trusted their cash with their servants, until the civil war broke out, when it was very customary for their apprentices and clerks to leave their masters, and go into the army. Whereupon the merchants began, about the year 1645, to lodge their cash in goldsmiths' hands, both to receive and pay for them; until which time the whole and proper business of London goldsmiths was to buy and sell plate and foreign coins of gold and silver," &c.

385*] *"This account," says Anderson, "we have from a scarce and most curious small pamphlet, printed in 1676, entitled "The mystery of the new-fashioned goldsmiths, or bankers, discovered, in eight quarto pages," from which he extracts the following passage: "Such merchants' servants as still kept their masters' running cash, had fallen into a way of clandestinely lending it to the goldsmiths at 4 pence per cent. per diem; who, by these and such like means, were enabled to lend out great quantities of cash to necessitous merchants and others, weekly or monthly at high interest; and also began to discount the merchants' bills at the like or a higher rate of interest. That much about this time, they (the goldsmiths or new-fashioned bankers) began to receive the rents of gentlemen's estates remitted to town, and to allow them and others, who put cash into their hands, some interest for it, if it remained a single month in their hands, or even a lesser time. This was a great allurement for people to put their money into their hands, which would bear interest till the day they wanted it; and they could also draw it out by 100*l.* or 50*l.* &c. at a time, as they wanted it, with infinitely less trouble than if they had lent it out on either real or personal security. The consequence was, that it quickly brought a great quantity of cash into their hands; so that the chief or greater part of them were now enabled to supply Cromwell with money in advance on the revenues, as his occasions required, upon great advantage to themselves.

"After the restoration, King Charles being in want of money, they took ten per cent. of him barefacedly; and by private contract on many bills, orders, tallies and debts of that king, they got 20, sometimes 30 per cent. to the great dishonor of the government. This great gain induced the goldsmiths to become more and more lenders to the king; to anticipate all the revenue; to take every grant of parliament into pawn, as soon as it was given; also to outvie each other in buying and taking to pawn, bills, orders and tallies; so that in effect all the revenue passed through their hands. And so they went on till the fatal shutting of the exchequer, in the year 1672."

The banking trade was at its greatest height in 1667, when the Dutch burnt some ships at Chatham. But that disaster causing a run on the bankers, it in some measure lessened their future credit, which was entirely ruined by the shutting up of the exchequer, five years after: by which they were prevented from drawing out the money weekly, as it came in, so as to answer the demands upon them. The consequence was, their failure for nearly a million and a half sterling, which sum they were in advance to the king; and the ruin or injury of 10,000 families.

*This short history of the goldsmiths [*386 will account for the sudden increase of paper credit after the year 1645, and renders it extremely probable that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact from the cases in the books; upon examining which we shall find that there was no distinction made between inland bills of exchange, and promissory notes; they were both called bills; they were both called notes; sometimes they were called "bills or notes." Neither the word "in-

land," nor the word "promissory," was at this time in use, as applied to distinguish the one species of paper from the other. The term "promissory note" does not seem to have obtained a general use till after the statute. There was no distinction made, either by the bench, by the bar, or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II. James II. and King William, of which Lord Mansfield complained so much in the case of Grant and Vaughan, 3 Burr. 1525, and 1 W. Bl. 488, where he says that in all the cases in King William's time, "there is great confusion; for, without searching the record, one cannot tell whether they arose upon promissory notes, or inland bills of exchange;" for the reporters do not express themselves with sufficient precision, but use the words "note" and "bill" promiscuously. This want of precision is apparent enough to us who now (since the decision of Lord Holt in the case of *Clerk v. Martin*) read the cases decided by him before that time; but at the time of reporting them there was no want of precision in the reporter, for there was not, in fact, and never had been suggested, a difference in law between a promissory note and an inland bill. They both came into use at the same time, were of equal benefit to commerce, depended upon the same principles, and were supported by the same law.

IV. The case of Edgar and Chut, or Chat and Edgar, reported in 1 Keb. 592, 636, Mich. 15 Car. II. anno 1663, seems to be the first in the books which appears clearly to be upon an inland bill of exchange. Without doubt many had preceded it, and passed *sub silentio*. The case was this: A butcher had bought cattle of a grazier, but not having the money to pay for them, and knowing that the parson of the parish had money in London, he obtained (by promising to pay for it) the parson's order or bill on his correspondent, a merchant in London, in favor of the grazier. The parson having doubts of the credit of the butcher, wrote secretly to his correspondent not to pay the money to the grazier until the butcher had paid the parson. In consequence of which, the London merchant did not pay the draft, and the grazier brought his suit against the parson, and declared on the 387*] *custom of merchants. It was moved in arrest of judgment that neither the drawer nor the payee was a merchant. But it was held to be sufficient that the drawee was a merchant.

Next came the case of *Woodward v. Row*, Mich. 18 Car. II. anno 1666. 2 Keb. 105, 132, in which the court said that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant: and they will intend that he of whom the value is said to be received by the defendant was the plaintiff's servant."

The next is *Milton's Case*, Mich. 20 Car. II. Hard. 485, of which it may be necessary to take notice, as it has been considered as a leading case, and as having established some principles upon which a number of subsequent cases have been decided. It was an action of debt in the exchequer upon a bill of exchange accepted. The plaintiff declared that by the custom of England, if a merchant send a bill of exchange to another merchant to pay money to another person, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted: *per quod actio accrevit*. Upon *nil debet* pleaded, the verdict was for the plaintiff. A motion was made in arrest of judgment, and one of the reasons assigned was, that there was "no privity between the plaintiff and defendant," "nor any contract in deed, or in law."

The Chief Baron, among other things, said, that "without doubt, if the common law, or the custom of the place, create a duty, debt lies for it; as in the case of a toll due by custom; 20 H. VII.; and so in cases of a certain sum due by custom for pound breach to the lord of the manor, or to a gaoler for bar fees, 21 H. VII. But the great question here is, whether or no a debt or duty be hereby raised; for if it be no more than a collateral engagement, order or promise, debt lies not, as in the case that has been cited, or goods delivered by A. to B. at the request of C. which C. promiseth to pay for if the other does not; for in that case a debt or duty does not arise betwixt A. and C. but a collateral obligation only. In our case the acceptance of the bill amounts clearly to a promise to pay the money; but it may be a question whether it amounts to a debt or not."

Precedents were ordered to be searched; but none being found, the court, afterwards, in Hilary term, 20 and 21 Car. II. declared their opinions, "that an action of debt would not lie upon a bill of exchange *accepted [*388 against the acceptor; but that a special action upon the case must be brought against him. For the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills being a general custom among all traders both within and without the realm, and having everywhere that effect as to make the acceptor liable to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt; it only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in the case of toll; and so in case of a fine for a copyhold.

"Wherefore, and because no precedent could be produced that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested."

The ground of this judgment seems to be, that the drawer is the original debtor, and that the undertaking of the acceptor is only to pay the drawer's debt; and therefore is a collateral and not an original engagement. If the court were mistaken in this position, the case is not law; or at least the reason of the case fails. It may be true that the drawer is the original debtor until the bill is accepted; but after the bill is accepted the acceptor is the original debtor, and the undertaking of the drawer is collatereral, viz., to pay in case the acceptor does not. The question in the case of *Heylin* and *Adamson*, 2 Burr. 674, was, who was the original debtor in a bill of exchange. Lord Mansfield said, "a bill

of exchange is an order or command to the drawee, who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted, he is the original debtor." If so, a duty is certainly created by the acceptance, and according to the Ch. Baron's own admission, "debt lies for it." In the same case of *Heylin v. Adamsom*, Lord Mansfield states the law to be the same respecting the maker of a promissory note, as the acceptor of a bill of exchange; yet it has been held in the cases of *Rumbald v. Ball*, 10 Mod. 38 *Rudder and Price*, 1 H. Bl. 547, and *Bishop v. Young*, 2 Bos. & Pull. 78, that debt lies against the maker of a promissory note. See also Chitty on Bills, 220, where the authority of the case in Hardres, 485, is doubted.

The next case is that of Brown and London, reported in 1 Vent. 152. 1 Lev. 298. 1 Mod. 285, and 2 Keb. 695, 713, 726, 758, 822. (Mich. 22 Car. II. anno 1670,) in which it was decided, upon the authority of *Milton's Case*, Hard. 485, that *indebitatus assumpsit* would not lie upon 389*] *the acceptance of a bill of exchange. This case was not decided on the ground of want of privity, because it is said by the court, that "if A. delivers money to B. to pay to C. and gives C. a bill of exchange drawn on B. and B. accepts the bill, and doth not pay it, C. may bring an *indebitatus assumpsit* against B. as having received money to his use: but then he must not declare only on a bill of exchange accepted, as the case at bar is." And in the case of *Rables v. Sikes*, at the same term, 2 Keb. 711, such a declaration of *indebitatus assumpsit* for money had and received in case of a bill of exchange, was adjudged good upon demurrer.

The case of *Baker v. Hill*, (Pasch. 28 Car. II.) 3 Keb. 627, is the next which occurs in the books. This is said by the reporter to be "Debt on inland bill by custom of merchants." This appears to be the first case in which the term "inland bill" is used, but it furnishes no evidence that the case was not upon a promissory note; for it will be observed by any one who will take the trouble to examine the cases prior to the judgment in the case of *Clerk v. Martin*, (1 Anne,) that the term promissory note was not in use, nor had they any technical name by which to distinguish a promissory note from an inland bill of exchange, unless it was by calling the former an inland bill, and the latter an inland bill of exchange. In the case of Baker and Hill, the circumstance of its being an action of debt, induces a suspicion that it was a promissory note, because we have already seen that in the case of a bill of exchange, it had been decided in Hard. 485, that an action of debt would not lie.

In the next case, which is "against Elborough," Pasch. 28 Car. II. 3 Keb. 765, it seems doubtful whether it was a promissory note, or an inland bill of exchange. It is a short note of a case in these words: "In action upon the case on custom of London, that any merchant or other inhabitant there, subscribing a note for payment of money to any other, not said where inhabiting; on default of payment by him on whom the bill is drawn, should pay, &c. Thompson excepted in arrest of judgment, that no action lieth as between merchants it doeth; *sed non allocatur*, for, *per curiam*, there is as much reason for inland bills as for bills of exchange, and this is no more, and being averred that the defendant is an inhabitant in L. &c. judgment for the plaintiff."

The case of *Sheldon v. Hentley*, 2 Show. 161, (33 Car. II. B. R. anno 1680,) was "upon a note under seal, whereby the defendant promised to pay to the bearer thereof, upon delivery of the note, 100*l.* and avers that it was delivered to him (meaning the defendant) by the bearer thereof, and that he (the plaintiff) was so."

*It was objected that this was no [*390 deed, because there was no person named in the deed to take by it. But it was answered that it was not a deed until delivered, and then it was a deed to the plaintiff.

"Court. The person seems sufficiently described at the time that 'tis made a deed, which is at its delivery: and suppose a bond were now made to the Lord Mayor of London, and the party seals it, and after this man's mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *et traditio facit chartam loqui*. And by the delivery he expounds the person before meant; as when a merchant promises to pay to the bearer of the note, any one that brings the note shall be paid. But Mr. Justice Jones said it was the custom of merchants that made that good." Here it will be observed that the court, in order to elucidate the subject before them, refer to principles of law more certain and better known, viz., that a promissory note payable to bearer is good, and that promissory notes were within the custom of merchants.

Then followed the case of *Norfolk v. Howard*, Trin. 34 Car. II. B. R. anno 1681, 2 Show. 235, which was "case upon special promise on a note wherein the defendant promised to pay unto the plaintiff 50*l.* at any time during the joint lives of plaintiff and defendant, within three months after the plaintiff should demand the same; and no demand *modo et forma* pleaded." The demand proved was by plaintiff's attorney who delivered a demand in writing at the defendant's house to his maid, by whom it was sent up to the defendant, being sick and not to be spoken with; the maid brought down word she had delivered it to her master;—held no good evidence to maintain the action, for the demand ought to be personal. No objection was made to the form of the action; it was only to the sufficiency of the demand.

The next case is *Hintons*, (Mich. 34 Car. II. anno 1681,) 2 Show, 235, which is said to be, "Case on a bill of exchange against the drawer. Bill not being paid, and payable to I. S. or to the bearer; the plaintiff brings the action as bearer; and upon evidence ruled by the Lord Pemberton, that he must entitle himself to it on a valuable consideration, though among bankers they never make indorsements in such case; for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." It does not appear that this is not an action on a promissory note. It seems to have been either a banker's promissory note, or a check drawn on a banker, and at this time no difference was supposed to exist as to the law in those cases. But it expresses a clear opinion that the bearer of such a note or bill *may maintain an [*391 action in his own name, if he came fairly by the bill. And although this principle was de-

nied in the subsequent cases of *Horton and Coggs, Hodges and Steward, and Nicholson and Sedgwick*, yet these again were expressly overruled and denied to be law by Lord Mansfield and the rest of the judges, in the case of *Grant v. Vaughan*, 3 Burr. 1516, in which case the reasoning of the court applies as strongly to the case of a promissory note as to that of an inland bill of exchange.

In the case of *Claxton v. Swift*, in the exchequer, on a writ of error, (Hil. 36, 37 Car. II. anno 1684,) 11 Lut. 878, it was decided, upon an inland bill, "that the first drawer of the bill and every indorser is liable to the payment of a sum certain to the last indorsee." No difference was then taken between an inland bill and a promissory note. Both were considered as being within the custom. So that what is stated to be law as to one may be considered to be law as to the other.

In the cases of *Cramlington and Evans*, (Trin. 3 Jac. II.) 2 Vent. 296, and *Ewers v. Benchkin*, (Mich. 4 Jac. II.) 1 Lut. 231, the pleadings are set forth at large, and show the manner of declaring upon the custom as to inland bills.

The case of *Darrach v. Savage*, (Pasch. 2 W. and M. anno 1689,) 1 Show. 155, was "*indebitatus assumpsit* for 40*l.* received to the plaintiff's use. *Non assumpsit pleaded;* and upon the trial, the evidence was a bill of exchange or note under the defendant's hand, dated the 22d February, 1687, directed to a merchant in London, 'pray pay to Mr. Darrach or his order the sum of 40*l.* and place it to my account, value received, witness my hand.'"

This case shows that a bill or note was good evidence on an action for money had and received; and that no distinction was made between a bill and a note.

Horton v. Coggs, (Mich. 2 W. and M. C. B. anno 1689,) 3 Lev. 299, was clearly upon a promissory note, yet in the margin it is called "*assumpsit sur* bill de exchange." The plaintiff "declared upon a custom in London, that if any merchant, or other person, merchandising in London, make a note in writing under his hand, and thereby promise to pay any sum of money therein contained, *to* a person therein named or bearer; and if the person in the note named, to whom by the note it was promised to be paid, assign or deliver it to any other person to receive it to his own use, and he bring it to 392*] the drawer *of the note, and request him to pay it to him who brings the note, then the person who made the note was chargeable to pay it to the bearer. And that the defendant, being a goldsmith, made such a note, thereby promising to pay 100*l.* to William Barlow, or the bearer; and that Barlow delivered the note to the plaintiff, to receive the money to his own use, in satisfaction of 100*l.* due to him by Barlow; and that the plaintiff brought and showed this to the defendant, and requested him to pay the 100*l.* which he had not done, whereby, by the custom, he became chargeable, and, so being chargeable, assumed to pay. After verdict for the plaintiff, it was moved in arrest, &c. that this custom to pay to bearer was too general; for perhaps the goldsmith, before notice by the bearer, had paid this to Barlow himself. (And this was at bar now alleged to be the truth of the case.) And of such opinion, after divers motions in Hilary term, and this term, were Pollexfen, Powell and Rooksby; Ventris being lead in the last vacation. Although upon the trial of the cause before Pollexfen, at Guildhall, he then held that the action well lay, this matter being objected at the trial. Levinz, of counsel for the plaintiff."

In this case the only objection was, that a custom to pay to bearer was too general. It seems to be admitted that Barlow himself might have brought an action upon the custom; and that a custom to pay to order, or to indorsee, would have been good. It is a sufficient answer to this case, that in the case of *Grant v. Vaughan*, 3 Burr. 1516, it was declared not to have been law, so far as it decided that an action could not be maintained by the bearer of such a note in his own name.

The case of *Dehers v. Harriot*, (Trin. 2 W. and M.) 1 Show. 163, was this: "A. draws a first and second bill of exchange payable by himself in Dublin, to B. or order," who indorsed to the plaintiff. No question was made as to this being a bill of exchange; and yet it differs in nothing but in form from a promissory note.

The next case is *Hodges v. Steward*, (Pasch. 5 W. and M.) reported in Comb. 204. 1 Salk. 125. 12 Mod. 36, and Holt, 115. The case is thus shortly stated by Comberbach. "Case upon a bill of exchange: Custom was laid in London, that where a bill is payable to A. or bearer, it must be paid to the indorsee. Holt, Chief Justice, said it was repugnant; for another person, and not the indorsee, might be the bearer." This seems to be the true ground of the decision, although the reasons are variously stated by the different reporters. They all call it a bill of exchange, but in 12 Mod. 36, we are informed what kind of a bill of exchange it was, viz., a bill drawn by the *defendant on [*393 himself, payable to another or bearer. The payee indorsed it and the indorsee, as such, and not as bearer, brought the action, which was held not to lie; because no authority was given to the payee to indorse, or to transfer it by indorsement. And in 1 Salk. 125, it appears that in the same case a difference was taken between a bill payable to bearer, and to order; for a bill payable to "I. S. or bearer, is not assignable by the contract so as to enable the indorsee to bring an action; because there is no such authority given to the party by the first contract." "But when the bill is payable to I. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action."

It was also said that although such an indorsement is not a good assignment of the bill so as to charge the drawer; yet it is a good bill between the indorser and indorsee; and the indorser is liable to an action for the money, "for the indorsement is in nature of a new bill." It was also held (as it had been before adjudged in *Milton's Case*, Hard. 485, and in *Brown and London's Case*, 1 Vent. 152,) that a general *indebitatus assumpsit* would not lie on a bill of exchange, but that the action must be either a general *indebitatus assumpsit* for money had and received, or a special action upon the case grounded on the custom. Upon this case it may be remarked that a bill drawn by a man on himself is precisely a promissory note in

effect; and Lovelass, in his Treatise on Bills and Notes, p. 22, expressly says, "that the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing." Marius, also, in his Advice, p. 3, says, "a bill may be by two persons, as where the drawer makes the bill payable to himself or order," so where a man draws a bill on himself. The same is said by Kyd on Bills, p. 2, and Chitty, 22, 48, says, "a bill will be valid where there is only one party to it, for a man may draw on himself, payable to his own order; but in such case it is said that the instrument is more in the nature of a promissory note than a bill of exchange."

The next case is that of *Hill et al. v. Lewis*, (Hil. 5 W. and M. B. R.) 1 Salk. 132. This was an action by the holder against the indorser of two notes subscribed by one Moore, a goldsmith, payable to the defendant, and by him indorsed in blank, and delivered to one Zouch, to whom he was indebted. Zouch delivered them so indorsed to the plaintiffs, and received from the plaintiffs therefor other bills and some cash. One of the notes was payable to the defendant or order, the other was payable to the defendant, without the words "or order." Moore broke and ran away; the plaintiff declared, 1st. Upon two bills of exchange against the indorser; 2d. Upon a *mutuatus;* 3d. Upon 394*] *and *indebitatus assumpsit* for money laid out for the use of the defendant. And the principal question was, whether the plaintiffs had used due diligence in applying to Moore for the money. Holt, Chief Justice, held "That goldsmiths' bills were governed by the same laws and customs as other bills of exchange; and every indorsement is a new bill: and so long as a bill is in agitation, (circulation,) and such indorsements are made, all the indorsers and every of them are liable as a new drawer. That by the law generally, every indorser is liable as the first drawer, and cannot be discharged without an actual payment; and is not discharged by the acceptance (receipt) of the bill by the indorsee; but by the custom this is restrained, viz., the acceptance (receipt) is intended to be upon this agreement, sc. that the indorsee will receive it of the first drawer if he can, and if he cannot, then that the indorser will answer it; as if the first drawer be insolvent at the time of the indorsement, or upon demand refuses to pay it, or cannot be found. And the indorser is not discharged without actual payment, until there be some neglect or default in the indorsee, as if he does not endeavor to receive it in convenient time, and then the first drawer becomes insolvent." "He left it to the jury to consider, whether the time in this case were convenient time or not; and if the plaintiff had convenient time to receive his money, then to find for the defendant, otherwise for the plaintiff. And they, upon consideration, found for the plaintiff; upon which the plaintiff prayed to take the verdict upon the *indebitatus assumpsit. Et per Chief Justice.* You cannot take the verdict upon any part of the declaration but that to which evidence was given, and here it will be good if found upon the bills of exchange; but if the evidence be applicable to any other part of the declaration, you may take it upon any such part to which the evidence is applicable. And because Zouch had sworn that he received the benefit of, and had been satisfied with, the bill he took of the plaintiff, by which the defendant was discharged against Zouch, the verdict was taken upon the *indebitatus assumpsit* for money laid out for the defendant's use; and it seemeth the indorsement by the defendant to the plaintiff was good evidence of a request to pay the said money to Zouch. Now, exception was taken that one bill was payable to the defendant only, without the words 'or his order,' and, therefore, not assignable by the indorsement; and the chief justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words 'or to his order,' give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer that he would answer it to the assignee; but the indorsement of the bill which has not the word 'or to his order' is good, or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee." This case *cer- [*395 tainly ought to have been considered as settling the law upon promissory notes. Lord Holt here admits that promissory notes are "governed by the same laws and customs as other bills of exchange;" and that if the verdict had been taken upon the count which declared upon the notes as bills of exchange it would have been good. His reasons why a note to order is assignable, viz., "that the words, 'or to his order,' give authority to the plaintiff to assign it by indorsement; and that 'tis an agreement by the first drawer that he would answer it to the assignee," are certainly good; and are the same which were used in several modern cases which will be noticed hereafter. The observation is also important "that the indorsement by the defendant to the plaintiff was good evidence of a request to pay the money to Zouch." We shall have occasion to refer to this case again when we come to consider the cases of Clerk and Martin, and Buller and Crips, decided about nine years afterwards.

The case of Pearson and Garret occurred in the next term, anno 1693, and is reported in Comb. 227, and 4 Mod. 242. "The action was brought upon a note for the payment of sixty guineas when the defendant should marry such a person, &c. in which the plaintiff declared as upon a bill of exchange setting forth the custom of merchants," &c. This note appears by the declaration, which is stated at length 4 Mod. 242 to be dated 21st of October, 4 W. and M. by which the defendant "promised to pay to the plaintiff or his assigns sixty guineas in two months after the defendant should be lawfully married to one Elizabeth Pretty."

It was objected that this was "only an agreement founded upon a brokerage, and, therefore, not within the custom of merchants; neither were there ever yet any precedents to pay money upon such a collateral contingency." The judgment was for the defendant; and it was said that, "if the note had been given by way of commerce it had been good; but to pay money upon such a contingency cannot be called trading, and, therefore, not within the custom of merchants."

If any doubt could remain that the case of *Hill and Lewis* had fully settled the law that

promissory notes were within the custom of merchants, that doubt must have been completely removed by the case of *Williams v. Williams*, decided at the next term in the same year in the king's bench, (*viz.* Pasch. 5 W. & M. anno 1692,) Carth. 269. "The plaintiff Thomas Williams, being a goldsmith in Lombard street, brought an action on the case against Joseph Williams, the projector of the diving engine, and declared upon a note drawn by one 396*] *John Pullin, by which he promised to pay 12*l.* 10*s.* to the said Joseph Williams on a day certain; and he indorsed the note to one Daniel Foe, who indorsed it to the plaintiff for like value received. And now the plaintiff, as second indorsee, declared in this manner, viz., "that the city of London is an ancient city, and that there is, and from the time to the contrary whereof the memory of man doth not exist, there hath been, a certain ancient and laudable custom among merchants and other persons residing and exercising commerce within this realm of England, used and approved, viz. &c. So sets forth the custom of merchants concerning notes so drawn and indorsed *ut supra*, by which the first indorser is made liable as well as the second, upon failure of the drawer, and then sets forth the fact thus, viz., And whereas also, a certain John Pullin, who had commerce by way of merchandising, &c. on such a day, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made a certain bill or note in writing, subscribed with his name bearing date, &c., and by the said bill or note promised to pay, &c., setting forth the note; and further, that it was indorsed by the defendant to Foe, and by Foe to the plaintiff, according to the usage and custom of merchants; and that the drawer having notice thereof, refused to pay the money, whereby the defendant, according to the usage and custom of merchants, became liable to the plaintiff, and in consideration thereof promised to pay it, &c. alleging that they were all persons who traded by way of merchandise, &c.

"To this the defendant pleaded a frivolous plea, and the plaintiff demurred; and upon the first opening of the matter had judgment in B. R. And now the defendant brought a writ of error in the exchequer chamber, and the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place, (as the usual way is,) but had declared on a custom through all England, and if so it is the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place, from whence a *venue* might arise to try it.

"To which it was answered that this custom of merchants concerning bills of exchange in part of the common law, of which the judges will take notice ex officio as it was resolved in case of *Carter v. Downish*, and therefore it is needless to set forth the custom specially in the declaration, for it is sufficient to say that such a person, according to the usage and custom of merchants, drew the bill; therefore, all the matter in the declaration concerning the special 397*] *custom was merely surplusage, and the declaration good without it.

"*The judgment was affirmed.*"

There cannot be a stronger case than this. On demurrer judgment was rendered for the plaintiff in the king's bench, which judgment was affirmed upon argument, upon a writ of error in the exchequer chamber, on the very point of the custom; so that here was the unanimous concurrence of all the judges of England. This case, it is believed, has never been denied to be law, either before or since the statute of Anne.

A short note of this case is to be found in 3 Salk. 68, by the name of *Williams v. Field*, in these words, "Ruled, that where a bill is drawn payable to W. R. or order, and he indorses it to B. who indorses it to C. and he indorses it to D. the last indorsee may bring an action against any of the indorsers, because every indorsement is a new bill, and implies a warranty by the indorser that the money shall be paid."

The next case upon a promissory note is that of *Bromwich v. Loyd*, (Hil. 8 W. III. C. B. anno 1696,) 2 Lut. 1582, where the pleadings are set forth at full length, in which the plaintiff declares, that "at London aforesaid, viz., in the parish, &c. there is a custom that if any merchant or other person residing and trading at London, make any note with his proper hand subscribed, and thereby promise to pay to any other person dwelling at London, any sum in such note specified, then such person who subscribed such note, by reason thereof, and by the said custom, is liable to pay the money, &c. That the defendant, 8th June, 1696, residing and dealing at London, made a note, &c. and thereby promised to pay to the plaintiff at London aforesaid, in the parish and ward aforesaid residing, 26*l.* 10*s.* 9*d.* on demand, by reason whereof, &c.

"To this the defendant pleaded that at the time of making the said note, he was resident at Brentford, &c. *absque hoc* that he was resident at London. To which plea the plaintiff demurred, for that the defendant had traversed matter not traversable, and because it tended to the general issue," &c.

It was urged for the defendant, that the custom was laid in St. Mary le Bow, but in fact is extended to London, and was therefore contradictory. *Sed non allocatur*, "for, *per curiam*, the parish is mentioned *but in respect [*398 of the venue, and that it was matter of necessity to allege it so."

And it was further said for the defendant, "that there were three things necessary to maintain the action, viz., 1. Commorancy; 2. The making of the note; 3. Commerce between the parties; but there is no place mentioned in the declaration where the note was made; *sed non allocatur*, for it shall be intended at the parish of St. Mary le Bow; for it is said, that the defendant at London aforesaid, in the parish and ward aforesaid, residing and using commerce, made a note; and therefore the whole is to be intended at the same place.

"It was also objected that the custom was unreasonable, because it took away the proof how the money became due; but the Court were of opinion that the custom was good, notwithstanding this objection.

"TREBY, *Chief Justice*, said in this case, that bills of exchange at first were extended only to merchant strangers, trading with English merchants, and afterwards to inland bills between merchants trading one with another here in

England; and after that to all traders and dealers, and of late to all persons trading or not; and that there was no occasion to allege any custom; and that was not denied by any of the other justices. And the Chief Justice also said, that bills of exchange were of such general use and benefit, that on an *indebitatus assumpsit*, a bill of exchange may be given in evidence to maintain the action; and POWELL, *Justice*, said, that on a general *indebitatus assumpsit* for money received to the use of the plaintiff, such bills may be left to the jury to determine whether it was for value received, or not. In Hil. 9 and 10 W. III. the plaintiff had judgment by the opinion of the whole court." This case is in perfect conformity to those of Hill and Lewis, and Williams and Williams.

The case of *Pinckney v. Hall*, (Hil. 8 and 9 W. III. anno. 1697 B. R.) 1 Lord Raymond, 175, was by the indorsee of a promissory note made by the defendant for himself and partner as joint merchants, to Hutchins or order, and by him indorsed to the plaintiff. The declaration was on the custom of England, to which the defendant demurred.

1st. "Because the declaration being *per consuetudinem Angliæ*, &c. was ill, for the custom of England is the law of England, of which the judges ought to take notice without pleading. *Sed non allocatur*. For though heretofore this has been allowed, yet of late time it has always been overruled, and in an action against a carrier it is always laid *per consuetudinem Angliæ*. 2. Though *lex mercatoria* is part of the law 399*] *of England, yet it is but a particular custom among merchants, and therefore it ought to be shown in London, or some other particular place. *Sed non allocatur;* for the custom is not restrained to any particular place." Two other exceptions were taken which are not material to the present question; but judgment was given for the plaintiff.

At the next term, (Easter, 9 W. III.) 1 Lord Raymond, 180, occurred the case of *Nicholson v. Sedgwick*, reported also in 3 Salk. 67, where it is stated to be upon a bill.

"The defendant Sedgwick, being a goldsmith, made a note in writing, by which he promised to pay to one Mason, or to the bearer thereof, 100*l*. Mason delivered the note to the plaintiff for 100*l*. in value received," who brought the action as bearer, and declared upon the "custom of merchants and others trading within this realm."

Upon *non assumpsit* pleaded, and verdict for the plaintiff, "it was moved in arrest of judgment that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable. *Quod fuit concessum per curiam;* for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order; in the latter case the indorsee has been allowed to bring the action in his own name." The principal point of this case, viz., that the bearer could not maintain an action in his own name, was expressly declared not to be law in the case of *Grant v. Vaughan*, 3 Burr. 1516.

In the same year in the case of *Boulton v. Hillesden*, Comb. 450, it was decided that a master may be bound by a promissory note made by his servant.

Another case in the same year is cited in 1 Com. Dig. 190, 191, by the name of *Cromwell v. Floyd*, in C. B. which does not seem to have been reported, unless it be the same case with that reported in 2 Lut. 1582 by the name of *Bromwich v. Loyd;* which is not impossible.

In Mich. term, of the same year, in the case of *Woolvil v. Young et al.*, 5 Mod. 367, it was held that a declaration upon a promissory note, founded on the custom of England, was bad, because it did not allege that the defendants were *commercium habentes;* but it seems to admit that it would have been good if those words had been used.

In an anonymous case in chancery, in the same year, reported by Ch. Baron Comyns, p. 43, it is said that the "indorsee for a valuable *consideration recovered in *indebitatus* [*400 *assumpsit* on this bill of exchange, against the drawer. The drawer filed a bill in chancery to be relieved against this judgment at law, alleging that he received no value; and that the indorsee might resort to the indorser for his original claim. It was answered that the drawer might be relieved against the payee, or any claiming as servant or factor of, or to the use of the payee; but the Chancellor held that the indorsee being an honest creditor, and coming by this bill fairly, for the satisfaction of a just debt, he would not relieve against him, because it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security."

It may be doubted whether this was really a bill of exchange or a promissory note; and perhaps it is immaterial which it was, as the law had been clearly settled to be the same upon both. Yet if it had been a bill of exchange, it seems probable that something would have been said of the drawee; by which it should appear that the plaintiff had a right of action against the drawer; such as that the bill had been presented for acceptance, and refused; or that being accepted by the drawee, he had refused to pay, &c.

The case of *The Bank of England v. Newman*, 12 Mod. 241. B. R. 1 Lord Ray, 442, and Comyns' Rep. 57, was upon a promissory note, drawn by one Bellamy, payable to Newman or bearer, who discounted it at the bank without indorsing it. Upon Bellamy's failure, the bank brought suit against Newman. But the Court held him not to be liable, "for the law is, that if a bill or note be payable to one or bearer, and he negotiates the bill, and delivers it for ready money paid to him, without any indorsement on the bill, this is a plain buying of the bill; as of tallies, bank bills, &c. but if it be indorsed, there is a remedy against the indorser."

Hawkins v. Cardy, in the next year, (Mich. 10 W. III. B. R.) 1 Lord Raym. 360. 1 Salk. 65 Carth. 466, was also upon a promissory note.

"The plaintiff brought an action on the case upon a bill of exchange," (says the reporter,) "against the defendant, and declared upon the custom of merchants, which he showed to be thus: that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man or his order, and afterwards, the person to whom the bill was made payable indorses the said bill for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is

indorsed payable; and then the plaintiff shows that the defendant, being a merchant, subscrib-
401*] ed a bill of *46*l.* 19*s.* payable to Blackman or order; that Blackman indorsed 43*l.* 4*s.* of it, payable to the plaintiff," &c.

On demurrer, the declaration was adjudged ill; "for a man cannot apportion such personal contract; for he cannot make a man liable to two actions, where by the contract he is liable but to one." "But if the plaintiff had acknowledged the receipt of the 3*l.* 15*s.* the declaration had been good."

And HOLT, *Chief Justice*, said "that this is not a particular local custom, but the common custom of merchants, of which the law takes notice."

Salkeld, in reporting this case, begins thus: "A. having a bill of exchange upon B. indorses part of it to I. S. who brings an action for his part," &c. This, compared with Lord Raymond's report of the case, shows what has been already so often mentioned, that no difference had yet been discovered between the law respecting promissory notes, and that concerning inland bills of exchange. Even Lord Raymond states it first to be a bill of exchange, and immediately shows it to have been a promissory note. So glaring a contradiction could not have been passed uncorrected, if a promissory note and an inland bill of exchange had not been considered as the same thing.

In this case it will be remarked, that upon demurrer, the Court said that this declaration, upon the custom of merchants, on a promissory note, by the indorsee against the maker, would have been good, if the receipt of the 3*l.* 15*s.* had been acknowledged.

The next year produced the case of *Lambert v. Oakes*, (Pasch. 11 W. III. B. R.) reported in 1 Lord Ray. 443. 1 Salk. 127, by the name of *Lambert v. Pack*. 1 Salk. 126, case 6, *Anonymous*. 12 Mod. 244, and Holt, 118. This case was clearly upon a promissory note, although four out of the five reports of the case call it a bill of exchange. This circumstance shows that no difference was understood to exist at that time between a promissory note and an inland bill of exchange; for upon this supposition only can we account for the extreme inaccuracy of so many reporters upon that point. The fact of its being called a bill of exchange induces also a strong presumption of another fact which does not expressly appear in Lord Raymond's report of the case, and that is, that the plaintiff grounded his action on the custom of merchants; which was at that time the only known and established form of declaring upon a promissory note. This was, then, an action by the indorsee against the indorser of a prom-
402*] issory note, payable *to defendant or order, grounded on the custom of merchants, in which it was decided that the plaintiff must demand the money of the drawer of the note before he could resort to the indorser; and is another strong case to show that promissory notes and inland bills of exchange, before the statute of Anne, were precisely on the same footing.

The case of *Starke v. Cheeseman*, in the same year, Carth. 509, was upon a bill of exchange drawn by the defendant in Virginia upon himself in London, which, as has been before observed, is in effect a promissory note. The plaintiff had judgment, although he had not alleged in the declaration that the defendant promised to pay the money after protest, or even that he had notice of the protest, for "the law did raise the promise upon the custom of merchants, and, therefore, it was not necessary to lay an actual promise."

In the next year, (Pasch. 12 W. III. anno 1700, B. R.) we find the case of *Carter v. Palmer*, reported in 12 Mod. 380.

"Palmer had given a note under his hand in this form: "I promise to pay the *bearer* so much money on demand."

"Plaintiff brings his action grounding it upon the custom of merchants, as if it were a bill of exchange; and avers no consideration. After verdict, upon motion in arrest of judgment, HOLT, *Chief Justice*, "We will take such a note prima facie for evidence of money lent; and though they have declared on the custom, yet we must take care that by such a drift, the law of England be not changed, by making all notes bills of exchange." "But all seemed to agree if it were made payable to him or order, the defendant by that form had made it negotiable, and by consequence he would be liable to the action of assignee in his own name; for if a man who is no merchant will draw a bill of exchange, he is suable upon it according to the custom of merchants, for he makes himself a merchant *pro tanto*. And inland bills were not known till trade grew to a great height; and when they obtained, they received the same law with outlandish bills; and he said he remembered that at a trial upon an inland bill before Hale, the defendant's counsel would put the plaintiff to prove the custom; but Hale said they had a hopeful point of it. *Et adjorn.*" ..

It does not appear that this case was finally decided, but the principal point, viz., that a bill or note payable to bearer was not a bill of exchange, had been before decided in the cases of Horton and Coggs, Hodges and Steward, and Nicholson v. Sedgwick, (before cited.) But *these cases, as before observed, were [*403 expressly denied to have been law, by Lord Mansfield and the other judges in the case of *Grant v. Vaughan*, 3 Burr. 1516.

The other point of the case, viz., that if the note had been made payable to him or order, the defendant, by that form, had made it negotiable, and the assignee might have sued in his own name, is in strict analogy with the whole current of authorities from the time of the first introduction of promissory notes: and the reason given is the same with that used in the case of Grant and Vaughan, viz., that the defendant by the original contract had made it negotiable, and had made himself expressly liable to the action of the assignee. The further reason given by the Court shows most clearly that a promissory note payable to order was an inland bill of exchange; "for, say the Court, if a man who is no merchant will draw a bill of exchange, he is suable upon it according to the custom of merchants, for he makes himself a merchant *pro tanto*."

There was another similar case at the same term, between *Jordan and Barloe*, 3 Salk. 67, where it is said to be "ruled that where a bill is drawn payable to W. R. or order, tis within the custom of merchants; and such a bill may be negotiated and assigned by custom, and the

contract of the parties; and an action may be grounded on it, though 'tis no specialty; but if 'tis made payable to W. R. or bearer, 'tis not within the custom of merchants: and, therefore, when upon such a bill, the plaintiff declared, that the defendant being a merchant, had drawn a bill according to the custom of merchants, but had not paid the money, this declaration was held ill."

Although the instrument in this case is not expressly stated to be a promissory note, yet it seems strongly implied from the expressions used. For it may be remarked, 1st. That it appears by all the reports of the time that the words bill and note were synonymous; that the term promissory note was not in use, and that generally whenever the term bill is used alone, it meant a promissory note.

2d. It is said that "a bill payable to W. R. or order, was within the custom of merchants." It was surely not necessary at that time to have decided solemnly that a bill of exchange was within the custom of merchants.

3d. It is said that "such a bill may be negotiated and assigned by custom and the contract of the parties, and an action may be grounded 404*] *on it, though 'tis no specialty;" which last expression seems more applicable to a promissory note than to a regular bill of exchange.

4th. It is said that "the defendant drew a bill but had not paid the money;" without naming any drawee, or a non-acceptance or non-payment by the drawee, or any other circumstance to show that the drawer was liable to pay the money.

5th. The points decided are precisely those mentioned in the preceding case of *Carter v. Palmer*.

In the case of *Crawley v. Crowther*, 2 Freem. 257, (Trin. 1702,) in chancery, it was said, that "it is now likewise held, and the practice is so, that if a man gives a note for money, payable on demand, he need not prove any consideration."

Lawson v. Lamb, (Hil. 12 W. III. C. B. anno 1700,) 1 Lut. 274, was another case upon a promissory note by assignee of payee, a bankrupt, against the maker of the note. The pleadings are set forth at large, and it appears that the plaintiff declared upon the custom of merchants within the realm of England, upon a note payable to the bankrupt or order.

"The objection to the declaration was, that all the proceedings of the commissioners of bankrupt ought to be alleged at large; but by reason of divers precedents, according to the declaration here, judgment *per tot. cur.* was given for the plaintiff."

In Trin. term of the same year, it is said by Comyns, in his Digest, p. 191, of vol. 1, that in the case of *Butcher v. Swift*, in B. R. it was doubted whether a promissory note to A. or order was within the custom of merchants, and whether the assignee could bring an action upon it in his own name. This case, it is believed, has not been reported.

In 1 Salk. 183, *Ford v. Hopkins*, (Hil. 12 W. III.) Lord Holt is reported to have said at *nisi prius*, "that goldsmiths' notes to pay money or tickets, are evidence of the receipt of money." As he had before said that every indorsement makes a new bill, it seems to follow that an indorsement is also evidence of the receipt of money.

We have now examined all the reported cases upon promissory notes, from the time of the first introduction of inland bills, to the time of Lord Holt's decision in the case of *Clerke v. Martin*. At least, if any *others are to [*405 be found, they have escaped a diligent search. They form a series of decisions for a period of more than 30 years, in which we discover an uncommon degree of unanimity as well as of uniformity. We find the law clearly established to be the same upon promissory notes as upon inland bills; and we find no evidence that the latter were in use before the former.

There is not a contradictory case, or even *dictum*, unless we consider as such the doubt expressed in the case of *Butcher v. Swift*, cited by Comyns; but that case is not reported, and therefore it is impossible to say upon what ground the doubt was suggested. The cases upon promissory notes and inland bills, go to establish not only their likeness in every respect, but even their identity; for the former are almost uniformly called inland bills.

V. Upon examining the printed books of precedents during the above period, we shall find that the common usage was to declare upon a promissory note as upon an inland bill of exchange.

The first precedent of a declaration upon a promissory note is that in Brownlow Latine Redivivum, p. 74, which is prior to any of the declarations upon inland bills of exchange. It is in substance as follows, that there is, and was from time immemorial, a custom among merchants at the city of Exeter, and merchants at Crozict, that if any merchant at Crozict should make any bill of exchange, and by the said bill should acknowledge himself to be indebted to another merchant in any sum of money to be paid to such other merchant or his order, and such merchant to whom the same should be payable, should order such sum to be paid to another merchant, and such merchant to whom the same was payable should request the merchant who acknowledged himself so as aforesaid to be indebted, to pay such sum to such other merchant to whom he had ordered the money to be paid; and if upon such request the merchant who acknowledged himself to be indebted in the sum in such bill and indorsement mentioned, should accept thereof, then he would become chargeable to pay the said sum to the person to whom it was by the said bill and indorsement directed to be paid at the time in the said bill mentioned, according to the tenor thereof. It then avers that on the 8th of May, 1678, the defendant, according to the custom aforesaid, acknowledged himself to be indebted to one M. M. in 52s. which he obliged himself and his assigns (this is probably misprinted) to pay to the said M. M. who, by indorsement on the same bill of exchange on , at , ordered the money to be paid to the plaintiff, which bill of exchange afterwards, to wit, on , at , the defendant saw and accepted, by which acceptance, and by the usage aforesaid, the *defendant became liable, &c. and [*406 in consideration thereof promised to pay, &c..

There is in the same book, p. 77, a declaration upon a bill of exchange at double usance, which is probably upon an inland bill, as the custom is alleged generally among merchants, but does not say at what place.

The next declaration on a promissory note is in the case of *Horton v. Coggs*, 3 Levinz, 296. The note is dated 1st October, 4 Jac. II. The custom is alleged to be in London, that if any merchant or goldsmith in London should make a bill or note in writing, with his name subscribed, and thereby promise to pay to any person or bearer, &c.

In Clift's Entries, 918, is a declaration upon an inland bill of exchange, calling it a note, and the word bill is not mentioned in the whole count. This shows that the word bill and note were considered as synonymous.

In the same book, p. 899, *Turner v. Toft*, is a declaration by the indorsee v. the maker of a promissory note dated 6th November, 1684. It states that within this realm of England, viz., at the city of Bristol, there is, and from time immemorial has been, a custom among merchants, &c. used and approved, viz., that if any merchant or other person using commerce, &c. make any note under his proper hand, and thereby promise to pay to any other merchant, &c. in the same note mentioned, or to his order, any sum of money at any time in such note specified; and such merchant, &c. to whom or to whose order the same is payable, &c. by indorsement of the said note, appoint such sum of money in the note mentioned to be paid to any other merchant, &c. in the said indorsement mentioned, or to his order, then such person who subscribed such note, having notice of such indorsement, is chargeable, and for the whole time aforesaid hath been accustomed to be chargeable, to pay the sum of money in such note mentioned, to the person in such indorsement mentioned, at the time in such note limited for the payment thereof, according to the tenor of such note. It then sets forth the facts to bring the case within the custom, by reason of which, and of the custom aforesaid, the defendant became liable, &c. and so being liable, in consideration thereof promise to pay, &c.

The next precedent is in the case of *Sheppard and Bragg v. Flemyng*, (Mich. 5 W. and M.) Clift. Ent. 929, *Indorsees v. Maker*. "Whereas the said Flemyng, on the 28th of October, 1692, at, &c. according to the custom of merchants in that case used and approved, made his certain bill in writing, and the same bill with his proper hand subscribed, and by the said bill promised to pay to one George Mason or order, 407*] the *sum of 40*l.* upon the 28th day of November then next following, for value received, and whereas the said George Mason, afterwards, viz., on , at , by indorsement with his proper hand subscribed upon the said bill, according to the usage and custom of merchants aforesaid in that case used and approved, appointed the contents of the said bill to be paid to the said William Sheppard and Joseph Bragg, by the name of William Sheppard and Company, in the said indorsement named, whereof the said Flemyng then and there had notice, by reason of which premises, and by the custom of merchants in that behalf used and approved, he was liable, &c. and being so liable in consideration of the premises, promised to pay," &c.

In Clift. Ent. 916, in the case of *Gibb's Adm'x v. Fowle and Wooton*, is a declaration upon the custom of merchants, by administratrix of the payee against the master, upon a promissory note made by his servant, dated 29th May, 1693. See also 1 Wentworth's System of Pleading, 346.

In p. 914, in the case of *Dymes v. Smith* (Mich. 8 W. III.) is a declaration on the custom, by the payee against the master upon a like note made by the servant, 7th May, 1696. And in p. 913, in the case of *Wiseman v. Conyers*, is another, upon the custom, by the indorsee against the maker of a promissory note, dated 4th May, 1686.

In 2 Mod. Intr. 126, is another declaration upon the custom by the indorsee against the maker of three promissory notes, dated in 1697. This declaration is precisely like a modern declaration upon a promissory note, excepting that the note is called a bill, and is said to be made and indorsed "according to the custom of merchants," "whereby, according to the custom of merchants," the defendant became liable, and so being liable, &c.

In p. 122, is another by payee v. the maker of a promissory note, calling it a "bill or note," and setting forth the custom specially.

In every case upon a promissory note the declaration is grounded on the custom of merchants.

Upon a review of this list of authorities and precedents we are at a loss to imagine from what motive, and upon what grounds, Lord Holt could at once undertake to overrule all these cases, and totally change the law as to promissory notes; and why he should admit inland bills of exchange to be within the custom of merchants, and deny that privilege to promissory notes; when the same evidence *which proved the former to be within [*408 the custom equally proved that it extended to the latter. By examining the books it will be found that most of the points which have been decided respecting inland bills of exchange, have been decided upon cases on promissory notes. If he considered promissory notes as a new invention, when compared with inland bills of exchange, he seems to have mistaken the fact; for the probability is, that the former are the most ancient, or, to say the least, are of equal antiquity.

VI. But let us proceed to examine the case of *Clerke v. Martin*, Pasch. 1 Anne, B. R. 2 Lord Ray. 757. 1 Salk. 129, upon which alone is founded the assertion in modern books "that before the statute of Anne promissory notes were not assignable or indorsable over within the custom of merchants, so as to enable the indorsee to bring an action in his own name against the maker." The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon his case against the defendant upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another was upon the custom of merchants as upon a bill of exchange; and showed that the defendant gave a note subscribed by himself, by which he promised to pay to the plaintiff or his order, &c. Upon *non assumpsit* a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and, therefore, the plaintiff, having declared upon it as such, was wrong; but that the proper way in such cases is to declare upon a general *indebitatus*

assumpsit for money lent, and the note would be good evidence of it.

"But it was argued by Sir Bartholomew Shower, the last Michaelmas term, for the plaintiff, that this note being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to I. S. or bearer, which he admitted was not a bill of exchange because it is not assignable nor indorsable by the intent of the subscriber, and, consequently, not negotiable, and, therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought his action upon it as upon a bill of exchange, and might have declared upon the custom of merchants. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself, since the defendant by his subscription has shown his intent to be liable to the payment of this 409*] *money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange. That there is no difference in reason between a note which saith, "I promise to pay to I. S. or order," &c. and a note which saith, "I pray you to pay to I. S. or order," &c. they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant, (2 Vent. 292. *Sarsfield v. Witherly*,) and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants."

"But HOLT, *Chief Justice*, was *totis viribus* against the action; and said that this could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to a new sort of specialty unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield v. Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing a writ of error.

"Gould, Justice, said, that he did not remember it had ever been adjudged that a note in which the subscriber promised to pay, &c. to I. S. or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between *Horton and Coggs*, now printed in 3 Lev. 299, but that it was never resolved that the party himself (to whom such note was payable) could not have an action upon the custom of merchants upon such a bill. But HOLT, *Chief Justice*, answered, that it was held in the said case of *Horton v. Coggs*, that such a note was not a bill of exchange within the custom of merchants. And afterwards, in this Easter term, it was moved again, and the court continued to be of opinion against the action. And then Mr. Branthwaite, for the plaintiff, urged, that if this note was not a bill of exchange within the custom of merchants, then the promise founded upon it was void; and then it could not be intended that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general *indebitatus assumpsit*. HOLT, *Chief Justice*, said that would be true, if it had been void by reason of its being insensible; but this matter is sensible enough though not sufficient in law to raise a promise; *and, therefore, one cannot [*410 intend but that damages were given for it; and, consequently, that judgment must be arrested. And judgment was given *quod querens nil capiat per billam*, &c. by the opinion of the whole court."

As four other cases are reported upon this subject prior to the statute of Anne, all of which were dependent upon this of *Clerke and Martin*, it may be proper to notice what fell from the Court in each, before any comments are made on that case.

At the same term, the case of *Potter v. Pearson* (1 Lord Ray. 759,) was upon a writ of error from C. B. in which the Court said, "It is a void custom, since it binds a man to pay money without any consideration; for the rule is, *ex nudo pacto non oritur actio*. And, therefore, the judgment was reversed."

In the case of *Burton v. Souter*, at the next term (2 Lord Ray. 774,) it was moved in arrest of judgment, "that such a note is not within the custom of merchants, but they ought to declare upon a *mutuatus*, and give the note in evidence, as it was settled last term between Clerke and Martin. And of that opinion was the whole Court."

The case of *Williams v. Cutting*, at the next term, (2 Lord Ray. 825. Farr. 154,) was another writ of error from the C. B. There were two counts: 1. On the custom of merchants, declaring upon a note given by the defendant to the plaintiff promising to pay him so much money; 2. Upon an *indebitatus assumpsit*. There were several damages, but only one judgment; and it was assigned for error that the count upon the custom of merchants was void; and, therefore, there being one entire judgment, all was void, and judgment ought to be reversed in toto. And the case of *Clerke v. Martin* was quoted as an authority in point.

The Court were all of opinion that, "if one of the declarations was such on which no damages ought to be recovered, it would be bad." And, per Holt, as to that point he had "proposed it to all the judges, and that they were all of opinion that a declaration upon the custom of merchants upon a note subscribed by the defendant to the plaintiff for so much money, or promising so much money, was void; for it tended to make a note amount to a specialty. And judgment thereupon was reversed in toto."

Lord Raymond does not mention this last observation of Lord Holt, but says, "Note; all the judges held clearly that the first count was ill, * (according to the case of *Clerke v.* [*411 *Martin*,) except Powell, Justice, who doubted."

The next and last case in the books before the statute of Anne, is that of *Buller v. Crips*. (Mich. 2 Anne, anno 1703,) 6 Mod. 29. "A note was

in this form: "I promise to pay to I. S. or order, the sum of 100*l.* on account of wine had of him." "I. S. indorses this note to another; the indorsee brings the action against him that drew the note, and declares upon the custom of merchants, as upon a bill of exchange; and a motion was in arrest of judgment, upon the authority of Clerke and Martin's case.

"But Brotherick would distinguish this case from that; for there the party to whom the note was originally made brought the action, but here it is by indorsee; and he that gave this note, did, by the tenor thereof, make it assignable or negotiable by the words 'or order,' which amounts to a promise, or undertaking, to pay to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

"*Chief Justice* HOLT. I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would have put them to prove the custom; at which Hale, who tried it, laughed, and said, 'They had a hopeful case on't.' And in my Lord North's time it was said that the custom in that case was part of the common law of England, and the actions since became frequent as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest. And the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them. And sure to allow such note to carry any lien with it, were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty, and besides, to empower one to assign that to another, which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it. And these notes are not in the nature of a bill of exchange; for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise it hinders the exportation of money out of the realm.

"He said, if indorsee had brought this action against indorser, it might peradventure lie, for the indorsement may be said to be tantamount to drawing a new bill for so much mon-
412*] ey as the note is for, upon the *person that gave the note; or he may sue the first drawer in the name of the indorser, and convert the money, when recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use. And besides, it is a good authority to the original drawer to pay the money to indorsee. And Powell, Justice, cited one case where a plaintiff had judgment upon a declaration of this kind in the common pleas; and that my Lord Treby was very earnest for it, as a mighty convenience for trade; but that when they had considered well the reasons why it was doubted here, they began to doubt too; and the whole court seemed clear for staying the judgment. And at another day the Chief Justice declared, that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that was pretended would ensue by obstructing this course; and that they had told him, it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree a bill of exchange may be made between two persons without a third; and if there be such a necessity of dealing that way, why do not dealers use that way which is legal? and may be this; as if A. has money to lodge in B.'s hands, and would have a negotiable note for it, its only saying thus: 'Mr. B. pay me, or order, so much money, value to yourself;' and signing this, and B. accepting it; or he may take the common note, and say thus: 'for value to yourself, pay indorsee so much; and good.' And the court at last took the vacation to consider of it," but what became of the case afterwards does not appear.

These five cases, viz., *Clerke v. Martin*, *Potter v. Pearson*, *Burton v. Souter*, *Cutting v. Williams*, and *Buller v. Crips*, are the only reported cases in which the former decisions were overruled, and it may be observed, that the four last were decided upon the authority of the first, which is to be considered as the leading case; and it is in that case, therefore, that we are to look for the grounds upon which so great a change of the established law was founded. We shall, however, consider the reasons that are scattered among the whole, as having concurred in the formation of Lord Holt's opinion. In the first place, we find an assertion of his Lordship, in *Clerke v. Martin*, "that this note could not be a bill of exchange," but he seems to have been too much irritated at that time to give a reason for the assertion, or to recollect that in the case of *Hill v. Lewis*, upon promissory notes, he had said, "that goldsmiths' bills were governed by the same laws and customs as *other [*413 bills of exchange," and that the verdict in that case would be good "if found upon the bills of exchange."

His next assertion is, "that the maintaining these actions upon such notes, were innovations upon the rules of the common law."

But if, as we have shown, the custom of merchants is a part of the common law; if promissory notes had always, from the time of their first introduction, been adjudged to be as much within the custom of merchants as inland bills of exchange, then an action on a promissory note, founded on the custom, was not more an innovation than a like action upon an inland bill of exchange. Besides, that could hardly deserve the name of innovation, which had been sanctioned by all the judges of England, on a demurrer, as was the case in *Cutting* and *Williams*.

His next assertion is, "that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard street." To this it may be answered, that it did not amount to the setting up a specialty, because the consideration of a specialty is not examinable at law; but between immediate parties to a bill of exchange, or a promissory note, the defendant might always have availed himself of the want of consideration. It only

amounted at most to the setting up a promissory note as a bill of exchange. The assertion that promissory notes were invented in Lombard street, is certainly not correct, for Malynes mentions them as in use in foreign countries, and as being assignable by the custom of merchants, long before they appear to have been introduced into England.

The other assertions of his lordship only tend to show a degree of irritation which derogates from the respect which the decision might otherwise deserve. The mildness of Mr. Justice Gould forms a contrast with the precipitation of the Chief Justice. He said, "he did not remember that it had ever been adjudged that a note, in which the subscriber promised to pay, &c. to I. S. or bearer, was not a bill of exchange; and that it was never resolved that the party himself, to whom such note was payable, could not have an action upon the custom of merchants upon such a bill."

In the case of *Potter v. Pearson*, it was said, that "it is a void custom, since it binds a man to pay money without consideration." This reason equally applies to inland bills, and is no reason why a distinction should be taken between them and promissory notes payable to order. The one is as much a mercantile trans- [*414*] action as the other; *and "a *nudum pactum* does not exist in the usage and law of merchants," nor is "the want of consideration an objection in commercial cases." 3 Burr. 1669. 1 Powell on Cont. 341.

The case of *Burton v. Souter* furnishes no new reason, but relies almost entirely upon the case of *Clerke v. Martin*.

The case of *Williams v. Cutting*, as reported by Lord Ray. 825, shows only that Mr. Justice Powell doubted upon the case of *Clerke v. Martin*. But in Farr. 155, it appears that Holt said, "he had proposed it to all the judges, and that they were all of opinion, that a declaration upon the custom of merchants upon a note was void; for it tended to make a note amount to a specialty." It has been before shown that this reason was not founded in fact; and it may be further remarked that if true in point of fact, yet it would equally apply to inland bills, and, therefore, is no ground for a discrimination. But it appears by Lord Raymond, that all the judges did not agree, for Powell doubted.

The case of *Buller v. Crips* differed from the others in this, that the action was brought by the first indorsee, and not by the payee of the note. Lord Holt again declares that "the notes in question are only an invention of the goldsmiths in Lombard street," in which he was certainly mistaken. He repeats that "to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty;" and the reason which he gives why this case ought not to be distinguished from that of *Clerke v. Martin*, is that a man cannot assign that which he has not himself. But it is not as assignee that the indorsee was entitled to his action, but as the payee of a bill of exchange; for an indorsed note is a bill drawn, by the payee of the note, upon the maker in favor of the indorsee; and the maker accepts the bill when he signs the note, for it is no objection to the acceptance of a bill that the acceptance is made before the bill. However, if the judgment in *Clerke v. Martin* was against law, the foundation of Lord Holt's opinion in this case must fail. His lordship again asserts, that "these notes are not in the nature of a bill of exchange;" and he now condescends to give his reasons why they are not; "for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise it hinders exportation of money out of the realm;" in each of which reasons he is equally unfortunate, for the expedition of trade is not more promoted, nor is its safety more secured, by inland bills than by promissory notes, nor is the exportation of money more prevented by the former than by the latter. Indeed, it is in modern times *fully admitted, that pay- [*415 ment by bills on a foreign country has no effect either by increasing or diminishing the current coin of a nation. For payment of a sum by exchange prevents the importation of exactly the same sum of money.

But Lord Holt himself admitted, that "if the indorsee had brought this action against the indorser, it might peradventure lie; for the indorsement may be said to be tantamount to the drawing a new bill for so much as the note is for, upon the person that gave the note; or he may sue the first drawer in the name of the indorser, and convert the money, when recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use; and besides, it is a good authority to the original drawer to pay the money to the indorsee."

If this indorsement makes it a bill of exchange for one purpose, the reason is not easily perceived why it should not be a bill of exchange for other purposes. The express promise of the maker to pay the money to the indorsee seems to be at least equal to an acceptance of the bill; and, as it has been before observed, a bill may be accepted before it is in fact drawn. 3 Burr. 1663. Doug. 284, 1 Atk. 715, (611,) Kyd. 48. A bill drawn by a man on himself "is payable by him at all events," and such a bill "is tantamount to an acceptance." 1 Went. System of Pleading, 225.

Lord Holt admits also that the indorsement will authorize the indorsee to sue in the name of the indorser; hence it appears that the whole dispute was merely about the form of the action; and this renders it the more astonishing that he should have contended, "*totis viribus*," as Lord Raymond says he did, for an exception so clearly contrary to the justice of the case, especially as the point had been before so solemnly settled in the case of *Cutting v. Williams*. Indeed his Lordship seems, by the latter part of the report of *Buller v. Crips*, to have relented a little, after his conversation with the merchants, for he agreed "that a bill of exchange may be made between two persons without a third," by saying thus, "Mr. B. pay me or order, so much money, value to yourself; and signing this and B. accepting it. Or he may take the common note, and say thus: For value to yourself, pay indorsee so much; and good."

The last example seems to have been precisely the case before the court; and as the court adjourned without giving judgment, it seems *to be doubtful how they would have [*416

decided, notwithstanding what had been said before.

Hence then we find, from an examination of all the cases before the statute of Anne, that it never was adjudged that a promissory note for money payable to order, and indorsed, was not an inland bill of exchange. But we find that the contrary principle had been recognized in all the cases from the time of the first introduction of inland bills and promissory notes to the first year of Queen Anne, and that in one of them it had been expressly adjudged upon demurrer in the king's bench, and the judgment affirmed upon argument in the exchequer chamber, before all the judges of the common pleas and barons of the exchequer, so that it may truly, be said to have been solemnly adjudged by all the judges of England. Principles of law so established are not to be shaken by the breath of a single judge, however great may be his learning, his talents or his virtues. That Lord Holt possessed these in an eminent degree will never be denied; but he was not exempt from human infirmity. The report itself, in the case of *Clerke v. Martin*, shows that, from some cause or other, he was extremely irritated with the goldsmiths of Lombard street, and that his mind was not in a proper state for calm deliberation and sound judgment. The same observation applies to the case of *Buller v. Crips*, and is further confirmed by that of *Ward v. Evans*, 2 Lord Ray. 930, in which his lordship said, "But then I am of opinion, and always was, (notwithstanding the noise and cry, that it is the use of Lombard street, as if the contrary opinion would blow up Lombard street,) that the acceptance of such a note is not actual payment." This circumstance has also been noticed by judges and others, in some of the more modern reports. In the case of *Grant v. Vaughan*, 3 Burr. 1520. Sir Fletcher Norton and Mr. Dunning observed that "Lord Holt was peevish," in the case of *Clerke v. Martin*, and Lord Mansfield remarked, that "Lord Holt got into a dispute with the city about it." In 1 W. Bl. 487. Lord Mansfield said, "The first struggle of the merchants, (which made Holt so angry with them,) to make inland bills in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the judges why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded." And in the case of *Brown v. Harradan*, 4 Term Rep. 151, Lord Kenyon said, it is not necessary now to consider whether or not Lord Holt were right in so pertinaciously adhering to his opinion, before the statute of Anne, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the 417*] *debt; that question exercised the judgments of the ablest men at that time; but the authority which his opinion had in Westminster Hall made others yield to him; and it was thought necessary to resort to the legislature to apply a remedy." And in the same case, p. 154, Buller, Justice, said, "The cases cited by the defendant's counsel are extremely material; for though they do not directly decide the question, they show that the courts of Westminster have thought the analogy between bills of exchange and promissory notes so strong that the rules established with respect to one ought also to prevail as to the other. Such is the general tendency of the case since Lord Mansfield's time. Many of the cases alluded to by the plaintiff's counsel happened before the statute of Anne: they only show the strong disposition which Lord Holt manifested on all occasions to discourage promissory notes. It appears from them that Lord Holt and the merchants were perpetually disputing whether or not they should be put upon the same footing with bills of exchange. The merchants did not contend that they might recover on notes in particular cases only, but that they should be universally considered in the same light as bills of exchange. Upon that ground they applied to the legislature for relief, and their conduct is very strong to show what construction the statute of Anne ought to receive."

Lord Kenyon said, "it has been argued that there is an essential difference between bills of exchange and promissory notes; and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess I see no difference whatever; they both make engagements of the same nature, and when the acceptor has accepted a bill he is equally bound to be prepared to pay on the day appointed, as to the maker of a promissory note." Lord Hardwicke, in the case of *Walmsley v. Child*, anno 1749, 1 Ves. 346, says, "The reason of making the statute 3 and 4 Anne, arose from some determinations, in the beginning of her reign, by Holt, Chief Justice, that no action could be maintained on a promissory note, nor declaration thereupon, viz., *Clerke v. Martin*, and *Potter v. Pearson*, 1 Salk. 129, which cases produced the act, as the act itself recites; but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved if lost." From this concurrent testimony it is apparent, that the case of *Clerke v. Martin* was a hasty, intemperate decision of Lord Holt, which was acquiesced in by the other judges, in consequence of his overbearing authority, "which made others yield to him;" and that he so "pertinaciously" adhered to his opinion, as to render it necessary to apply to parliament to overrule him.

*This, it is believed, is the true origin [*418 of the statute of Anne, which did not enact a new law, but simply confirmed the old; the authority of which had been shaken by the late decision of Lord Holt. This idea is confirmed by the words of the preamble of the statute, which are, "Whereas it hath been held" that notes in writing, &c. payable to order, "were not assignable or indorsable over, within the custom of merchants," and that the payee could "not maintain an action, by the custom of merchants," against the maker; and that the indorsee "could not, within the said custom of merchants, maintain an action upon such note" against the maker; "therefore, to the intent to encourage trade and commerce," &c. Be it enacted, &c. that all notes in writing made and signed by any person, &. whereby such person, &c. shall promise to pay to any other person, &c. or his order, or unto bearer, any sum of money, &c. "shall be taken and construed to be, by

virtue thereof, due and payable to any such person, &c. to whom the same is made payable;" "and also every such note payable to any person," &c. "or his order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants," and that the payee may maintain an action for the same, in such manner as he might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, &c. who signed the same." And that the indorsee "may maintain his action," for such sum of money, either against the maker or any of the indorsers, "in like manner as in cases of inland bills of exchange." Here it may be observed, that by using the words, "it hath been held," the legislature clearly alludes to certain opinions, which they carefully avoid to recognize as law. And in the enacting clause they say that such notes "shall be taken and construed to be due and payable," &c. expressing thereby a command to certain persons, without saying expressly that the notes shall be due and payable, &c. for this being the law before, it was not necessary to enact the thing itself, but to instruct the judges how they should construe it. The mischief to be remedied was the opinion which had "been held," not any defect in the law itself. By comparing this act with the cases decided prior to *Clerke and Martin*, it will be found to contain no principles but such as had been fully recognized by the courts of law. It follows, therefore, that it was passed simply to restore the old order of things, which had been disturbed by Lord Holt.

The only real effect of the statute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reason of the custom of merchants, the new say that he became liable by force of the statute. Even Lord Holt himself always admitted that an *indebitatus assumpsit* for money had 419*] and received, or money lent, *would lie, and the note would be good evidence of it. His objections were only to the form of the action, and not to the liability of the parties.

A promissory note was always as much a mercantile instrument as an inland bill of exchange, and there certainly seems to be more evidence that the former is within the custom of merchants than the latter, and that if it was so at an earlier period on the continent of Europe, from whence it was introduced into England; and when introduced it came attended with all the obligations annexed which the custom had attached to it.

We sometimes, in modern books, meet with an assertion that a promissory note was not negotiable at common law; this may be true, because a promissory note was not known at common law, if from the term common law we exclude the idea of the custom of merchants. It was a mercantile instrument introduced under the custom of merchants. But if the custom of merchants is considered, as it really is, a part of the common law, then the assertion that a promissory note was not negotiable at the common law, is not correct.

VIII. In the present case of *Dunlop v. Silver*, it is not necessary to inquire whether a promissory note, while it is confined to the original parties, can be considered as a bill of exchange within the custom of merchants, although the authorities already cited show it to have been so adjudged; but it is sufficient if it become so by being indorsed. It has already been observed, that it has never been decided that an indorsed promissory note is not a bill of exchange, or a negotiable instrument, under the custom of merchants, but that the contrary has been solemnly adjudged; and has been settled law for more than a century.

One of the counts in the present case is for money had and received; and the evidence produced is a promissory note made by Cavan, payable to the defendants or order, by them indorsed to Downing and Dowell, and by them to the plaintiff. The note was in due time protested, as an inland bill of exchange, for nonpayment, and due notice given to the defendants. So that every step was taken which would have been necessary to charge the defendants as drawers or indorsers of an inland bill.

The indorsement of the defendants is evidence of money received by them from the intermediate indorsers, and the only question is, whether the money so received is for the use of the plaintiff. The *solution of this [*420 question depends upon the nature of the contract which the defendant's entered into by their indorsement. Lord Holt himself always admitted that every indorsement was the drawing of a new bill; and even in the case of *Buller v. Crips*, he admits that the indorsement of a promissory note is the drawing of a bill on the maker in favor of the indorsee, and that the indorsee may maintain an action against the indorser, upon the custom of merchants. This principle, which, so far from being denied, has always been recognized in the subsequent cases, Chitty, 121, 4 T. R. 149, decides the nature of the engagement which the defendants entered into by their indorsement. It was that of the drawer of an inland bill of exchange, whose obligation as such is well ascertained by the custom of merchants. The plaintiff does not claim as assignee at common law, but as indorsee under the law merchant; by which law the defendants are clearly liable, as drawers of the bill, to pay the money to any indorsee, holder of the bill; and where the plaintiff has either an equitable or legal right to money received by the defendant, he may recover in an action for money had and received. The defendants, then, having received money, (which they are clearly not entitled to hold, for it is admitted that the intermediate indorser would be entitled to recover it against them,) and being, by the terms of their contract, as construed by the custom of merchants, liable to the plaintiff, are answerable in an action for money had and received. We have seen that in the old declarations upon bills of exchange, the custom of merchants is not alleged, and yet the courts presumed that the advancer of the money was the factor of the plaintiff, through whom the plaintiff is supposed to pay the money to the defendant. In the case of Woodward and Row, before cited, the court said expressly that they would "intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant." Upon the same principle the intermediate indorser is to be presumed to be the servant of the plaintiff in the present case.

The indorser of a promissory note, or bill of

exchange, when he receives the money from the indorsee, holds it in trust to be repaid to the holder of the bill or note, if he shall fail to obtain it from the acceptor or maker, after using due diligence, and giving proper notice. When this contingency has happened, the trust becomes absolute, and it is against conscience if the indorser refuses to pay the money to whom of right it belongs.

The argument on the part of the defendants in this action is, that as a promissory note is not an instrument negotiable by the custom of merchants; as the statute of Anne is not in 421*] force in Virginia, and as *the act of assembly of Virginia does not give an action against the indorser, his engagement is only such as arises at common law; which is only an implied contract to refund money which has been paid in contemplation of a consideration that has failed. That this contract exists only between the indorser and his immediate indorsee, and is such a chose in action as by the common law is not assignable. That it arises only in consequence of the money paid, and is raised in favor of that person only from whom the money was received. That the payment of the money by the plaintiff to the intermediate indorser raises no contract between the defendant and the plaintiff. That there is no privity between the plaintiff and defendant, whereby the plaintiff can derive any benefit from the contract made by the defendant with the intermediate indorser; and that no action of *indebitatus assumpsit* will lie without such privity. That even supposing the contract of the defendant was express to pay the money to the intermediate indorser, or to his order, yet that contract would not be negotiable or assignable so as to enable the plaintiff to recover in his own name, because no consideration moved from him, and no promise is made to him, and if the promise were in fact made to him yet it would be as to him *nudum pactum*.

This argument, so far as it is necessary to consider it, may be reduced to these five propositions:

1. That promissory notes are not negotiable within the custom of merchants.

2. That the contract of the indorser is only an implied contract, grounded on the receipt of money upon a consideration that has failed.

3. That this contract is a chose in action not assignable.

4. That no action of *indebitatus assumpsit* will lie without privity.

5. That a promise in writing, without a consideration expressed, is a *nudum pactum*.

The first proposition, viz., that promissory notes are not negotiable within the custom of merchants, has been fully considered, and seems not to be maintainable. It might, therefore, be deemed unnecessary to examine the argument further; but as some of the other points are questionable, it may be worth while to notice them.

422*] *The 2d proposition is, that the contract of the indorser is only an implied contract, grounded upon the receipt of money upon a consideration which has failed.

If this were true, it would equally apply to the case where a man receives a note with a blank indorsement and passes it away, for a valuable consideration, without indorsing it himself. But in such a case, no man has ever been held liable, unless there was an antecedent debt, or, from particular circumstances, a guaranty of the note could not be presumed, or unless he knew the note to be a bad one at the time. 3 T. R. 759, 761, *Fenn v. Harrison*. This point was early decided in the case of *The Bank of England v. Newman*, in 1 Lord Ray. 442. It is true that this was a note payable to the defendant or bearer, but it has been held in the case of *Peacock v. Rhodes*, Doug. 636, (614,) and Doug. 639, (617.) *Archer v. Bank of England*, that a note with a blank indorsement is exactly like a note payable to bearer. The reason is, that the receiver of such a note takes it upon the credit of the parties named upon it, and gives no personal credit to the man who merely pays it away, without indorsement. The obligation of the indorser, then, does not arise from the receipt of money only, but in consequence of his having written his name upon the instrument. But the simple writing of his name upon the instrument can create no obligation unless it be the sign of a certain contract. Words are but representatives of ideas, and evidence of the intention of the contracting parties. Any other mode of conveying those ideas, and testifying that intention, if equally certain, is equally capable of being the evidence of an express contract. The act of writing one's name upon the back of an instrument of a certain description, is as strong evidence of an express contract, as if it had been written in a thousand words. What the nature of that contract is, depends upon the nature of the instrument indorsed; but still it is not an implied, but an express contract. The terms of that contract are known by a reference to the usual mode of transacting business, the nature of the instrument, and the incidents which have been attached to it either by positive law, by common acceptation, or by judicial authority. The purpose for which a man puts his name on the back of a promissory note is well known, and cannot be mistaken; it is to give credit to the note; but to answer that purpose it must be the sign of a contract to pay the money to the holder if the maker does not. Such is the common acceptation and understanding of the country. The signature of the defendants is as much evidence of such a contract, as it is of the receipt of the money, or of an order to pay the money to the indorsee. But it is said,

*3d. That such a contract, being made [*423 with the immediate indorsee, is not negotiable, because it is a chose in action which by common law cannot be assigned.

To this it may be answered, that the antiquated doctrine that a chose in action is not assignable was introduced in early times before negotiable instruments were in use, when trade was carried on in its simplest form, and when the principal, if not the only purpose intended to be answered by the rule, was to prevent maintenance in controversies respecting titles to land. It was to prevent the poor man from being oppressed by a powerful antagonist to whom his competitor might assign his title, and who, by his wealth, his influence, or his power, might pervert justice. At what time, or by what means, it was first applied to personal rights is not ascertained; but it seems clear that in its original adoption it was never intended

to apply to those instruments which, by their nature and the original contract of the parties, were made negotiable. Every man has a natural right to make such contracts as he pleases, provided they are not repugnant to any positive law, nor injurious to others; and all contracts entered into without fraud or force, are legally and morally obligatory according to their spirit and intent. The reason of the rule was to prevent maintenance. (Co. Litt. 214.) But no man could be oppressed by maintenance who had expressly agreed to pay his debt to such person as his creditor should appoint. The reason of the rule failing, the rule itself cannot apply. Blackstone (2 Com. 442.) calls it the strict rule of the ancient common law; and the reason given is, "because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law." But it was a rule introduced for the benefit of the debtor, and every man may waive the benefit of a law introduced for his advantage. Blackstone says, "this nicety is now disregarded; though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust," &c.

Wooddeson says (in vol. 2, p. 387,) "It is a maxim of the common law that no chose in action can be granted or assigned. The policy whereof was to avoid a multiplicity of suits, by preventing those who would not prosecute their right themselves, from transferring it to others of a more litigious disposition; and particularly to prevent the granting of pretended titles to great men, 'whereby,' saith Sir Edward Coke, (1 inst. 214, a. 266, a.) 'Justice might be trodden down.' Perhaps the rule was more general than the mischief apprehended; and having relation originally to landed estates, was afterwards unnecessarily transferred to personal 424*] property. The doctrine, *however, always was, that a chose in action was assignable in equity for a valuable consideration. Bills of exchange and promissory notes are regularly assignable by indorsement; and if bonds, policies of insurance, and even judgments, are in like manner assigned for valuable consideration, the assignee may sue in the name of the original claimant, and the latter will not now be permitted, even in the courts of common law, to undo his own transfer, or unconscientiously to obstruct the plaintiff's suit. Where one of the captors of a maritime prize, before condemnation thereof, transferred his proportionate share of the property taken, it was held that the assignee might maintain an action for the same, against the capturing ship's agent, as for money received by him to the plaintiff's use." 1 Wilson, 211, *Morrough v. Comyns.*

Upon which case it may be observed, that the sailor's right to a share of the prize money was as clearly a chose in action as a right to any other property not in possession; and the assignment of such right was as clearly within the old rule that a chose in action is not assignable; it is therefore a much stronger case than that of a debt which, by the original contract itself, the parties have made negotiable.

The cases on this subject are collected in a very able argument of Judge Buller, in the case of *Master v. Miller*, 4 Term Rep. 340; and although the judgment in that case was contrary to his opinion, yet it was not given upon the point mentioned in that part of his argument which we shall cite. Evans on Bills, 106, speaking of this argument, says, "it furnishes a greater share of professional instruction, and a more admirable specimen of judicial reasoning, than can often be found in an equal compass." "It is laid down," says the judge, "in our old books, that for avoiding maintenance a chose in action cannot be assigned or granted over to another. Co. Litt. 214, a. 266, a. 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times, it has been so explained away, that it remains at most, only an objection to the form of the action in any case. In 2 Roll. Abr. 45, 46, it is admitted that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in that of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an *ex- [*425 pense which he would otherwise be put to, was held guilty of maintenance, Bro. tit. *Maintenance*, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpœna, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and amongst others it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 Roll. Abr. 115. But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a chose in action; and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198, 2 Cro. 180. Courts of equity, from the earliest times, thought the doctrine too absurd for them to adopt; and, therefore, they always acted in direct contradiction to it. And we shall soon see that courts of law also altered their language very much. In 12 Mod. 554, the court speak of an assignment of an apprentice or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act upon. So an assignment of a chose in action has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29, 1 Sid. 212, and T. Jones, 222; and lastly by all the judges of England in *Moulsdale against Birchall*, 2 Black, 820, though the debt assigned was uncertain. After these cases we may venture to say that the maxim was a bad one, and that it proceeded upon a foundation which fails. But still it must be admitted that though the courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet in many cases

they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow, when the substance is gone; and that it is merely a shadow, is apparent from the latter cases, in which the courts have taken care that it shall never work injustice. In *Bottomly v. Brooke*, C. B. Mich. 22 G. III. (1 T. R. 621,) which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.*, lent to the defendant by E. Chancellor; and was given by her direction in trust for her, and E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the court. In *Rudge v. Birch*, K. B. Mich. 25 G. III. (1 T. R. 622,) on the same pleadings there was judgment for the defendant. And in *Winch v. Keeley*, K. B. Hil. 27 G. III. (1 T. R. 619,) where the obligee assigned over a bond, and 426*] afterwards became *bankrupt, the court held that he might, notwithstanding, maintain the action. Mr. J. Ashhurst said, "it is true that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned, but this court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim, "there may still be some cases in which an action cannot be maintained by an assignee of a chose in action in his own name; it remains to be considered whether that objection ever did hold, or ever can hold, in the case of a mercantile instrument or transaction. The law merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans v. Van Mierop*, Lord Mansfield said, if a man agreed to do what, if finally executed, would make him liable, as in a court of equity, so in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold, that is, in the cases of bills of exchange, and policies of insurance." (He might have added the case of bills of lading.) "The first is the present case; and bills are assignable by the custom of merchants. So in the case of policies of insurance, till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it. Circulation, and the transfer of property, are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned, and I will show you other cases in which the court have allowed it. 1st. In *Fenner v. Meares*, 2 Bl. Rep. 1269, where the defendant, the captain of an East Indiaman borrowed 1,000*l.* of Cox, and gave two respondentia bonds, and signed an indorsement on the back of them, acknowledging that in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said, 'Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the *first obligee. [*427 This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration that, upon such assignment, the money which I have borrowed shall no longer be the money of A. but of B. his substitute. The plaintiff is certainly entitled to the money in conscience; and therefore I think entitled also at law; for the defendant has promised to pay any person who is entitled to the money.' So, in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is bound by law to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here, in the beginning of the last term, on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of the plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2d. *Clarke v. Adair*, sittings after Easter, 4 G. III. Debray, an officer, drew a bill on the agent of a regiment, payable out of the first money which should become due to him on account of arrears, or non-effective money. Adair did not accept the bill, but marked it in his book; and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brough an action against Adair for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: but Lord Mansfield said, it is an assignment for valuable consideration, with notice to the agent, and he is bound to pay it. He said he remembered a case in chancery where an agent under the like circumstances had paid the money to the administrator, and was decreed, notwithstanding, to pay to the person in whose favor the bill was drawn. 3d. In *Israel v. Douglas*, C. B. Est. 29, G. III. (1 H. Bl. 242.) A. being indebted to B. and B. indebted to C., B. gave an order to A. to pay C. the money due by A. to B., whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. J. Heath expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the House of Lords in *Gibson v. Minet*. Lastly, I come to the case of *Tatlock*

v. Harris, (3 T. R. 182,) in which Lord Kenyon, in delivering the judgment of the court, said, 'it was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement 428*] between all the parties *to appropriate so much property to be carried to the account of the holder of the bill, and this will satisfy the justice of the case without infringing any rule of law.' All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and we ourselves have been on former occasions. Let us recollect, as Lord Chief Justice Wilmot said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionam*, but *ampliare justitiam;* and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of subpœna, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs can admit of no question: neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive."

Thus we see that the rule that a chose in action is not assignable, has been often shaken; that at most it amounts only to an objection to the form of action, and that courts of law ought to lean against an exception to form, which does not support the substantial merits of the case. No case is recollected in which it has ever prevailed when the instrument was made negotiable by the original contract and intention of the parties. This promissory note was intended by the parties to be negotiable; it is made payable to order, and says on the face of it, "negotiable at the bank of Alexandria." And in the cases of *More v. Manning*, Comyns, 311. *Acheson v. Fountain*, 1 Str. 557, and *Edie v. E. India Company*, 2 Burr. 1216, it is determined that a bill or note, negotiable in its original creation, remains negotiable in the hands of the indorsee, even if it be not indorsed payable to order. If the original contract of the maker was negotiable, the dependent contract of the indorser must be negotiable also, for he warrants that the maker shall perform his engagement; which is, to pay the money to the holder. The indorsement follows the nature of the original contract, and partakes of its negotiability.

That a chose in action may be made negotiable or assignable in its original creation, by the contract and intention of the parties, independent of the custom of merchants and of statute law, seems not to be a new idea, but is strongly supported by the reasons assigned by the judges for their judgment in several of the reported cases. It was very early settled that if A. delivered money to B. to be paid to C., C. might maintain an action against B. for the 429*] money. Dyer, 21. a. pl. 128. *Core *v. Woddyc*, Trin. 28 H. VIII. 1 Bulstrode, 68, *Flewellin v. Rave*, Mich. 8 Jac. 1 Roll. Abr. 7, pl. 2, *Beckingham and Lambert v. Vaughan*, Trin. 14 Jac. 1 Roll. Abr. 30, 31. *Disborne v. Denaibe*, Pasche, 1649. 1 Brownlow's Rep. 82, and Yelv. 23. *Wherwood v. Shaw*, 44 Eliz. Moore, 854. *Babington v. Lambert*, 14 Jac. Hardres, 321. *Bell v. Chapman*, 14 & 15 Car. II. 1 Vent. 152. *Brown v. London*, 23 Car. II. 1 Vent. 119. *Hornsey v. Dimocke*, 23 Car. II. 2 Vent. 310. *Cramlington v. Evans*, 1 W. and M. In these cases it will be found that no consideration passed from C. to B., nor any promise from B. to C., and yet an action was held to be maintainable by C. against B. upon the contract made between A. and B. So that to support an action for money had and received, it is not necessary that a consideration should pass from the plaintiff to the defendant, nor any promise from the defendant to the plaintiff; and this principle will be found to run through all the cases for money had and received.

In the case of *Oble v. Dittlesfield*, 23 Carr. II. B. R. 1 Vent. 154, the principal is carried still farther. The money in this case was not paid by A. to B. purposely to pay over to C. as in the former cases, but B. being indebted to A., and A. to C., A. appointed C. to receive the money from B. in satisfaction of the debt due to C. by A. which he, (A.) signifying to B. (the defendant,) he, in consideration of the premises, and that the plaintiff (C.) would forbear him a quarter of a year, promised that he would then pay him. It was moved in arrest of judgment that there was no sufficient consideration; for the defendant was no party to this agreement, and was not liable to the plaintiff, and therefore the plaintiff's forbearance was no benefit to the defendant; *sed non allocatur*, for Hale said, "When assumpsits first grew into practice, they used to set out the matter at large, viz., in such a case as this, *Quod muto agreatum fuit inter eos, &c.*, and they should be discharged one against the other. But since, it hath been the way to declare more concisely. And upon the whole matter here it appears that the defendant agreed to the transferring of the debt to the plaintiff; and that it was agreed he should be discharged against A."

Here, then, is an assignment of a debt, and held to be valid because the debtor agreed to it. This was a precedent debt, and was clearly a chose in action; and if such a debt may be assigned by a subsequent agreement of the debtor, *a fortiori* may a debt be assigned which the debtor expressly makes assignable at the very moment of its creation. Its negotiability then becomes a part of the nature of the contract; it is a quality belonging to the debt itself, and enters into its very essence.

Another principle which seems to be well established is, that he for whose benefit a promise is made, may maintain an action upon it, although *no consideration pass from [*430 him to the defendant, or any promise from the defendant directly to the plaintiff. This proposition is supported not only by the authorities already cited, but by the case of *Dutton v. Poole*, 30 Car. II. T. Jones, 102. 1 Vent. 318, 332. 1 Freem. 471. T. Ray. 302. 2 Lev. 210. 3 Keb. 786, 814, 830, 836. Styles's Prac. Reg. 59. Savil, 24, *Sadler v. Paine*. 1 Roll. Abr. 23, pl. 13, and Styles, 296. *Starkey v. Mill*, Mich. 1651. Hetley, 176. *Hadves v. Levit*, Moore, 550. *Hawes v. Levitt*, Cro. El. 652. S. C. Cro. El. 849, 881. *Rippon v. Norton*, 1 Vent. 6, 7. *Bourne v. Mason*, 20 Car. II. Latch. 206. *Legat's Case*, 3 Car. Cowper, 443. *Mar-*

tyn v. Hind. 1 Bos. and Pull. 101. *Company of Feltmakers v. Davis*, 38 G. III. C. B.

If A. lends B. 100 dollars, for which B. gives A. his promissory note payable to A. or order, the money thus delivered by A. to B. is delivered to be paid over by B. to a third person upon a contingency, viz., that A. shall, by indorsement on the note, name the person to whom it is to be paid. This differs in nothing from the case of *Core* and *Woddye*, and the other cases before cited, except that the third person is not named at the time of the delivery of the money to B. But the case of *Oble v. Dittlesfield* shows, that the naming of a third person may be as well done after the debt is created, as at the time of its creation, provided the debtor agree to the transfer. These principles certainly go far to prove that a contract for the payment of money may be made negotiable in its nature by the consent of parties, on principles of common law. It must be an obstinate principle of law, indeed, and justified by the strongest reasons, that can prevent free agents from voluntarily entering into a contract not injurious to themselves or others. Every contract is to be construed according to the intention of the parties.

A contract constitutes the law between the contracting parties, unless it be contrary to some positive law, or prejudicial to society.

No good reason can be given why a man should not be permitted to make his contract negotiable.

In the case of *Hodges v. Steward*, 1 Salk. 125, 3 W. and M. it is said, "a difference was taken between a bill payable to I. S. or bearer, and I. S. or order; for a bill payable to I. S. or bearer is not assignable by the contract, so as to enable the indorsee to bring an action if the drawer refuse to pay, because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee if he pays it to the bearer, though he comes to 431*] it by trover, *theft, or otherwise. But when the bill is payable to I. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action."

Here it is held that the words "or order," make the contract negotiable.

In *Hill v. Lewis*, 1 Salk. 132, 5 W. and M. Lord Holt said, "for the words or order" (this was in a promissory note before the statute of Anne) "give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer that he would answer it to the assignee."

In *Jordan v. Barloe*, 12 W. III. 3 Salk. 67, it was "ruled that where a bill" (probably meaning a promissory note) "is drawn payable to W. R. or order, 'tis within the custom of merchants, and such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be grounded on it, though 'tis no specialty."

In *Carter v. Palmer*, 12 Mod. 380, 12 W. III. upon a promissory note payable to bearer, "all seemed to agree, if it were made payable to him or order, the defendant by that form had made it negotiable, and by consequence he would be liable to the action of assignee in his own name."

In *Clerke v. Martin*, 1 Lord Raym. 757, 1 Anne, Shower, for the plaintiff, argued in the same manner, using nearly Lord Holt's own expressions in the cases just cited; yet his lordship was "*totis viribus*" against him. Shower contended, "that this note being payable to the plaintiff or his orders, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S. or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and, consequently, not negotiable and therefore it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought an action upon it, as upon a bill of exchange. Why, then, should it not be before such indorsement a bill of exchange to the plaintiff himself; since the defendant by his subscription has shown his intent to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange; and to make *such a note a bill of exchange can be no [*432 wrong to the defendant, because he, by signing the note, has made himself to that purpose a merchant, and has given his consent that his note shall be negotiated, and has thereby subjected himself to the law of merchants." Strong as this reasoning is, it was not sufficient to convince Lord Holt. A similar argument by Brotherick produced no greater effect upon his lordship in the case of *Buller v. Crips*, 6 Mod. 29, 2 Anne, where it was said that "he that gave this note did, by the tenor thereof, make it assignable or negotiable by the words 'or order,' which amounts to a promise or undertaking, to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

But although his Lordship would not acknowledge the weight of his own arguments, they have been duly appreciated by subsequent judges.

In the case of *Edie et al v. E. India Company*, Trin. 1 G. III. 2 Burr. 1216, it was contended for the plaintiffs "that a promissory note or bill of exchange, originally made payable to one, or order, is, in its own nature, assignable; and the assignee has the whole interest in it, and may assign it as he pleases; and any restriction or confinement of his assignment of it is contrary to the nature of the thing, and, therefore, void." And the counsel for the defendants admitted that such a bill of exchange "was negotiable in its nature." But they contended that an indorsement to a man, without the words or order, was no more than a naked authority to receive the money.

Lord Mansfield said, "a draft drawn upon one person, directing him to pay money to another or order, is, in its original creation, not an authority, but a bill of exchange, and is negotiable."

Mr. Justice Dennison. "Where a bill is originally made payable to A. or order, it is of course, and in its very essence, negotiable, from hand to hand. An inland bill of exchange is assignable in its nature." "Foreign bills are equally so by the laws of merchants." "This is matter of law: and the law is clearly and fully fixed. There is no instance of a restrictive limitation, where a bill is originally made payable

to a man or order." "In general the indorsement follows the nature of the thing indorsed; and is equally negotiable." "The law has determined that the bill is negotiable in itself."

Mr. Justice Wilmot. "This original contract is 'to pay to such person or persons as the payee or his assignees, or their assignees shall direct,' and there is the same privity (see 1 W. Bl. Rep. 299, S. C.) between the drawer and the last assignee, as the first." "The first 433*] *assigns over that chose in action which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages that it had when he received it." "The indorsement is part of the original contract, and is incidental and appurtenant to it, in the nature of it, and must be understood and interpreted in the same manner as the bill was drawn. And the endorsee holds in the same manner, and with the same privileges, qualities and advantages as the original payee held it; that is, as an assignable, negotiable note, which he may indorse over to another, and that other to a third, and so on at pleasure." "And there is no difference whether the determinations be on promissory notes or on bills of exchange: it is just the same thing; because it is to be governed by the same rule." "The convenience and course of trade is to be attended to: the intention is to be regarded, not the form."

The case *Grant v. Vaughan*, 3 Burr. 1516, was by the bearer against the drawer of a check in this form, "Pay ship Fortune or bearer 70*l.*" This check was delivered to one Bicknell, the ship's husband who lost it. It came honestly to the hands of the plaintiff in the way of trade. The declaration was upon a bill of exchange, and for money had and received. On the part of the defendant it was contended "that this was not a negotiable note, but only an authority to receive so much cash. That it cannot be considered as a negotiable bill of exchange; for it was not accepted nor indorsed, nor was it protestable, nor entitled to any day of grace."

"The plaintiff's counsel insisted that this bill or note was in its nature negotiable; that such bills were in fact always considered as negotiable, and actually negotiated, and commonly circulated as cash. And if they be, from the nature of the contract, negotiable, the finding of the jury cannot alter the law." "They object that it is not a bill of exchange, because it is not accepted, nor can be protested, nor is entitled to a day of grace, nor is indorsable. But it is a negotiable instrument. It is not necessary that it should be a bill of exchange; an inland bill of exchange is not like a foreign bill of exchange; for the former could not have been protested before this act of parliament, nor needs to be so since the act; whereas, a foreign one always absolutely required it." "Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer; however, an implied promise would suffice for our purpose."

This reasoning is evidently grounded upon general principles of the construction of contracts; for the counsel then go on to reason from the statute of Anne. "But," say the coun-
434*] sel, "they were negotiable *before the act was made." "And there is no case at all where it has been determined that a note of this kind cannot be given in evidence upon a general *indebitatus assumpsit* for money had and received. It is enough for the plaintiff that this note was negotiable. The bearer must prevail against the drawer in some mode of action." "But there can be no sort of doubt on the latter count," (money had and received,) "as the note is evidence of the plaintiff's money being in the hands of the person who gave it. Whether, therefore, this case be considered upon principles of law, prior to the act of 3 and 4 Anne, or upon that act, or upon what has passed since the act, it will appear that the plaintiff ought to recover upon this action."

Lord Mansfield went into a minute examination of the cases of Nicholson and Sedgwick, Horton and Coggs, and Hodges v. Steward, and said that upon general principles, they were not agreeable to law. "It is a question of law whether a bill or note be negotiable or not. It appears in the books that these notes are by law negotiable; and the plaintiff's maintaining his action or not maintaining it, depends upon the question, whether such a note is negotiable or not." Speaking of the decisions of Lord Holt before the statute of Anne, he says, "The objection was to bringing an action upon the note itself, as upon a specialty; but I do not find it anywhere disputed that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one or order." "But upon a second count, the present case is quite clear, beyond all dispute; for undoubtedly, an action for money had and received to the plaintiff's use may be brought by the bona fide bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and, if so, it is for the use of the person who has the note as bearer."

Mr. Justice Wilmot. "Probably the jury took upon themselves to consider whether such bills or notes as this is, were in their own nature negotiable." But this is a point of law; and by law they are "negotiable." And again he says, "But this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ* and a person may take by that description as well as by any other. In the nature of the contract there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it, (whether it be a note, or a bill of exchange,) and it is repugnant to the contract, that the drawer should object that the bearer has no right to demand payment from him."

"*It is agreeable to common sense [*435 and reason that if a man comes by such a note or bill fairly, and on a valuable consideration, he should have a right to maintain an action upon it as bearer."

"The reasons given in the cases that are opposite to this. (*Hinton's Case*, 2 Shower, 235,) are altogether unsatisfactory. Those determinations strike at this great branch of commerce; if they were to prevail they would put an end to all this species of it."

"Even before the statute of 3 and 4 Anne, *Lord Chief Justice* HOLT himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note: and if it was a question antecedent to that act, I should stand by that first

case of Hinton, rather than the latter ones which differ from it. But that statute was made expressly, and on purpose, to obviate these doubts. However, if you would suppose it made to introduce a new law, and that such an action could not be maintained before the making of it, yet," &c.

"This now under consideration is a negotiable instrument, which I think partakes more of the nature of a promissory note than a bill of exchange. But taking it as a bill of exchange.

A bill of exchange is a promise to pay the money if the drawee does not pay it."

Mr. Justice Yates said, "nothing can be more peculiarly negotiable than a draft or bill payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*.

"It had been doubted, it is true, whether that species of action where the plaintiff declares upon the note itself, as upon a specialty, was proper; but here is a count for money had and received to the plaintiff's use. The question whether he can bring this action, depends upon its being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and, therefore, he was certainly entitled to bring this action, and if he transfers his property to another person, that other person may maintain the like action." "Giving such a bill is, as it were, an assignment of so much property, which becomes money had and received to the use of the holder of the bill." (See also 3 T. R. 182, *Tatlock v. Harris*.)

It will be observed that the whole reasoning of this case is grounded, not on the custom of merchants, but upon the check being a negoti-436*] able *instrument, in its nature; and that it applies as strongly to a promissory note before the statute of Anne as to a bill of exchange.

A practical exposition of these principles is to be found in the case of *Fenner v. Meares*, 2 W. Bl. 1269, which was an action for money had and received, brought by the assignee of a *respondentia* bond, against the obligor. The bond was payable to one Cox. The defendant, in the presence of Cox, signed an indorsement on the bond, by which he acknowledged himself "bound to pay to such assignee thereof as should be duly appointed by him the said James Cox, the whole of the principal and interest of the within bond, agreeably to the tenor thereof, without any deduction or abatement whatsoever."

It was objected for the defendant, that no general *indebitatus assumpsit* will lie where the debt arises on a specialty, and if it did, yet the plaintiff ought to have recovered no more than he paid to the assignor, with common legal interest.

For the plaintiff it was said, that the objection was only to the form of the action; and the court would not grant a new trial contrary to equity. "But the form of the action is well conceived. The indorsement is an assumpsit by single contract, as much as if made on a separate paper after the assignment had. Meares promises to pay any one to whom Cox should assign; besides the reiterated promise made to Evans after Meares's return." "As for the damages and interest, those must pursue the terms of the original contract, which is now transferred to Fenner."

BLACKSTONE, *Justice*. "As this is entirely a new question, and I cannot, upon so short a consideration, foresee all the consequences attending it, I shall avoid giving any decisive opinion upon it. I cannot, for instance, upon so transient a view, discern what effect might be derived to the assets of a person deceased, by thus turning a specialty debt into a simple contract. And from this caution, rather than from any great doubt attending this particular case, I choose to determine it upon plainer and more indisputable grounds, arising from the evidence before us. The promise made by Meares to Evans," (a messenger sent by the plaintiff to the defendant to give him notice of the assignment and to demand the money,) "upon his return from India, is clearly an assumpsit to Fenner. It would be a sufficient promise to avoid the statute of limitations. And the assignment and other transactions are fully sufficient as a consideration, to make that assumpsit binding. Upon that ground it is therefore clear that a general *indebitatus assumpsit* will lie. 2d. As to the quantum of damages, *I think it perfectly right.[*437 Whatever would have been due to Cox, is, by the assignment, transferred to Fenner."

NARES, *Justice*. "I think this is a particular promise to the assignee, whenever any such should be. When, therefore, the assignment is executed, the money is demandable by virtue of that assumpsit; and, of consequence, this action well lies. I agree with my brother Blackstone, in respect to the quantum of damages."

DE GREY, *Chief Justice*. "At the trial I gave an opinion that in point of law this action was maintainable, and I have seen no reason to change it. Were I now silent, it might be thought I had. But I am still satisfied that the action will lie, abstracted of the particular evidence on which my brother Blackstone has founded his opinion. *Respondentia* bonds have been found essentially necessary for carrying on the Indian trade. But it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments; and amounts to a declaration, that, upon such assignment, the money which I have so borrowed, shall no longer be the money of A. but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and, therefore, I think, entitled also at law; for the defendant has promised to pay any person that shall be entitled to the money."

It will be observed that there is no difference between the ground of Blackstone's opinion and that of the other judges, excepting in this, that the former chose to ground his opinion upon the verbal promise made after the assignment, and the others rested it upon the written promise on the back of the bond, made before the assignment; but all must have agreed that the debt was assignable, with the assent of the debtor.

The case of *Innes v. Dunlop*, 8 T. R. 595, was by the assignee of a Scotch bond, against the obligor. There were two special counts, and four money counts. To the two special counts the defendant demurred.

"Onslow, Sergeant, in support of the demurrer, objected that the plaintiff, who was merely

the assignee of a chose in action, could not sue in his own name, but should have brought the action in the name of Hunter & Co., the obligees in the bond. But,

"*The Court*, after observing that this was not an action on the bond, said that they were clearly of opinion that the assignment of the 438*] bond *to the plaintiff was a consideration for the assumpsit by the defendant, in the same manner as actions of assumpsit are maintained, in every day's practice, upon foreign judgments; and the defendant, by demurring, had confessed both the consideration and the assumpsit. And, therefore, they gave judgment for the plaintiff." In a note to this case, the reporter refers to the case of *Fenner and Meares*, 2 Bl. Rep. 1269, before cited. Although the declaration states, that "by reason of the premises," (viz., the making of the bond and the assignment to the plaintiff,) "and according to the law of Scotland, the defendant became, and was indebted to the plaintiff," and being so indebted, in consideration thereof, promised to pay," &c., yet the law of Scotland does not seem to be the ground of the judgment, but the court rely entirely upon the assignment of the bond being a sufficient consideration for the assumpsit, agreeably to Judge Blackstone's opinion in *Fenner and Meares*.

The case of *Reed v. Ingraham*, 3 Dall. 505, is a strong case in support of the principle that a contract may be made negotiable by the intention of the parties. It was an action in the Supreme Court of Pennsylvania, brought by the assignee of a stock contract to recover the amount of the difference, due on the contract, which was expressed in these words: "On the 18th of April, 1792, I promise to receive from Joseph Boggs, or order, ten thousand dollars, six per cents and pay him for the same at the rate of 23 shillings and 7 pence ¾ per pound.

(Signed) "FRANCIS INGRAHAM."

The assignment was indorsed in these words: "I do hereby authorize William Reed, or his order, to tender or deliver the stock within mentioned, and the said William Reed, or his order, to receive for the same the sums of money due and payable therefor, at the rates within expressed. (Signed) JOSEPH BOGGS."

The defendant had notice of the assignment before the day of payment, and the stock was duly tendered. The defendant contended that the contract was not negotiable, but that if it was, he had a right to offset against Boggs.

"*By the Court*. The action is well brought, as it is founded on a contract in which the defendant expressly stipulates that he will receive the stock from, and pay the price to, Joseph Boggs, or his order. On general principles of law, stock contracts cannot be regarded as 439*] *negotiable; but a contractor may certainly make himself liable as if they were so; and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case.

"With respect to the alleged inconvenience, that in the present form of action the defendant is debarred from the benefit of a set-off, it would be enough to answer, that as this is the consequence of his own act and agreement, he has no reasonable cause of complaint. But it is also obvious that when the contract was assigned, and the present action was instituted, there did not exist between him and Boggs any mutual debt, or demand, which could be the subject of defalcation upon the principles of the act of assembly."

"Verdict for the plaintiff."

Upon a policy of insurance, the person interested is allowed to bring an action in his own name, although not mentioned in the policy. 1 Shower, 156. And a bill of lading has always been held to be assignable, and the assignee may bring an action in his own name, against the master or owners for the goods. 1 Lord Ray. 271, *Evans v. Martlett*, 4 Burr. 2051, *Wright v. Campbell*, 1 T. R. 205, *Caldwell v. Ball*, 1 T. R. 745, *Hibberts v. Carter*. In these cases it was held that the assignment of the bill of lading alters the property. So in the case of *Walker v. Walker*, 5 Mod. 13, Lord Holt held that the cast of a die altered the property of the money in the hands of a stakeholder. Kyd. 22, says, that notes payable to order have always been held to be negotiable."

To these authorities may be added that of the case of *Gerard v. La Coste et al.* 1 Dallas, 194.

From all these cases it seems to be a maintainable proposition that a man may make his debt negotiable, notwithstanding the principle that a chose in action cannot be assigned. Indeed, that principle seems to have been introduced for the purpose of preventing the creditor from transferring his right of action contrary to the will of the debtor, but was not intended to apply to those cases where the debtor had expressly authorized his creditor to assign it.

4. The fourth point is that no *indebitatus assumpsit* will lie without privity.

This idea seems to have been founded upon the exploded doctrine, that *indebitatus assumpsit* will lie only in cases where debt will lie. But *even admitting the latter proposi- [*440 tion to be true, yet it will not apply; for in the case of *Core and Woddye* (and the other cases cited which were dependent upon it) it was held that if a man receives money to my use, I may maintain an action of debt against him for it.

Plowden, in the case of *Platt v. Locke*, Pasch. 4 Edw. VI., which was an action of debt against the sheriff for an escape, fol. 36. (a. and b.) says, "And so it appears that the action upon the matter was maintainable, although there was not any contract between them; for upon a liberate delivered to the clerk of the Hanaper, who has assets in his hands, an action of debt will lie against him, as appears by 1 H. VII., and yet there is not any contract between them, nor any privity in words; and so in many like cases."

In the case of *Wherwood v. Shaw*, 44 Eliz. 1, Brownlow, 82, it was adjudged that although no contract was between the parties, yet when either money or goods are delivered, upon consideration, to the use of A., A. may have an action of debt. And of that opinion was Montague, 28 H. VIII. in *Core and Woddye's Case;* and also there is a precedent of such actions in the Book of Entries." Yelv. 23, S. C.

In 1 Salk. 27, *Jacob v. Allen*, an executor brought an action for money had and received against an attorney of an administrator, who had been appointed before it was known that there was a will, and it was held to lie, although the attorney had paid it over to the administrator before action brought. Here certainly was no privity of contract.

In 2 W. Bl. 830, *Hitchen v. Campbell*, it is said by the court that, "The same principle which supports this action against one who receives money from the bankrupt himself, will support it against another who receives it under the bankrupt. In both cases it is the property of the assignees. And though while this action was in its infancy (2 Jones, 126, 2 Lev. 245), the courts endeavored to find technical arguments to support it, as by a notion of privity, &c., yet that principle is too narrow to support these actions, in general, to the extent to which they are admitted." In the same case, as reported in 3 Wilson, 304, it is said by the court, "Whoever has received the money for the bankrupt's goods is supposed in justice to have received the same for the use of the assignees, in whom the property of those goods was, by law, vested; and to have promised to pay the same to the assignees; there is a supposed privity of contract between the persons whose money it lawfully is, and the 441*] person who has got or received it." *The same ideas are suggested by Lord Mansfield in the case of *Hawkes v. Saunders*, Cowp. 290. Indeed, among the innumerable cases in which the action for money had and received is the proper remedy, scarcely one can be found in which there exists any privity of contract between the parties.

It lies to recover fees received by the defendant claiming a right to the plaintiff's office; as in the case of *Howard v. Wood*, 2 Jones, 126, 1 Freem. 473, 478, where the action was brought to try the plaintiff's title to the office of steward of a court baron. "It was objected for the defendant, that, this action did not lie, but only a special action on the case; and that this action is not only improper, but contrary to the truth of the case; for the plaintiff declares upon assumpsit for money received by the defendant to the use of the plaintiff, and the jury find that the defendant received the money to his own use, claiming the office of steward in his own right, and the money as fees incident to the office, which he had exercised contrary to the will of the plaintiff, and not otherwise due than by the exercise of the office. That this money was incident to the tort done by the defendant in the exercise of the office, and where a receipt depends merely on a tort, there can be no contract, or privity, and without these, no debt, and by consequence *indebitatus assumpsit* does not lie." But it was resolved by the whole court that the action lay; for this is an expeditious remedy to facilitate the recovery of just rights; and this manner of action has now prevailed for a long time; and the point had been ruled often by the judges in their circuits, and actions frequently brought in this manner; and lately upon solemn argument in the court of exchequer, in the case of *Dr. Aris*, 2 Mod. 260, who brought such action for the profits of the office of comptroller in the port of Exeter, it was resolved by the Lord Chief Baron and all the court that the action lay." Here the same exception was expressly overruled which is now set up in the present action; and it has been uniformly overruled ever since. The same points were made and overruled in the case of Dr. Aris, above cited; and the court said that *indebitatus assumpsit* will lie for rent received by one who pretends a title, and cited 4 H. VII. 6, b. and Moor, 458. This was also agreed in 12 Mod. 324, *Hussey v. Fiddall*.

"In assumpsit for money received to the plaintiff's use, the question at the trial was, who was the yeoman of the black rod." 12 Mod. 607. It lies to try the title to a curacy, 3 Wil. 355. So for money extorted by duress of goods. 2 Str. 915, *Astley v. Reynolds*, and 4 T. R. 485, *Irving v. Wilson*. And for money paid under an order of a court not having competent authority. 2 Ld. Ray. 742, *New- [*442 digate v. Davy*. For a part of a sum of money paid, and the whole sum afterwards recovered by judgment. 1 Vern. 176, *Barbone v. Brent*. By a soldier against his captain for the value of a horse lost in a storm. 2 Ld. Ray. 1007, *Norris v. Napper*. By a woman against a man who married her, having a former wife living, for rents of the plaintiff's lands received by the man. 11 Mod. 146, *Asher v. Wallis*. Against a sheriff for money levied on a *fi. fa.* Comb. 430, 447. 1 Salk. 22, 6 Mod. 161. For the price of goods taken in execution, and sold under a warrant of distress upon a conviction, the conviction having been quashed. *Feltham v. Terry*, cited in *Lindon v. Hooper*, Cowp. 419. So it lies against a stake holder on the determination of a wager. 10 Mod. 315, *Temple v. Welds*. For money paid to insure lottery tickets, such insurance being contrary to law. Cowp. 793, *Browning v. Morris*. For a forfeiture under a by-law of the corporation of barber surgeons in London. 2 Lev. 252. So it lies in disaffirmance of the contract, for the purchase money paid for a thing not delivered. 1 Str. 407. *Anon.* For money paid by mistake. Cowp. 567, *Buller v. Harrison*. Doug. 637. (615) *Ancher v. Bank of England*. Against commissioners of bankrupt, for a dividend. Doug. 408, *Brown v. Bullen*. Against the principal, if the money be paid over by the agent. 1 Str. 480, *Cary v. Webster*, 4 Burr. 1984, *Sadler v. Evans*. In the cases of a fictitious payee of a bill of exchange, it was admitted there was no privity, and yet the plaintiffs recovered on the count for money had and received. 1 H. Bl. 313, *Collins v. Emmit*, 3 T. R. 177, *Tatlock v. Harris*, 3 T. R. 182, *Vere v. Lewis*, 1 H. Bl. 586, *Gibson v. Minet*. In the following cases there was no privity of contract, yet the plaintiff had judgment. Styles, 296, *Starkey v. Mill*. 1 Vent. 119, *Hornsey v. Dimocke*, 1 Burr. 374, *Harris v. Huntback*, 2 Burr. 1005, *Moses v. Macferlan*, 3 Burr. 1516, *Grant v. Vaughan*, Cowp. 199, *Clarke v. Shee and Johnson*. 2 W. Bl. 827, *Hitchen v. Campbell*. 3 Wilson, 308, S. C. These cases clearly show that the want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. If, then, the want of privity is no bar, what is there to prevent the plaintiff from recovering against the defendant? Is it that he is not in justice entitled to the money? Or has the defendant a right to retain it? It is admitted that the plaintiff may look to the intermediate indorser, and that he may recover from the defendant. The objection then is, that the defendant is not liable to the present plaintiff, but to the intermediate indorser, who alone is liable to the plaintiff. But the plaintiff may sue in the name of the intermediate indorser, "for" as Lord Holt says in *Buller v. Crisp*, "the indorsement amounts at least to an

agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use;" and this court will prevent 443*] *the intermediate indorser from releasing the action, and from interfering in any other manner to frustrate the plaintiff's suit. Besides, a recovery and satisfaction in the present action will be a bar to any action which the intermediate indorser may bring against the present defendants on the same note. Complete justice is done between both parties in the shortest, least expensive, and least oppressive manner; and that circuity of action, which the "law abhors" is avoided. If the plaintiff recover against the intermediate indorser, and he against the defendant, the judgment will come down upon the defendant, charged with the heavy expenses of two suits instead of one. The plaintiff will be turned round upon a mere point of form, and perhaps may lose the debt altogether by the insolvency of the intermediate indorser. If the indorsements are in blank, the plaintiff may strike out the intermediate indorsements, and declare as the immediate indorsee of the first indorser. *Evans on Bills*, 15, 1 Esp. Rep. 180, *Smith v. Clark*. For a blank indorsement authorizes the holder to fill it up with what he pleases, consistent with the nature and tenor of the instrument. So that if privity is necessary, it is in the power of the plaintiff to raise it. But the cases before cited show that privity is not necessary to support the action for money had and received; and from the nature of the thing it cannot be necessary in any case where the instrument is negotiable, whether it be made so by the custom of merchants, by positive statute or by the contract of the parties.

5. The fifth proposition is, that a promise in writing, without a consideration expressed, is *nudum pactum*.

This doctrine of *nudum pactum* seems not to be well settled, although much has been said upon the subject.

It was considerably discussed in the case of *Pillans v. Van Mierop*, 3 Burr. 1663, but as there were other principles in that case, it was not necessary to decide absolutely upon this point. Yet the whole court seemed strongly inclined to the opinion that the rule, *ex nudo pacto non oritur actio*, did not apply to a promise in writing. Lord Mansfield said, "A *nudum pactum* does not exist in the usage and law of merchants.

"I take it, that the ancient notion about want of consideration was for the sake of evidence only; for when it is reduced to writing, as in covenants, specialties, bonds, &c. there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle. In commercial cases amongst merchants, the want of consideration is not an objection." 444*] *Mr. Justice Wilmot. "I can find none of those cases that go upon its being *nudum pactum*, that are in writing; they are all upon parol. I have traced this matter of *nudum pactum*; and it is very curious." He then explained the principle of an agreement being looked upon as a *nudum pactum*, and how the notion of *nudum pactum* first came into our law. He said "it was echoed from the civil law. '*Ex nudo pacto non oritur actio.*' Vinnius gives the reason in lib. 3, tit. *De Obligationibus*, 4th ed. 596. If by stipulation, (and *a fortiori*, if by writing) it was good without consideration. But it was made requisite in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view either writing or certain formalities were required. Id. on Justinian, 4th ed. 614. Therefore it was intended as a guard against rash, inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection it had activity; and such promises were binding. Both Grotius and Puffendorf hold them obligatory by the law of nations. Grot. lib. 2, c. 11, De Promissis. Puff. lib. 3, c. 5. They are morally good, and only require ascertainment. Therefore there is no reason to extend the principle, or carry it farther. There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing."

Mr. Justice Wilmot then refers to a passage in Bracton, which will be considered presently, and proceeds thus: "Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308, b. in the case of *Sherynton* and *Pledal v. Strotton* and others, mentions it; and no one contradicted it. He lays down the distinction between contracts or agreements in words, (which are more base,) and contracts or agreements in writing, (which are more high,) and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said. 'Words pass from men lightly;' but where the agreement is made by deed, there is more stay," &c. "The delivery of a deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed to the other; and, therefore, a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration." "The voidness of the consideration is the same in reality in both cases; the reason of adopting the rule was the same in both cases; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise, therefore if it stood only upon the naked promise, its being in this case reduced into writing, *is a sufficient guard [*445 against surprise; and, therefore, the rule of *nudum pactum* does not apply in the present case.

"I cannot find that a *nudum pactum* evidenced by writing has ever been holden bad; and I should think it good: though, where it is merely verbal, it is bad. Yet I give no opinion upon its being good always when in writing." "It has been melting down into common sense of late times."

Yates and Aston, *Justices*, concurred in opinion, nearly on the same grounds.

This opinion of the court in *Pillans v. Van Mierop*, does not seem to be contradicted by any subsequent case, so far at least as it affirms this principle, that a written promise carries with it a prima facie evidence of a good consideration, (until the contrary appears,) and throws the burden of proof upon the opposite party. So that in an action between the original parties, upon a promise in writing, it does

not seem to be necessary to aver a consideration.[1] Blackstone's opinion (2 Com. 446,) goes further than this, for he says, "if a man gives 446*] *a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every note, from the subscription of the drawer," "carries with it internal evidence of a good consideration." The case, however, which he cites from Lord Raym. 760, does not bear him out in the full extent of his proposition; for the court said, that "though no consideration was expressed in Hurst's note, yet the note, being subscribed by Hurst, was good evidence of a debt due from Hurst to the plaintiff."

There is certainly a difference between good evidence, and incontrovertible, or conclusive evidence. The expression good evidence, seems to imply only prima facie evidence. And this seems to be the extent of the proposition, as it applies to an action between the original parties to a note, for when it is negotiated, and the action is between an indorsee and the maker, the latter will not be allowed to aver the want of a consideration, because "its operation is then governed by the same law as a bill of exchange, which is the law merchant; and that is founded upon the law of nature and nations, in which the want of a consideration is no essential defect in the contract." (1 Powell on Contracts, 341,) and in which the great leading principle is, *fides est servanda*. 1 Fonb. 338, note (d).

Powell and Fonblanque have both controverted the doctrine as laid down by Wilmot, in the case of *Pillans v. Van Mierop*, and by Blackstone, in the passage above cited; but their arguments only go to prove that a note in writing is not conclusive and incontrovertible evidence of a good consideration between the original parties; and it is believed a case cannot be found in which the plaintiff has been put to prove the consideration of a written promise, by a mere denial on the part of the defendant. It seems to be the rule, that the plaintiff is not obliged to *prove the [*447 consideration of such a promise, until the defendant has proved circumstances tending to destroy the presumption arising from the written contract. Powell and Fonblanque have taken opposite premises, and yet both draw the same conclusion. The former says, (in his Essay on the Law of Contracts, vol. 1, p. 340) "Now it seems reasonable to conjecture, that when this maxim of the Roman law, *'quod ex nudo pacto non oritur actio,'* was adopted and received into our system, it was adopted in its full extent."

Fonblanque (vol. 1, p. 326, note a.) says, "The civil law is so generally referred to in the discussion of this subject, that it may be material to take a cursory view of the different means by which a legal obligation was created by that law, in order to show that though we have borrowed the phrase *nudum pactum* from the civil law, and the rule which decides upon the nullity of its effect, yet that the common law has not in any degree been influenced by the notions of the civil law, in defining what constitutes *nudum pactum*."

He then cites authorities to show that by the civil law a promise in writing might be a *nudum pactum*, and, therefore, not capable of supporting an action, and hence seems to infer that such is the rule of the common law.

However, both Wilmot and Blackstone are supported by Bracton, who appears to be the first writer upon the English law, who has noticed the doctrine of *nudum pactum*. Bracton has certainly interwoven many of the principles of the civil law with his observations on the common law, but it is believed he has done it only in cases where the common law has rec-

1.—At the time this argument was made, the writer had not seen the case of *Rann v. Hughes*, in the House of Lords, reported in a note to the case of *Mitchinson v. Hewson*, 7 T. R. 350, which is said in a third edition of Doug. 683, to have been decided 14th of May, 1778, and to be reported in 7 Bro. Part. Cases, 550. Nor is the case mentioned by Powell, or Fonblanque, in treating of this subject.

The Lord Chief Baron Skynner, in delivering the opinion of the judges, has these observations: "But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing;" "but whatever may be the rule of the civil law, there is certainly none such in the law of England." His lordship observed upon the doctrine of *nudum pactum* by Mr. J. Wilmot, in the case of *Pilans v. Van Mierop and Hopkins*, 3 Burr. 1663, and that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

"All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. But it is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of, as all other agreements in writing are, by the common law, and does not prove the converse of the proposition, that, when in writing, the party must be, at all events, liable. He here observed upon the case of *Pillans v. Van Mierop* in Burr., and the case of *Losh v. Williamson*, Mich. 16 G. *III.* in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him, that in this case there was not a sufficient consideration to support this demand, as a personal demand, against the defendant, and that its being now supposed to be in writing makes no difference."

This case, as far as it goes, must be considered as having decided the law in England, where the decisions of the highest court of judicature are regarded as binding. But in this country it can only be respected as an opinion; and the question is still open as to the grounds of that opinion.

It is not contended that a promise in writing cannot be a *nundum pactum*; but the question is, whether the burden of proof is not thrown upon the promisor; or whether the writing does not raise a prima facie presumption of a good consideration. How far this question is affected by the case of Rann and Hughes, is left to the consideration of the reader.

If a promissory note is admitted to be a mercantile instrument, and governed by the law merchant, the question of *nudum pactum* cannot arise in the present case. For it is believed to be settled law, that "a *nudum pactum* does not exist in the usage and law of merchants."

Browne, in his View of the Civil Law, vol. 1, p. 358, in a note, speaking of writings not under seal, as considered at common law, says, "they may be evidence of the agreement, or intent of the parties, but not conclusive evidence of sufficient consideration;" and cites the case of *Rann v. Hughes*.

ognized those principles. The passages of Bracton, alluded to by Wilmot, in the case before cited, are the following: Book 3, c. 1, § 2, p. 99, edition of 1640. "Videndum est etiam unde actio oritur? Et sciendum est quod ex obligationibus, tanquam à matre, filia. Obligatio autem, quæ est mater actionis, originem ducit et initium *ex aliqua causa præcedente*, sive ex contractu vel *quasi*, sive ex maleficio vel *quasi*. Ex contractu vero oriri poterit multis modis, sicut ex conventione, per interrogationes et responsiones, ex conceptione verborum quæ voluntates duorum in unum trahit consensum, sicut sunt pacta, conventa, quæ *nuda* sunt aliquando, aliquando *vestita; quæ, si nuda fuerint, exinde non sequitur actio, quia ex nuda pacto non nascitur actio*. Oportet igitur quod habeat *vestimenta*, de *quibus* inferius dicendum est. In the next chapter, § 1, in the same page, he tells us what are those *vestimenta* which prevent pacts from being *nude*.

"Est enim obligatio, quasi *contra* ligatio, et quatuor habet species, quibus contrahitur, et *plura* vestimenta. Contrahitur enim *re*, ver- 448*] bis, *scripto*, consensu, traditione, junctura, quæ omnia dicuntur *vestimenta* pactorum."

"And in § 9, of the same chapter, he says, "Inventæ autem sunt hujusmodi stipulationes et obligationes ad hoc, quod unusquisque habeat et sibi acquirat quod sua interest, si contra ea agatur quæ in stipulationem deducuntur. Et si res in stipulatione deducta *alii detur*, nihilominus intererit stipulatoris, *quia ille qui promisit*, tenebitur ad interesse, vel ad pœnam, si pœna fuerit in stipulationem deducta."

"Per *scripturam* vero obligatur quis, ut si quis *scripserit alicui se debere, sive pecunia numerata sit, sive non* obligatur *ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere*. Et non solum obligatur quis per verba, sed per scripturam, et per literas, non ut literæ quidem ipsæ, vel figura literarum obliget, *sed oratio significativa quam exprimunt literæ;* sed utrumque cooperatur ad obligationem, oratio significativa cum litera."

These expressions of Bracton are strong and clear; and if he is to be considered as only borrowing terms from the civil law to express his ideas of the common law, they are certainly conclusive.

The reason of the rule seems to be truly given by Plowden, in the case cited by Mr. Justice Wilmot; and if a written promise is not within the reason of the rule, it would seem that the rule cannot apply. In the ancient books, no notice is taken of any written agreements but those under seal; and the reason probably is, that in those times by far the greater part of the people could not write, so as to sign their names to an instrument. Hence a seal was substituted for a signature; but not because it was a more solemn act, but from the necessity of the case. Witnesses also were produced for identifying the seal, and not to add to the obligation of the contract. But the difference between sealed instruments and others has now become obsolete in practice; for there is no case of a contract, where the interests of third persons are not involved, in which the defendant may not either at law or in equity, avail himself of the want of consideration. And the most trifling consideration is now held sufficient to take even parol contracts out of the rule of *nudum pactum*.

In Styles, 419, *Bunniworth v. Gibbs*, Chief Justice Rolle said, "a little consideration will serve to ground a promise on." Blackstone (2 Com. 445,) says, "any degree of reciprocity will prevent the pact from being nude." And Wilmot, (3 Burr. 1666), said, "the least spark of a consideration will be sufficient." In *Fenner v. Meares*, *2 W. Bl. 1271, Judge Black- [*449 stone said, that "the assignment and other transactions were fully sufficient as a consideration to make the assumpsit to the assignee binding." And in *Hawkes v. Saunders*, Cowp. 290, Lord Mansfield said that "a legal or equitable duty is a sufficient consideration for an actual assumpsit;" and that it "was too narrow ground" to say that "there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made." And Buller declared the true rule to be, "that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." But even admitting that the rule of *nudum pactum* applies to written contracts, yet in the present case there is a sufficient consideration. For, according to Judge Blackstone, "the assignment and other transactions," and particularly the payment of the money by the intermediate indorser to the defendant, were certainly sufficient considerations to support the *assumpsit*.

Upon the whole, therefore, whether this case be considered upon the ground of a promissory note before the statute of Anne, or upon general principles of common law, the count for money had and received seems to be well supported by the evidence offered.

IX. It is believed that no case has been reported in Virginia in which this question has been decided. There are cases, however, which may possibly be considered as affecting some of the principles involved in the present inquiry.

In *Mackie and Davis*, 2 Wash. 229, it is held that the assignee of a bond may maintain *indebitatus assumpsit* for money had and received against the assignor upon principals of common law. There are, in that case, several assertions and admissions of counsel which are deemed not to be correct, but are warranted only by a few immature observations of some of the writers since the statute of Anne. One of the counsel seems to consider the custom of merchants as no part of the common law. This has been shown to be an incorrect position, by the concurrent adjudications of a long series of years. It is said also that "as to promissory notes, the right of recovery against the indorser is expressly given by the statute of Anne, and from this provision, an invincible argument is to be drawn in favor" of the defendant, "for, if in a commercial country like England, it was necessary for the legislature to provide a remedy against the indorser of a promissory note, it is obvious that no such right existed at common law. But if the statute of Anne was in affirmance of the law as it stood before, and only enacted to remove the doubts which *had [*450 been raised by Lord Holt's decision in *Clerke v. Martin*, then this argument totally fails. And that such was the fact is believed to be proved by the authorities before cited.

One of the counsel for the plaintiff considered the case as standing on the same ground as notes

of hand did before the statute of Anne; and denies that notes were within the custom of merchants, for which he cites Kyd as an authority; but Kyd says only "that it was held," &c. and relies on the case of *Clerke v. Martin*, and the preamble of the statute. And in the same manner, every like assertion in the modern books may be traced up to the same source. The only authority which can support the position is the case of *Clerke v. Martin*. The statute of Anne having put the question at rest, no one has taken the pains to examine the real state of the law prior to the statute, but one writer after another has repeated the assertion without the least examination. In England it is of no importance whether they are correct or not; but in this country, where few of the states have adopted the statute, it becomes interesting to know how the law really stood before. In the case of *Mackie and Davis*, the counsel and the court place much reliance on the privity between the indorser and his immediate indorsee, and it is evident that they borrowed their ideas from Kyd on Bills, 114. But Kyd cites no authority for his observations; nor are they warranted by any adjudged case, at least so far as they apply to the action for money had and received. Judge Roane says, "The case of promissory notes will be an important guide, and, therefore, it will be proper to see how they stood previous to the statute, which it is supposed created the liability of the indorser of them." But he proceeds no farther in his investigation than to the case of *Lambert v. Oaks*, 20th May, 11 W. III. He says, "this case was decided antecedent to the statute of Anne, and was, consequently, governed by the principles of the common law." If he considered the custom of merchants as part of the common law, (as it really is,) he was certainly correct. But the probability is, that the declaration was in that case grounded on the custom of merchants: 1st. Because that was the usual and established form of declaring on promissory notes in those days; 2d. Because there had not at that time been a distinction discovered between a promissory note and an inland bill of exchange; 3d. Because there never was, either before or since the statute of Anne, a time when an indorsed promissory note was not considered as a bill of exchange; and, 4th. Because four out of the five reporters of that case call it a bill of exchange, and even Lord Raymond himself calls it a bill throughout his whole report, except in the first line where he calls it a note.

451*] *Judge Roane further says that "Bonds, in England, are not assignable, and, therefore, stand in the same situation as notes of hand did at the time when this case was determined." It is believed, upon the authority of the cases already cited, that there never was a time when a promissory note payable to order was not assignable, and even Lord Holt, subsequent to the case of *Clerke v. Martin*, admitted, in the case of *Buller v. Crips*, that an indorsement of such a note would create a negotiable bill.

In the case of *Norton v. Rose*, 2 Wash. 240, the counsel admit that goldsmiths' notes "circulated like bills of exchange" before the statute of Anne, and yet it is contended that promissory notes derived their whole negotiability from the statute. But goldsmiths' notes were simple promissory notes, and were not more negotiable than the promissory notes of any other description of persons. Again, the same counsel observes, "that though notes of hand, according to the statute of Anne, were placed on the same ground with bills of exchange, and of course governed by the same rules, the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange in this country, and thereby gave a convincing proof that it was not their intention to suffer bonds to be governed by those rules which apply to bills." And in confirmation of his argument he cites Dall. Rep. 23. Judge Roane observes, "that notes of hand are now assignable in England, and it is admitted that the assignee is discharged of any equity which existed against the assignor, unless the note was given for a usurious or gaming consideration. The reason of this is, not that the principal attached to them as a legal consequence of their being made assignable, but because this rule, for commercial purposes, applied to bills of exchange; and the statute of Anne, declaring notes assignable in like manner as bills of exchange, showed an intention, as it was supposed, to render the former as highly negotiable, and as current in internal, as the latter were in external commerce. The act of our assembly embraces equally the subject of bonds and notes, but contains no expressions tending to induce a belief that the making them assignable was intended for the purposes of commerce. The design certainly was to make them transferable to a certain extent; the provision points out the limits of their negotiability, and fixes a strong mark of distinction between them and bills of exchange. As to the latter, they were assignable, and the indorsement transferred a legal right to the indorsee. They did not owe this quality to statutory provisions, and of course they continued within that principle which had attached to them, and of which they were not deprived by any statute." He then cites the case of *Peacock v. Rhodes*, Doug. 636, *where Lord Mansfield observes [*452 that the indorsee of a promissory note or bill of exchange is not to be considered in the light of an assignee at common law, because it would stop their currency, and injure trade and commerce.

He then proceeds: "It is, therefore, not because the indorsee is the assignee of the legal right to such bills and promissory notes that the equity is barred by the indorsement, but because of their quality as a currency, and from the necessity of adopting such a principle, for the convenience of trade and commerce with respect to such currency. But bonds are not to be considered as a currency, and within the reason of the principle laid down in *Peacock v. Rhodes;* for that principle is founded on commercial considerations altogether, and not upon a distinction between legal and equitable assignments. The provision of this act has long governed the assignment of bonds, and it is but of late years that the existence of such a principle, as has been contended for in this cause, has been thought of as applicable to bonds and notes."

CARRINGTON, *Justice*. "To consider this case upon general principles, the question is, whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. In England, notes of hand were not assignable until the 3d and 4th of Queen Anne, so as

to enable the assignee to bring suit in his own name. Courts of equity were of course resorted to, where the maker of the note was not precluded from setting up any equitable defence which he might have. Frequent attempts were made by the bankers and traders to bring them within the custom of merchants, and to place them upon the same footing of negotiability with bills of exchange. But the judges still considered them as evidences of debt. At length the statute was procured, conformably with the wishes of the trading part of the community, making them assignable in like manner as bills of exchange. The likeness, thus strongly sanctioned by legislative authority, produced similar decisions in cases where their negotiability was concerned. But no efforts were made in favor of bonds, and they remain in the same situation in England as they stood at common law. This country was then a part of the British empire, and our legislature assimilated its laws to those of the mother country so far as our local situation and state of society authorized it. In 1705, shortly after the English statute passed respecting notes of hand, the assembly passed a law authorizing the assignment of bonds and notes. This law I cannot meet with, but it was repealed by proclamation in 1730, and in the same year another law was enacted exactly similar to the act of 1748. 453*] *With the English statute before their eyes, the legislature did not choose to adopt it altogether, or to introduce into it a principle which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negotiability of bonds and notes was qualified and restricted within bounds consistent with the commercial station of this country. There was no necessity for exalting those kinds of papers to the high ground on which the commercial world had placed bills of exchange, and the whole complexion of the law shows that it was intended to be avoided. The doctrine which has been stated and relied upon as applicable to foreign bills of exchange, is consequently inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long formed opinions, unless the expressions of the law rendered it absolutely necessary. That a bond, fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid, by assignment, is settled by the case of *Turton v. Benson*, and has uniformly been so decided in the courts in this country. No man can, by the mere act of assignment, transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid that which was originally vicious and void. In this enlightened age, though, former decisions are rejected, and a new mode of attaining justice is discovered. But is it true that the means are adequate to the object? It is urged, as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions on the public, and to cramp commerce by destroying the negotiability of bonds and notes. As it strikes me, they rather tend to prevent than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public to the avarice and injustice of a few. But I cannot perceive how commerce, or that sort of it which is most useful to society, can be injured. That their negotiability will be restrained I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts, and thereby affording a convenient and desirable accommodation to the people of this country."

Judge Lyon, in giving his opinion, observed, that "the arguments used to assimilate this to the case of a bill of exchange and promissory note, are totally without foundation. The reason of the law, *as applicable to those [*454 cases, is not founded upon the principle stated by the counsel for the appellee, but upon considerations altogether of a commercial nature."

These observations certainly claim great respect, not only as coming from the highest court of judicature in Virginia, but as containing the opinions of gentlemen high in the confidence of the people of that state, and whose decisions have been so generally correct. But still their weight depends upon the accuracy of the facts on which their opinions are founded, and the correctness of the arguments derived from those facts. In this case of *Norton* and *Rose*, the question was not upon a promissory note, but whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. Hence, what is said respecting promissory notes comes in incidentally, and was not properly before the court. The decision, as far as it respects the question before the court, seems to be correct.

The observations in these cases from Virginia, respecting promissory notes, may be reduced to three propositions.

1st. That promissory notes were not negotiable before the statute of Anne, so as to enable the indorsee to bring an action in his own name.

2d. That the act of assembly, by assimilating notes to bonds, shows an intention in the legislature to restrain the negotiability of both within the same limits.

3d. That the negotiability given by the act of assembly to bonds and notes was not "intended for purposes of commerce."

The first of these propositions is clearly incorrect. It never was doubted until the case of *Clerke v. Martin*, in the 1st year of Queen Anne, that a promissory note was a bill of exchange, even between the payee and the maker. And no case has yet decided that a promissory note, payable to order and indorsed, is not a good bill of exchange. It was never doubted until the case of *Buller v. Crips*, in the 2d year of Queen Anne, and that case was never decided. Judge Carrington says, "courts of equity were of course resorted to;" that is, because the indorsee could not bring a suit at law in his own name. If this was the case, it must have happened between Michaelmas term, 2 Anne, when *Buller v. Crips*, was argued, and 3 and 4 Anne, when the statute was enacted. For before the 2d Anne, the indorsee could bring and support a suit in his own name, at law, against the maker

455*] or any or all of the other *parties to the note. The case of *Buller v. Crips* only raised a doubt, and the statute followed immediately and dispelled it. No case, it is believed, can be found of an application to equity on the grounds suggested by the judge.

The second proposition, that the act of assembly, by assimilating notes to bonds, intended to restrain their negotiability within the same limits, contains an argument which, if used at the trial, was not much insisted on, but which seems to be the only ground upon which a doubt can be supported. It is much to be regretted that the act of 1705, c. 34, is not to be found, as it would probably throw some light upon the subject. Its title does not, like that of its successors, mention promissory notes. It is "An act declaring how long judgments, bonds, obligations and accounts shall be in force; for the assignment of bonds and obligations; directing what proof shall be sufficient in such cases, and ascertaining the damage upon protested bills of exchange."

Whether the legislature of Virginia, at the time of passing this act, had before them the statute of 3 and 4 Anne, c. 9, is very doubtful. It is not probable that the acts of that session of parliament were printed until some time after the end of the session, which was on the 14th of March, 1705, on which day the statute of Anne respecting promissory notes received the royal assent.

The Virginia assembly of 1705 met on the 23d of October in the same year. There does not seem to have existed any particular motive for transmitting in the most expeditious manner the new acts of parliament; and if their transmission was left to accident, as was probably the case, the presumption is, (especially as it was a time of war,) that the legislature of Virginia had no knowledge of the English statute until after their session in 1705. But however this may be, there is at present no evidence that promissory notes were made assignable by that act of assembly.

The act of 1730, c. 5, is entitled "An act for ascertaining the damage upon protested bills of exchange; and for the better recovery of debts due on promissory notes; and for the assignment of bonds, obligations and notes." As the act of 1705 was repealed by proclamation in 1730, it is not probable that the new act of that year would re-enact the same thing in substance. Hence a material variance may be presumed between the two. The act of 1730, c. 5, § 8, is as follows: "And to the end the recovery of money upon promissory notes, and other writings without seal, may be rendered 456*] *more easy, be it enacted, &c, that if any person or persons shall have signed, or hereafter shall sign, any note, or by any other writing, he, she, or they have promised or obliged, or shall promise or oblige him, her, or themselves to pay any sum of money, or quantity of tobacco, to any other person or persons, such person or persons, to whom the same is or shall be payable, shall and may commence and maintain an action of debt, and recover judgment for what shall appear to be due thereupon, with costs." And by the 11th sect. it is enacted, "That it shall and may be lawful to and for any person or persons to assign and transfer any bond or bill for debt, or any such note as aforesaid, to any other person or persons whatsoever: And that the assignee or assignees, his and their executors and administrators, by virtue of such assignment, shall and may have lawful power to commence and prosecute any suit at law in his, her or their own name or names, for the recovery of any debt due by such bond, bill, or note, as the first obligee, his executors and administrators, might or could lawfully do: Provided always, that in any suit commenced upon such bond, bill, or note, so assigned, the plaintiff shall be obliged to allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee."

The intention of this act seems clearly to be to extend and enlarge, and not to restrict or limit, the negotiability of the instruments of which it speaks. Such bonds, bills, and notes, as are described in the act, certainly were never negotiable or assignable at common law; and for this plain reason, because it was not the intention of the parties to make them assignable. The debtor had never consented to the making his debt negotiable; it would, therefore, have been unjust in the legislature not to have given him the full benefit of all discounts against his original creditor as well as against the assignee. The notes described by the act are those by which the signer shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to any other person. Such a note is not negotiable in its nature, nor by the original contract and intention of the parties; the signer never gave any authority to his creditor to negotiate it, and, therefore, legislative aid was necessary to render it negotiable. But legislative aid was never necessary to render negotiable a promissory note payable to order. Let it be again repeated, that although promissory notes had been in common use in England for more than half a century before the statute of Anne, yet there never was an adjudged case in which it was decided that an indorsee of such a note could not maintain an action in his own name against any of the parties to the note. But the whole course of decisions was uniformly to the contrary. There was no *necessity, therefore, for the Virginia [*457 assembly to provide for the negotiability of notes payable to order, and hence we find that they confine the act to bonds, bills, and such notes, as, at common law, stood upon the same ground as bonds; and were considered as mere choses in action, unassignable in their nature, and only simple evidence of a debt due by one man to another. Although it must be presumed that the legislature of Virginia in 1730 had full knowledge of the statute of Anne, yet it is equally to be presumed that they knew that it was made in affirmance of the law as it before existed, and solely to remove the doubts which had been suggested by Lord Holt. It must also be presumed that they knew what had been the uniform practice and course of adjudications, ever since the first introduction of promissory notes. The evidence which we still have of these facts is strong and clear; but it must have been more strong and clear in the year 1730, when many persons were living who probably had personal knowledge of the whole history of the statute of Anne. Hence, then, it may be fairly concluded

that the assembly intended to leave those instruments which in their own nature, and by the consent of the parties, were negotiable, as well as those which were negotiable under the custom of merchants, to the protection of such principles of law as had been already found sufficient to support them.

The act of 1748, c. 27, has precisely the same title as the act of 1730, and precisely the same provision as to the assignment of bonds, bills and notes, making use of exactly the same expressions, excepting that the words "before notice of such assignment was given to the defendant," are added immediately after the word "obligee" in the last line of the passage before cited. So that this act of 1748 gave the assignee of such bonds, bills and notes, the same remedy at law which he had before in equity; and this seems to have been the only use and intent of the act.

The act of 1786, c. 29, § 3 and 4, is in these words: "An action of debt may be maintained upon a note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another. Assignments of bonds, bills, and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." This act, although its language is more concise, does not, as it respects the present question, differ in substance from the act of 1730. It is evident that it re-
458*] fers to the same kind *of notes. If notes payable to order were negotiable before the passing of these acts, it is clear that there is nothing contained in either of them to restrict that negotiability. This brings us back to the inquiry, what was the law respecting such notes previous to the statute of Anne. If an indorsed promissory note payable to order was in its nature an inland bill of exchange, and if in practice it was always so considered, there is nothing in the acts of assembly of Virginia that forbids its being still considered as such. How and when did the law first obtain in Virginia respecting inland bills of exchange? Nothing is said of them in the statute law of Virginia until the act of 1786, c. 29, which adopts the provisions and nearly the words of the English statute of 9 and 10 W. III, c. 17, and 3 and 4 Anne, c. 9. Their negotiability is taken for granted, and must have been derived from the custom of merchants. But the same custom which gave negotiability to inland bills of exchange, gave equal negotiability to indorsed promissory notes payable to order. It made no distinction between them. What the practice has been in Virginia seems doubtful. Lawyers differ in their accounts of it; and it cannot be considered as settled.

The case of *Lee and Love*, 1 Call, 499, was by the indorsee against the indorser of a promissory note payable to order. The count relied upon was money had and received. But the court held that the plaintiff was not entitled to recover against the defendant, because he had not first brought suit against the maker of the note. It is to be regretted that the Court did not give their reasons for supposing such a suit necessary. It was said that they considered the case as having been already decided; and they probably alluded to the case of *Mackie v. Davis*, as that is the only case cited by the counsel for the defendant. But this point was not decided in that case. Judge Carrington said, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say that in the present case he went far enough." Judge Roane said, "In this country, the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject; it is therefore his duty to bring suit. The duty of bringing a suit does not, at the first glance, seem to be the inevitable consequence of a right to sue; and it is regretted that the intermediate terms were not hinted, which connect the conclusion with the premises. But the dictum of a single judge, however respectable, upon a point not necessary to support the judgment, cannot be considered as conclusively settling the law. The only points decided in that case were, that an assignee of a bond might maintain *an action for [*459
money had and received against the assignor; and that the assignee had done enough to entitle himself to such action, by bringing suit against the obligor, prosecuting it to judgment, and taking out a *fieri facias* which was returned *nulla bona*.

These seem to be all the reported cases in Virginia which bear upon the present question.

In Pennsylvania a number of cases have occurred, from the whole of which it appears doubtful whether the statute of Anne is to be considered as having been extended in practice to that state, or whether their actions upon promissory notes are grounded upon the custom of merchants. Their act of assembly of 28th May, 1715, seems to have been passed in the full contemplation of the statute of Anne, but it provides a right of action only for the indorsee against the maker, and that only to recover so much "as shall appear to be due at the time of the assignment, in like manner" as the payee might have done. But it gives no action to the payee against the maker, nor to the indorsee against any of the indorsers. Yet such actions are maintained in that state upon promissory notes considered as instruments. Judge Shippen, in the case of *Robertson v. Vogle*, 1 Dall. 252, says, "there can be no doubt that the right of indorsees to call upon the indorsers must be founded on the custom of merchants." It appears by their act of assembly that a right of action already existed by the payee against the maker; and Judge Shippen supposes it to be under the statute of Anne, which he imagines had been extended in practice to that state. But this could hardly have happened prior to the year 1715, (the date of their act of assembly,) which was only ten years after the statute of Anne. He observes also, that "the legislature when regulating the assignment of bonds and notes, though they did not expressly put them on the same footing with bills of exchange, must, from the terms of the act, have taken it for granted that an action might be brought upon a promissory note

considered as an instrument. Till, therefore, a contrary opinion is pronounced, we must proceed as in the case of a bill of exchange under the statute of Anne," &c.

But in the subsequent case of *M'Culloch v. Houston*, in the supreme court of Pennsylvania, 1 Dall. 441, Chief Justice M'Kean was of opinion that the legislature intended to put promissory notes on the same footing as bonds, at least so far as to admit the equity of a note to follow it into the hands of the indorsee. He says, "Before this act it appears that actions by the payee of a promissory note were not maintained, nor can they since be maintained, otherwise than by extending the English statute of 460*] Anne." And to account for this *extension of the statute he supposes "that actions upon promissory notes were brought here soon after the passing of the statute, by attorneys who came from England, and were accustomed to the forms of practice in that kingdom, but did not perhaps nicely attend to the discrimination with regard to the extension, or adoption, of statutes." But this could not have happened in the course of ten years so as to have established a practice; for we are first to suppose a practice in England under the statute, a subsequent removal of attorneys from England to Pennsylvania, and then practice in Pennsylvania to be established, and all this between the passing of the statute of Anne in the year 1705 and the act of assembly in 1715. A more probable conjecture seems to be, that the first settlers who came over from England about the year 1683, were well acquainted with the use of promissory notes, and the laws respecting them, as they had been practiced upon in that country for at least thirty years. The first emigrations to Pennsylvania were about the time when the banking business of the goldsmiths was at its greatest height, and it was fifteen or twenty years after the first settlement of Pennsylvania, before a doubt was suggested whether an action would lay on a promissory note as an instrument. Hence, it is probable that actions on such notes were brought in the same manner as they had been used in England, to-wit, on the custom of merchants; and upon that ground, and not upon the statute of Anne, probably rests the present practice in Pennsylvania.

The practice in New Hampshire and Massachusetts seems to have the same foundation. They declare upon promissory notes as instruments, and rely upon the express promise in writing, without alleging a consideration, or referring to any statute or custom whereby the defendant is rendered liable without a consideration. In Connecticut, it is said by Swift, in his System of the Laws, that the indorsee must sue in the name of the payee; but the payee can maintain an action upon the note without alleging any custom, or statute, or consideration. In New York they have nearly copied the statute of Anne as far as it relates to promissory notes, but how the law was considered before their acts of assembly of 1788, we are not informed. In Maryland the statute of Anne was considered as in force and always practiced upon. Their declarations have been precisely in the English form, alleging the defendant to be liable by force of the statute, and the courts have strictly adhered to the adjudications in England. Hence, nothing conclusive can be inferred from the practice of the states.

The third proposition drawn from the reported cases in Virginia is, that the negotiability given to bonds and notes by the act of assembly *of that state, was not intended for [*461 purposes of commerce. It seems difficult to assign a reason why the legislature should have made bonds and notes assignable, unless it was to enable people to transfer that kind of property which existed in such bonds and notes; and the transfer of property is the only means of commerce. It will not be contended that the sole object of the legislature was to enable the holders of such paper to give it away in voluntary donations. It must, therefore, have been intended to enable them either to pass it away in payment of debts previously contracted in the way of commerce, or to make it in itself an article of merchandize. If, therefore, for the purposes of commerce, the legislature intended to make those contracts negotiable, which were not so either in their nature or by the consent of the parties, it is fair to presume that they did not mean to impede the negotiability of such as were in their own nature negotiable, and were expressly intended to be made so by the will of the contracting parties. If there were any principles of law which would support the negotiability of a promissory note payable to order, it cannot be supposed that the legislature intended by implication alone to obstruct their operation. And even admitting that they did not, by the act making bonds and notes assignable, mean to aid commerce, yet it cannot be presumed that they intended to wage war with those commercial principles which were already established.

This brings us back again to the first inquiry, what were the principles upon which the negotiability of promissory notes was supported before the statute of Anne. If such principles did exist, there seems to be nothing in this act of assembly which prevents their full operation in Virginia.

The conclusion from the whole is, that there is no principle derived either from the common law, or from the act of assembly of Virginia, which will prevent a court of law from carrying into effect the contract of the parties according to their original intention.

Even admitting that the contract of the defendant is not negotiable at law so as to enable the plaintiff to declare upon the instrument itself, yet it cannot be denied that it is assignable in equity, and if so, the plaintiff becomes in equity entitled to the money which the defendant received from the intermediate indorser; and in such a case, there never has been a doubt, since the time of Lord Mansfield, that the plaintiff is entitled to recover in an action for money had and received.

NOTE (B.)

462*] *This case was much debated in the court below. It appeared from the books that the only reported case in which it had been decided that an action of debt would not lie upon a promissory note, was that of *Welsh v. Craig*, 11 Geo. I. 8 Mod. 373, 1 Str. 680, which is so inaccurately reported that it is impossible to say between what parties to the note the action was. In 8 Mod. "it was said that it would not lie against the indorser, but that it would lie against the drawer." But we collect from the report, that the reason of the decision was, that before the statute of Anne no action at all would lie upon the note, as a note; (for which the case of *Clerke v. Martin*, 1 Salk. 129, was cited.) That the statute gave only the same kind of action as upon inland bills, and that an action of debt was never known to be brought upon a bill of exchange. And probably the court in that case relied on Hard. 485, to support this position.

Another reason given is, that the statute declares "that the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages, &c. which shows that an action of debt will not lie, because damages are never recovered in debt."

The first position, viz., that no action, before the statute, would lay upon a note, as a note, seems not to be correct, although supported by the case of Clerke and Martin, for that case was directly contrary to the whole current of authorities prior to that time, particularly to the case of *Cutting v. Williams*, 5 W. and M. Carth. 269; and the statute of Anne seems to have been made, not to alter the law, but to overrule this case of *Clerke* v. *Martin*, and to place promissory notes on the same footing on which they stood prior to that decision. (See the preceding note.)

It is true that in Milton's case, Hard. 485, it was decided that an action of debt would not lie against the acceptor of a bill of exchange; but the reason given shows that it would lie against the maker of a promissory note. For it was said that the undertaking of the acceptor was only collateral, to pay the debt of another, and that the drawer continued debtor, notwithstanding the acceptance. So that the reason seems to be that the acceptor was not the original debtor. But the maker of a promissory note is the original debtor, and, therefore, an action of debt would lie against him, by the same rule that it would not lie against the acceptor of a bill.

463*] *In *Baker v. Hill*, 3 Keb. 627, the action was debt on an inland bill, but it is not stated between what parties. There was a demurrer to the plea, and judgment for the plaintiff. This was eight years after the case in Hardres. And in the case of *Brown v. London*, 2 Keb. 695, 713, 758, 822. 1 Vent. 152. I Lev. 298, and 1 Mod. 285, it seems to be admitted that an action of *indebitatus assumpsit* for money had and received would lie, if the acceptor had the money in his hands to pay.

In early times "all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery was by this action of debt." 1 Reeve, 159. It was not without repeated struggles that the action on the case was permitted to be brought for breach of a personal contract. Even as late as the reign of Queen Elizabeth it was considered as a matter of great doubt whether assumpsit would lie in any case where an action of debt might be brought. The court of king's bench held that it would; and the common pleas held that it would not; but it was finally determined, after great debate, before all the judges of England, in the exchequer chamber, in *Slade's Case*, 4 Co. 93, that assumpsit would lie for the price of corn sold.

The case of *Core* v. *Woddye*, 28 H. VIII. Dyer, 20, is a strong case to show that where the defendant has received money to which the plaintiff is entitled, he may have an action of debt for it.

A promissory note has always been held to be good evidence of money received by the maker of the note to the use of the payee. In that case the court, in giving their opinion said, "Admit that there was not any bill testifying the receipt, yet by common opinion of the books, it is in the election of the bailor to have an action of debt, or account, in such a case." And in the case of *Meredith v. Chute*, 2 Ld. Raym. 760, it was said by the whole court, that a note was good evidence of a debt due from the maker to the payee.

In Godbolt, 49, the action is said to be "debt upon a *concessit solvere*, according to the law merchant." This seems to have been some kind of an acknowledgment of a debt, in the nature of a promissory note.

In *Domingo Franca's Case*, 11 Mod. 345, it was held that debt or *indebitatus assumpsit* might be brought upon a bill of exchange by the payee against the drawer, "because it is in the nature of a security."

The action of debt was the ordinary remedy upon a tally, which seems to have been no better evidence of a debt than a promissory note. *A tally is thus defined by Spelman in [*464 his Glossary, p. 532, edit. 1637. "Tallium, alias Talea, est clavola vel ligni portiuncula, utrinque, complanata, cui summa, debiti inciditur; fissaque inde in duas partes, una debitori, altera creditori traditur, in rationis memoriam."

These tallies seem to have been a kind of common security for money, and to have been negotiable like bank bills, passing from hand to hand by delivery only. 12 Mod. 241. Actions of debt upon them are mentioned in Fitz. Abr. tit. *Debt*. 4. 4 E. II. Fitz. Abr. Ley, 68, 70, F. N. B. 122. I. Dyer 23, Hard. 333, and 2 Keb. 713. Sometimes they were sealed, but in general they were without a seal, and were only evidence of a simple contract. Against a common tally, the defendant might wage his law; and in Dyer, 23, it appears that "there is one book which says that a man may wage his law against a sealed tally, if the tally have only notches or scotches indented, each scotch for

twelve pence, according to the common usage; but if the sum be inscribed upon the sealed tally, he shall be ousted of his law."

The case of *Rumball v. Ball*, 10 Mod. 38, was debt upon a promissory note; and although an objection was taken to the want of a demand, yet none was made to the form of the action.

In *Rudder v. Price*, 1 H. Bl. 547, the action was debt upon a promissory note payable by installments; and although the case was warmly contested, and although Mr. Justice Lawrence, who was then at the bar, was for the defendant, yet no objection was suggested to the form of the action; but it was contended, and so held by the court, that an action of debt would not lie upon such a note until all the installments had become due.

Morgan, in his Precedents, p. 584, has given the form of a declaration in debt on a promissory note, and Kyd, in his Treatise on Bills and Notes, p. 114, (Dublin edit. 1791,) after noticing some of the authorities on this subject, says, "the conclusion resulting from the whole seems to be this, that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained."

Comyns (Dig. tit. *Debt*, A. 8,) lays down the proposition generally, "that debt lies upon every express contract to pay a sum certain," and cites 1 *Leon*. 208. And Blackstone (3 Com. 154,) says, "the legal acceptation of debt is, a sum of money due by certain and express agreement; as by a bond for a determinate sum, a bill or note," &c. "The non-payment of these is an injury, for which the proper remedy is by action of debt."

465*] *But the question is now settled in England, in the case of *Bishop v. Young*, 2 Bos. & Pull. 78, where it was held that "an action of debt lies by the payee against the maker of a promissory note expressed to be for value received."

The declaration in that case was, "for that the defendant, on , at , made his certain note in writing commonly called a promissory note, with his own proper hand thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the plaintiff, by which note the said defendant, one month after date, promised to pay the plaintiff or order 8*l*. value received in goods by the defendant, by reason whereof, and by force of the statute in that case made and provided, the defendant became liable to pay to the plaintiff the said sum of money in the said note mentioned, whereby an action hath accrued," &c. To this declaration there was a general demurrer, in support of which the counsel relied chiefly on the case of *Welch and Craig*, 8 Mod. 373. 1 Str. 680.

Lord Chief Justice Eldon, in delivering the opinion of the court, examined the cases cited and the principles on which the action of debt is founded. He held that the statute of Anne had put promissory notes on the same footing, and given upon them the same remedy, as was before had upon inland bills of exchange. That an action of debt would lie upon an inland bill of exchange, by the payee against the drawer, whom he considered as the original debtor, and, therefore, debt would lie by the payee of a promissory note against the maker, who is the original debtor. He relied also on the words value received; and cited Hard. 485, Skin, 398, *Pearson v. Garrett*. Com. Dig. Debt, B. Debt. A. 8 and 9. Salk. 23, *Hard's Case*. Skin. 346, *Hodges v. Stewart*, 10 Mod. 32, *Rumball v. Ball*.

The objection that the statute of limitations was not permitted to be given in evidence upon the plea of *nil debet*, is supported only by a dictum of Chief Justice Holt, in 1 Salk. 278. *Anon*. at nisi prius, anno 1690, and in the case of *Draper v. Glassop*, 1 Lord Ray, 153, 8 & 9 W. III. The reason which he gives in the first case is, "For the statute has made it no debt at the time of the plea pleaded; the words of which are in the present tense. But in case on *non assumpsit* the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise." The reason given in the case of Draper and Glassop is, "because *non assumpsit* goes to the præter tense; but upon *nil debet* pleaded the statute is good evidence, because the issue is joined *per verba de presenti*, and *with- [*466 out doubt *nil debet* by virtue of the statute: and it is no debt at this time, though it was a debt."

In 1 Morgan's Vade Mecum, 220, this case is cited with a "*sed quære*;" and he advises that the statute should be pleaded.

The expression of the statute of Jac. 1, c. 16, which is the same as that of the act of assembly of Maryland, 1715, c. 23, is, that the action shall be brought within such a time, and not after. It does not extinguish the debt, but only bars the remedy at law. The lapse of time is not of itself evidence that the defendant does not owe the money. The statute only creates a disqualification of the plaintiff to recover, like that of outlawry, alien enemy, feme covert, &c., or it may be considered as a special protection of the defendant, like a certificate of bankruptcy, infancy, or a discharge under an insolvent act.

That the debt is not extinguished by the statute is clear from the cases which have been decided since the time of Lord Holt.

In the case of *Quantock v. England*, 4 Burr. 2628, it was held that a debt barred by the statute is a good debt to support a commission of bankruptcy. The same was expressly decided by Lord Mansfield, at *nisi prius*, in the case of *Fowler v. Brown*, cited in Esp. N. P. 563. And in *Trueman v. Fenton*, Cowp. 548, his Lordship said, "all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. Where a man devises his estate for payment of his debts, a court of equity says, (and a court of law, in a case properly before them, would say the same,) all debts barred by the statute of limitations shall come in, and share the benefit of the devise."

Hence it appears that the reason which Lord Holt gives for the distinction between *non assumpsit* and *nil debet*, is not supported. And if the reason fails, the law fails with it.

The objections respecting the letters of administration, and the omission of the *debet and detinet* were supposed to come too late after verdict.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and Distarct Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citations of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,
So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text-books.

EDITOR.

I CRANCH.

1 Cr. 1-45, 2 L. 15, TALBOT v. SEEMAN.

Salvage.— Is a compensation for actual services rendered, demandable of right for vessels saved from pirates or the enemy. But the taking must be lawful and the service must be meritorious, p. 11.

Cited in Clarke v. Brig Dodge Healy, 4 Wash. C. C. 657, F. C. 2,849, denying right to salvage where it did not appear vessel was saved by libellant's instrumentality; Davidson v. Sealskins, 2 Paine, 333, F. C. 3,661, denying salvage because taking was unlawful; Steamboat Narragansett, Olc. 392, F. C. 10,020, denying salvage where effort was unsuccessful; Butterworth v. Washington, 4 F. C. 926, allowing slight salvage, the aid having been continuous and successful.

Salvage.— Intent with which recapture is made is not material on question of salvage, p. 34.

This holding is approved and applied in Le Tigre, 3 Wash. C. C. 574, F. C. 8,281, where seizure was not made to protect or benefit the owner.

Salvage.— To entitle to salvage the danger of the property saved must be real and imminent, not speculative merely; but loss need not be inevitably certain but for the salvage, pp. 22, 23.

This principle is cited and applied in Spencer v. Steamboat, 1 Bond, 121, F. C. 13,232, holding danger to life not an essential element; The Spokane, 67 Fed. 256, holding facts entitled to salvage although the peril but slight; Bark Delphos, 1 Newb. 419, F. C. 14,400, discussing the various considerations which go to fix amount of salvage; Steamboat Pontiac, 5 McLean, 365, 1 Newb. 135, F. C. 8,801, a steamboat held in great danger from ice upon a river; The Connemara, 108 U. S. 357, 27 L. 753, 2 S. Ct. 756, awarding salvage to rescue from fire although the danger of loss was relatively slight; The Senator, 1 Brown Adm. 375, F. C. 12,664, holding danger sufficient to entitle to small salvage; Brooks v. Wm. Penn, 2 Hughes, 148, F. C. 1,965, remarking that salvage is to be encouraged by liberal reward. Approved, Murray v. Charming Betsey, 2 Cr. 121, 2 L. 227.

Salvage.— The rule is that recapture of neutral vessel confers no right to, but a neutral vessel captured, armed and manned by French during state of limited war between France and United

States and recaptured by United States vessel is liable for salvage, because danger of condemnation by French was imminent, pp. 31-39.

Approved and followed in Murray v. Charming Betsey, 2 Cr. 121, 2 L. 227, as to recapture of neutral from the French; Williams v. Suffolk Ins. Co., 3 Sumn. 276, F. C. 17,738, awarding salvage in similar case because of practice of Buenos Ayres government similar to French. Cited, approving the general rule, in U. S. v. Wilder, 3 Sumn. 315, F. C. 16,694. Cited in Peck v. Randall, 1 Johns. 177, respecting the exceptional rule where condemnation imminent; similarly in Snowden v. Ins. Co., 3 Binn. 468, 471, a suit for insurance money on vessel; Clayton v. Ship Harmony, 1 Pet. Adm. 78, F. C. 2,871.

War.—A state of limited war existed in 1800 between France and United States, p. 33.

The proposition cited and affirmed in Clayton v. Ship Harmony, 1 Pet. Adm. 78, F. C. 2,871, awarding salvage to those rescuing vessel captured by French.

Evidence.— Foreign laws must be proved as facts, p. 38.

The following citing cases approve and apply this principle: Hanley v. Donoghue, 116 U. S. 4, 7, 29 L. 536, 537, 6 S. Ct. 244, 245, holding States of Union foreign within the rule, and that Supreme Court on error to State court notices only such laws as it does; Liverpool, etc., Co. v. Phœnix Ins. Co., 129 U. S. 446, 32 L. 794, 9 S. Ct. 473, reviewing authorities elaborately and declining to notice English law; Brashear v. Williams, 10 Ala. 633, holding Choctaw Indian custom and law as to descent must be proved; Brackett v. Norton, 4 Conn. 521, 10 Am. Dec. 181, and Dyer v. Smith, 12 Conn. 390, collecting cases and holding laws of sister State foreign and must be proved; Owen v. Boyle, 15 Me. 149, 32 Am. Dec. 145, discussing mode of proof and noting the exception introduced by the leading case; Bowditch v. Soltyk, 99 Mass. 138, where the proof was testimony of foreign jurists; Ward v. Morrison, 25 Vt. 602, holding that if foreign law was claimed to be different from domestic it must be proved so; Allen v. Watson, 2 Hill L. 320, admitting official publication of Georgia law; Henthorn v. Doe, 1 Blackf. 160, discussing acts of congress providing mode of proof; Ennis v. Smith, 14 How. 427, 14 L. 484, discussing modes of proof and holding it must be the best evidence obtainable; The Pawashick, 2 Low. 144, 147, F. C. 10,851, applying the rule in admiralty and discussing mode of proof of English laws; People v. Lambert, 5 Mich. 361, 72 Am. Dec. 51, ruling that proof of sister State law may be proved by authenticated copies; Barrows v. Downs, 9 R. I. 448, 11 Am. Rep. 285, allowing Spanish lawyer to prove Cuban law; Dundee Co. v. Cooper, 26 Fed. 669, 11 Sawy. 507, permitting witness to testify that certain volume was authoritative copy of English statutes; Beach

v. Workman, 20 N. H. 383, reviewing cases and refusing to admit Canadian publication in proof of English statute; Dawson v. Peterson, 110 Mich. 433, 68 N. W. 247, admitting volume of Canadian statute proved by testimony of Canadian solicitor. Cited in general discussion, McCall v. U. S., 1 Dak. 312, 46 N. W. 610.

Evidence.— Foreign public laws and decrees on a subject of international concern, promulgated by the United States, can be noticed without further proof in United States Admiralty Court, p. 38.

Approved and principle applied in Radcliff v. Unit. Ins. Co., 7 Johns. 51, holding diplomatic correspondence printed by the government admissible. Cited approvingly in People v. Lambert, 5 Mich. 361, 72 Am. Dec. 51, discussing modes of proof; Barrows v. Downs, 9 R. I. 448, 11 Am. Rep. 285, where Spanish lawyer was allowed to testify to Cuban partnership law; Dundee, etc., Co. v. Cooper, 26 Fed. 669, 11 Sawy. 507; McCall v. U. S., 1 Dak. 312, 46 N. W. 610, general discussion; Allen v. Blunt, 2 Wood. & M. 128, F. C. 217, general discussion.

Appeal and error.— Supreme Court with respect to facts is limited to the statement in the lower court, p. 38.

Cited in Insurance Co. v. Folsom, 18 Wall. 249, 21 L. 237, collecting authorities and applying the rule in reviewing trial of fact by court without jury; U. S. v. King, 7 How. 865, 12 L. 948, collecting cases and applying the rule.

Statutes.— Legislation founded on mistaken notion of what is the law does not change the actual state of the law as to pre-existing cases, p. 35.

Approved in Blanchard v. R. R., 31 Mich. 49, 18 Am. Rep. 146, arguing that individuals can much less change the legal effect of their written instruments; Van Norman v. Jackson, 45 Mich. 210, 7 N. W. 798, holding legislation assuming existence of a remedy does not establish it; Rhoades v. Davis, 51 Mich. 311, 16 N. W. 662, holding that empowering statute does not necessarily show that power did not previously exist.

Miscellaneous.— Cited as to amendment of writ of error, Garland v. Davis, 4 How. 154, 11 L. 918; cited as case where "reasonable cause" and "probable cause" were used interchangeably; Stacey v. Emery, 97 U. S. 646, 24 L. 1036; cited Perkins v. Hill, 2 Wood. & M. 165, F. C. 10,987, not in point. Cited in McLaren v. Pennington, 1 Paige, 108, not in point.

1 Cr. 45–103, 2 L. 29, WILSON v. MASON.

Jurisdiction.— The compact of two States cannot deprive congress of power to regulate appellate jurisdiction of Supreme Court. Ac-

cordingly Virginia act making State District Court decision final in case of caveat is nugatory where Federal Constitution confers appellate jurisdiction on Supreme Court, pp. 91, 92.

Principle applied in Young v. Bank, 4 Cr. 388, 2 L. 656, holding invalid a corporate charter provision denying right of appeal in all cases where Federal law or law of sister State conferred such right; Wheeling Bridge Case, 18 How. 433, 15 L. 438, holding compact of two States as to Ohio river cannot restrict power of congress to regulate commerce thereon; Ex parte Holman, 28 Iowa, 105, 4 Am. Rep. 169, holding one in custody under Federal process cannot be released by habeas corpus in State court. Cited arguendo in Ex parte Biddle, 2 Mason, 473, F. C. 1,391, on question of removal; dissenting opinion, Ex parte Crane, 5 Pet. 200, 205, 8 L. 96, 98, as instance of Supreme Court's appellate jurisdiction and in general discussion of jurisdictional question; Baker v. Biddle, 1 Bald. 406, 409, F. C. 764, on jurisdictional matters.

Under Virginia land act of 1779, a survey without an entry is not sufficient foundation for a title, but it must be by entry, pp. 94–100.

Principle followed with express approval and similarly applied in Latham v. Oppy, 18 Ohio, 110, 112; Patterson v. Bradford, Hardin (Ky.), 111, expressly approving and holding registering of survey equally abortive if not in pursuance of an entry; Railroad v. Hoye, 2 Bland Ch. 261, holding survey made before warrant lodged with surveyor, void as against regular entry and survey; see Kendrick v. Dallum, 1 Overt. 499, as to calls in an entry; Miller v. Page, 6 Call, 39, 40, 41, 42, where entry was held too vague; Depew v. Howard, 1 Munf. 301, where held sufficient. Cited generally in Rich v. Elliot, 10 Vt. 215. And see Hardin (Ky.), 17, note; Carson v. Hanway, 3 Bibb, 160; McGee v. Thompson, 1 Bibb, 133, 134; Beard v. Smith, 6 T. B. Mon. 510.

Distinguished in Overton v. Campbell, 5 Hayw. 171, where the two claims rested upon different statutes.

Land grants.— The Virginia land act provided the method of acquiring title and the courts may not hold sufficient the substitution of equivalent acts, pp. 97–100.

Approved in Campbell v. Galbreath, 1 Watts, 93, but upholding an earlier entry although defective against a later; Reid v. Dodson, 1 Overt. 409, applying the principle to a statutory requirement as to notice.

Distinguished in Overton v. Campbell, 5 Hayw. 171.

Land grant.— The purpose of requiring entry by claimant was to give notice. But the fact that the other claimant had actual notice of survey does not make that equivalent to entry, p. 100.

Approved in Miller v. Page, 6 Call, 36, 40, 41; Latham v. Oppy, 18 Ohio, 110. Principle applied in Kerr v. Mack, 1 Ohio, 166, holding vagueness in entry not cured by actual notice to other claimant; and in Smith v. Fultz, 4 Serg. & R. 479. Cited in general discussion as to entry and notice in McArthur v. Phœbus, 2 Ohio, 420; Jones v. Van Zant, 5 How. 225, 12 L. 127; Davis v. Bryant, 2 Bibb, 112.

Trustee.— One acquiring legal title with notice of another's equity is pro tanto trustee. But if no equity then he is not trustee, p. 100.

Cited and principle applied in Dunlap v. Stetson, 4 Mason, 376, F. C. 4,164, holding that grantor afterwards acquiring paramount title holds as trustee for his grantee; Miller v. Aldrich, 31 Mich. 420, holding that a certain grantee held insurance policy as trustee for the mortgagee; Buie v. Pollock, 55 Miss. 314, holding legatees paid before creditors to be deemed trustees for them. Cited generally in consideration of innocent purchaser's rights in equity in Boone v. Chiles, 10 Pet. 212, 9 L. 400; Perkins v. Swank, 43 Miss. 358; and Byers v. Fowler, 12 Ark. 286, 54 Am. Dec. 288.

Caveat is a remedy given to prevent a patent issuing where statutory directions have been violated to the injury of the commonwealth or where some person has a better right, p. 101.

Quoted approvingly in Miller v. Page, 6 Call, 39.

Statutes.— In case of doubt a literal construction leading to an absurdity must be rejected in favor of a more liberal which will effectuate object intended, pp. 101, 102.

Cited approvingly in Weatherhead v. Bledsoe, 2 Overt. 379.

Miscellaneous citations.— Hampton v. McGinnis, 1 Overt. 294, and Turney v. Young, 2 Overt. 268, to point that real property laws should be certain and uniform; Pierpont v. Fowler, 2 Wood. & M. 31, F. C. 11,152, to point that equitable remedy must be fuller or better than remedy at law; McLaren v. Pennington, 1 Paige, 108, to point that State may change remedy upon contract. Cited erroneously in Muldrow v. Agnew, 11 Mo. 621.

1 Cr. 103–110, 2 L. 49, UNITED STATES v. SCHOONER PEGGY.

Final judgment.— Last decree of inferior court is final as respects the power of that court, but not as respects its subject-matter unless acquiesced under, p. 109.

Cited and rule applied in Sharon v. Hill, 11 Sawy. 308, 26 Fed. 389, holding Superior Court judgment pending on appeal not res judicata; Hills v. Sherwood, 33 Cal. 478, 479, holding that covenant in deed that title would be confirmed by Federal court, not satisfied until time of appeal had expired. Cited approvingly in Oakes v. Rogers, 47 Minn. 39, 28 Am. St. Rep. 327, 49 N. W. 331; Cary v.

Richardson, 35 La. Ann. 506, holding certain judgment final and not interlocutory.

Treaty.— Provision of treaty with France for restoration of captured property "not yet definitively condemned" means property still in controversy, such as property condemned by lower court, but as to which appeal is pending, pp. 109, 110.

Treaty is part of supreme law and, therefore, binding on the judiciary which must obey its mandates, even though affecting litigation already in court, and compelling the reversal of a judgment below, pp. 109, 110.

Cited and principle applied in Pollard v. Kibbe, 14 Pet. 412, 415, 10 L. 519, 520, in construing Spanish treaty ceding Florida; Fellows v. Blacksmith, 19 How. 372, 15 L. 686, where treaty with Seneca Indians was involved; In re Metzger, 17 F. C. 234, holding French treaty as to extradition to be enforced by the courts like an act of congress; In re Race Horse, 70 Fed. 607, where Indian arrested for violating game laws was released under treaty provision; Howell v. Fountain, 3 Ga. 179, 46 Am. Dec. 417, where Indian treaty provision as to land sale was held part of the law to be observed; Little v. Watson, 32 Me. 225, holding treaty provision as to Canadian boundary supreme over provision of State Constitution; In re Kaine, 14 F. C. 89, holding treaty is in force as law without any enabling act. Cited in State v. Foreman, 8 Yerg. 313, discussing history of Indian treaties at length, dissenting opinion, Ex parte Crane, 5 Pet. 204, 8 L. 97, in general discussion. See also note on the effect of treaties, 81 Am. Dec. 539.

Distinguished in Sharon v. Sharon, 79 Cal. 647, 22 Pac. 30, refusing to reverse a State court judgment merely because it appeared that the Federal court had reached a different conclusion.

Retrospective laws.— Where private rights are involved, courts struggle hard against a retrospective construction of a law, p. 110.

This principle has been applied, In re Kean, 2 Hughes, 329, F. C. 7,630, refusing to apply a statute retrospectively in cases where it would affect vested rights of individuals. Cited in dissenting opinion, Rich v. Flanders, 39 N. H. 367, arguing that a retrospective law affecting remedies might be invalid; Gilliland v. Phillips, 1 S. C. 155, holding contract governed by usury law in force when entered into. Cited generally, State v. Dews, Charlt. (Ga.) 406, upholding act transferring custody of jail from sheriff. Cited as sustaining proposition that congress may validly pass retrospective laws in Schenck v. Peay, 21 F. C. 673.

Appeal and error.— Generally it is for appellate court merely to decide whether judgment was valid when rendered. But if the

law intervenes and the rule is changed it must be obeyed and a judgment, correct when rendered, be reversed, p. 110.

Cited and principle applied in State v. Baltimore, etc., R. R., 3 How. 552, 11 L. 722, where repeal of law imposing a penalty was held a remission thereof; First, etc., Bank v. Henderson, 101 Cal. 310, 35 Pac. 899, where act imposing penalty was repealed before decision in appellate court and the repealing act was held applicable; Coles v. Madison Co., Breese (Ill.), 159, 160, 12 Am. Dec. 166, 167, where penal law was repealed after verdict and before judgment and was held a bar to judgment; Thompson v. Basset, 5 Ind. 536, affirming that suit for penalty cannot be sustained after repeal of law creating it; Exeter v. Stratham, 2 N. H. 104; State v. Norwood, 12 Md. 206, reversing a judgment based on stamp act thereafter repealed; Mayor v. State, 30 Md. 119, penal law was repealed after indictment and the repeal was held a bar; Day v. Day, 22 Md. 539, reversing a judgment allowing a patent on ground of subsequent law prohibiting it; State v. Edward, 5 Mart. (O. S.) 475, dismissing appeal on this ground. The principle is applicable where the statute repealed is criminal and necessitates the defendant's discharge; Keller v. State, 12 Md. 326, 327, 71 Am. Dec. 597, 598; Wall v. State, 18 Tex. 697, 70 Am. Dec. 306; Mahoney v. State, 5 Wyo. 525, 63 Am. St. Rep. 67, 42 Pac. 15. Cited in general discussion and more generally applied in Price v. Nesbit, 29 Md. 266; Wade v. St. Mary's School, 43 Md. 181; Montague v. State, 54 Md. 483; Turner v. Bryan, 83 Md. 374, 35 Atl. 21; Bayard v. McLane, 3 Harr. (Del.) 233; Allen v. Farrow, 2 Bailey L. 587; State v. Taylor, 2 McCord, 490. See also note on effect of repeal of statute, 12 Am. Dec. 480.

Miscellaneous.— Cited in Ledgerwood v. Picket, 1 McLean, 145, F. C. 8,175, not in point.

1 Cr. 110–117, 2 L. 51, RESLER v. SHEHEE.

Practice.— The Virginia practice was to admit a plea at the term next ensuing a judgment by default, but at a subsequent term it is discretionary, p. 117.

Cited in Martin v. Baltimore, etc., R. R., 151 U. S. 686, 38 L. 316, 14 S. Ct. 538, where petition for removal after prescribed time was denied. Cited in Dibble v. Rogers, 2 Mich. 407, holding same rule as to discretion applicable in the granting of a new trial.

1 Cr. 117–137, 2 L. 53, TURNER v. FENDALL.

Virginia statute authorizing judgment against sheriff failing to pay over execution moneys, permits such judgment at any subsequent term and not merely that next ensuing, pp. 131, 132.

Evidence.— Fact of insolvency is matter in pais to be proved by parol and other testimony, p. 132.

Rule cited and followed in Dunlop v. Munroe, 1 Cr. C. C. 541, F. C. 4,167, and Noland v. Moore, 2 Litt. (Ky.) 368, allowing proof by parol that A. B. was justice of peace; Williams v. Clay, 5 Litt. 57, allowing parol proof of discharge in insolvency; Phelps v. Burton, 6 T. B. Mon. 37, holding such discharge not within the issue of nul tiel record.

Appeal and error.— To sustain exception to rejection of testimony its relevancy must be made affirmatively to appear, p. 132.

Cited and principle applied, Duffee v. Pennington, 1 Ala. 508; Crenshaw v. Davenport, 6 Ala. 392, 41 Am. Dec. 57; Carter v. Bennett, 4 Fla. 339; Jackson v. Roberts, 11 Wend. 429; Polk v. Robertson, 1 Overt. 457. Cited generally on relevancy of testimony, Blair v. Coffman, 2 Overt. 177, 5 Am. Dec. 660.

Execution.— Money may be seized upon, p. 134.

Cited and applied in Spencer v. Blaisdell, 4 N. H. 201, 17 Am. Dec. 414, in holding bank bills may be attached; Sheldon v. Root, 16 Pick. 509, 28 Am. Dec. 267, holding further the sale thereof unnecessary; Handy v. Dobbin, 12 Johns. 220, with express approval; Holmes v. Nuncaster, 12 Johns. 396. Cited arguendo, Citizens' Bank v. Nantucket Co., 2 Story, 52, F. C. 2,730; in U. S. v. Canoe, 5 Hughes, 493, F. C. 14,718, holding money included within prohibition against goods and chattels; Corbett v. State, 31 Ala. 340, holding bank bills may be subject of larceny; Doyle v. Sleeper, 1 Dana, 535, 543, 559, and Howe v. Waysman, 12 Mo. 174, 49 Am. Dec. 130, holding fraudulent, as against creditors, a purchase by a father in his children's name; Edmonson v. Meacham, 50 Miss. 39, as to similar deed in name of wife and children; Harris v. Moody, 30 N. Y. 277, 282, 86 Am. Dec. 383, holding bank notes liable along with rest of cargo to contribute to general average loss; Dolby v. Mullins, 3 Humph. 437, but disapproving Turner v. Fendall on the main point.

Execution may be levied upon money. But it cannot be levied upon money of a defendant when in the hands of a sheriff collected upon a judgment in such defendant's favor in another suit, pp. 133–137.

Turner v. Fendall is a leading case upon this question and has been followed almost uniformly by the various States. The following citing cases in various jurisdictions approve the rule, applying it in various ways: Barnett v. Bass, 10 Ala. 954, holding the contrary practice of a coroner error and declaring that he should have made special return setting forth the facts; Reddick v. Smith, 3 Scam. (Ill). 452, applying rule to attachment proceedings; Campbell v. Hasbrook, 24 Ill. 246, holding question settled in Illinois; Winton v. State, 4 Ind. 323, although a statute authorized levy on money in

general terms; Hooks v. York, 4 Ind. 637, holding judgment money in court's hands not leviable; Stratton v. Ham, 8 Ind. 90, note, holding executor may be garnished as to unascertained distributive shares of an estate; County of Polk v. Sypher, 17 Iowa, 365, 85 Am. Dec. 572, holding contra, although not distinguishing main case where writ was not required to be returned into court; First v. Miller, 4 Bibb (Ky.), 312, Harding v. Stevenson, 6 Harr. & J. 267; Jones v. Jones, 1 Bland Ch. 461, 18 Am. Dec. 342, holding that sheriff could not be compelled to return money into another court than that of the execution; Hardy v. Tilton, 68 Me. 196, 28 Am. Rep. 35, collecting a number of authorities; Wilder v. Bailey, 3 Mass. 291, expressly approving the rule; Thompson v. Brown, 17 Pick. 464, penalizing a sheriff for contrary practice; Marvin v. Hawley, 9 Mo. 384, 388, 43 Am. Dec. 549, noting and criticising contrary rule; Curling v. Hyde, 10 Mo. 376, denying that administrator can be garnished for property in his hands; Ex parte Fearle, 13 Mo. 468, 53 Am. Dec. 155, approving act of sheriff in obtaining order of court permitting application of such moneys to the second writ; State ex rel. v. Boothe, 68 Mo. 549, 551, holding money in sheriff's custody from an attachment afterwards dissolved could not be levied upon by execution; Crane v. Freese, 16 N. J. L. 307, following the rule, although statute authorized execution upon moneys in general terms; Davis v. Mahany, 38 N. J. L. 107, holding, however, that execution moneys may be attached; Miller v. Adsit, 16 Wend. 363; Baker v. Kenworthy, 41 N. Y. 217, reviewing New York cases; State v. Lea, 8 Ired. L. 95, 96; Dawson v. Holcomb, 1 Ohio, 276, 13 Am. Dec. 619; Means v. Vance, 1 Bailey L. 40, expressly approving rule; Hill v. Lacrosse, etc., R. R., 14 Wis. 293, 80 Am. Dec. 784, collecting cases and noting jurisdictions contra; Reno v. Wilson, Hempt. 93, F. C. 11,700a, applying the rule; Clarke v. Shaw, 28 Fed. 356, 24 Blatchf. 97, noting that Vermont rule is contra, but following principal case as to money in hands of United States marshal in that State; Pawley v. Gains, 1 Overt. 209, adopting rule in Tennessee. But see Dolby v. Mullins, 8 Humph. 438, 39 Am. Dec. 181. The Vermont court adopted the rule in Prentiss v. Bliss, 4 Vt. 515, 24 Am. Dec. 632, but afterwards ruled contra.

Cited in Summers v. Caldwell, 2 Nott & McC. 342, but upholding act of sheriff in levying execution upon such execution money. Cited arguendo in Wintercast v. Smith, 4 Rawle, 185.

Distinguished in Dunlop v. Patterson Ins. Co., 74 N. Y. 150, 30 Am. Rep. 285, holding money deposited with court clerk in lieu of undertaking on appeal liable to attachment. Denied in Dolby v. Mullins, 3 Humph. 438, 39 Am. Dec. 181, adopting rule that sheriff may so levy on execution moneys. Denied in Hamilton v. Ward, 4 Tex. 367, 369, Pace v. Smith, 57 Tex. 560, 561, and Mann v. Kelsey, 71 Tex. 613, 10 Am. St. Rep. 803, 12 S. W. 45, following Tennessee rule.

Execution.—An execution creditor has no property in or title to any specific pieces of money realized by the sheriff under the execution, p. 134.

This principle recognized and applied in Carlton v. Conroy, 21 Cal. 172, holding that creditor cannot follow such moneys deposited by sheriff with his banker; Scott v. Smith, 2 Kan. 445, holding depositor in bank had no leviable property in any specific money; Adams v. Lane, 38 Vt. 646, holding execution moneys deposited by sheriff with his banker not attachable.

Sheriffs.— It is proper practice for sheriff having money collected for execution creditor against whom he holds a writ of execution to return the money into court in conformity with the writ, so stating, and not apply it on the execution, pp. 136, 137.

Approved and practice followed: Bank of Minnesota v. Hayes, 11 Mont. 538, 539, 540, 29 Pac. 91; Hickman v. Matlock, 1 Overt. 252. Principle approved and applied in distribution of remnants and surpluses in admiralty, The Fanny, 8 F. C. 992. Cited in Acker v. Ledyard, 8 N. Y. 63, applying the principle in holding that sheriff may protect himself against hostile claimants to execution moneys by paying into court; Clerk's Office v. Allen, 7 Jones L. 158, holding that court may order application of plaintiff's execution money in sheriff's hands, to payment of his costs. Cited approvingly, First, etc., Bank v. Hanchett, 126 Ill. 505, 16 N. E. 909; Harding v. Stevenson, 6 Harr. & J. 267; Dennison v. Circuit Judge, 37 Mich. 284; Jones v. Jones, 1 Bland Ch. 461, 18 Am. Dec. 342, and Briggs v. Planters' Bank, 1 Freem. Ch. 585, holding sheriff cannot be required to return moneys into another court than that of the execution; Stebbins v. Walker, 14 N. J. L. 93, 97, 100, 25 Am. Dec. 501, 505, 508, remarking that sheriff may pay money over where no conflicting claims, but is entitled to protect himself by paying it into court; Williams v. Rogers, 5 Johns. 167, remarking that surplus moneys of defendant in execution in sheriff's hands might be subjected to a second execution. Dewey v. White, 65 N. C. 228, arguendo.

Miscellaneous.— Distinguished in Williamson v. Ringgold, 4 Cr. C. C. 59, F. C. 17,755, as not in point on question of replevin. Cited in Baker v. Allen, 2 Overt. 176, on point that regularity of summary proceedings ought to be favored in appellate court.

1 Cr. 137–180, 2 L. 60, MARBURY v. MADISON.

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Jurisdiction of Supreme Court.— Since affirmative words must often be understood as implying a negative, the grant of original jurisdiction to the Supreme Court contained in the Constitution, implies that its original jurisdiction shall be restricted to the constitutional grant; and an act of congress authorizing an additional original jurisdiction to issue mandamus and other writs, is pro tanto void. So also it seems that the grant of original jurisdiction in the

specified instances implies a prohibition against the concurrent exercise of any of that jurisdiction by other courts, pp. 173–176.

As has been seen above the Supreme Court held in this case that its original jurisdiction could not be enlarged by congress. Marbury v. Madison has been deemed to have "settled this construction of the Constitution * * * and no one who has examined the subject now questions it." Florida v. Georgia, 17 How. 505, 509, 15 L. 199, 201. See also Harrison v. Nixon, 9 Pet. 510, 530, 9 L. 211, 218; U. S. v. New Bedford Bridge, 1 Wood. & M. 440, F. C. 15,867; California v. Southern Pacific Co., 157 U. S. 261, 39 L. 695, 15 S. Ct. 604; Jim v. State, 3 Mo. 147, 149; Ex parte Vallandigham, 1 Wall. 252, 17 L. 593; Virginia v. Rives, 100 U. S. 327, 25 L. 672. And if not by congress then not by the courts themselves. Accordingly it has been held that certiorari would not issue from it to review proceedings of a military commission ordered by a general officer of the United States army. Ex parte Vallandigham, 1 Wall. 252, 17 L. 593. And that parties may not come in as intervenors when a prize cause is before the Supreme Court, who were not parties below, the Supreme Court having no original jurisdiction in prize causes. The William Bagaley, 5 Wall. 412, 18 L. 591. And in a more recent case the proposition is relied on in denying the original jurisdiction of the Supreme Court in a suit between a State and citizens of the same as well as of a foreign State. California v. Southern Pacific Co., 157 U. S. 261, 39 L. 695, 15 S. Ct. 604. This fact has also been pointed out as one of the peculiarities of the Supreme Court in a case discussing the limited character of the Federal jurisdiction and holding that a Federal criminal indictment must be sustainable by the provisions of Federal law. It is also made the basis for the proposition that it is incompetent for the Supreme Court upon motion in a mandamus proceeding pending before it on appeal, to substitute the name of a new incumbent as defendant in place of that of his predecessor in office. U. S. v. Boutwell, 17 Wall. 609, 21 L. 722, 8 MacA. 177, 178.

Jurisdiction of the Supreme Court to issue mandamus.— A further and most important consequence of this rule that the original jurisdiction of the Supreme Court may not be enlarged is the fact that the Supreme Court is thus cut off from power to issue the prerogative writs except as incident and auxiliary to the exercise of a jurisdiction already otherwise acquired. It can, therefore, only issue mandamus in the exercise of original jurisdiction in the few cases "where a State or ambassador or other public minister, or a consul or a vice-consul is a party," since it is only in these cases that it has original jurisdiction at all. Virginia v. Rives, 100 U. S. 327, 25 L. 672. These restrictions on the power to issue mandamus were specifically decided in Marbury v. Madison, and the citations concerned therewith are, therefore, more numerous. As to the proposition that the Supreme Court has

no jurisdiction to issue mandamus in the exercise of its original jurisdiction, except as noted above, there seems to have been no subsequent diversity of opinion. Apparently but one other case has reached the Supreme Court upon this question. McCluny v. Silliman, 2 Wheat. 370, 4 L. 263. Marbury v. Madison has "ever since been accepted as fixing the construction of this part of the Constitution." Ex parte Yerger, 8 Wall. 97, 19 L. 336. See also Riggs v. Johnson Co., 6 Wall. 188, 18 L. 774; Ex parte Newman, 14 Wall. 165, 20 L. 879; U. S. v. Boutwell, 17 Wall. 609, 21 L. 722.

Jurisdiction of inferior Federal courts in the matter of mandamus and other writs.— There has, however, been considerable litigation in the settlement of other phases of the question. It was early decided that the Circuit Courts of the United States were similarly without power to issue mandamus to executive officers, M'Intire v. Wood, 7 Cr. 504, 3 L. 420; M'Clung v. Silliman, 6 Wheat. 604, 5 L. 341; Van Antwerp v. Hulburd, 7 Blatchf. 426, 433, F. C. 16,826; State ex rel. Attorney-General v. Cunningham, Secretary of State, 81 Wis. 503, 51 N. W. 736; except in the exercise of a jurisdiction already otherwise acquired — as for instance, to compel county officers to levy a tax to pay railroad bonds, it having been duly decided that the bonds were a valid obligation and this the proper remedy. Riggs v. Johnson Co., 6 Wall. 188, 18 L. 774. But much of the effect of this ruling was counteracted by the further holding of another early case, that the jurisdiction of the Circuit Court for the District of Columbia is more extensive. And it is well settled that that tribunal and its successor the Supreme Court for the district, may issue mandamus to officers of the executive department of the government to compel the performance of mere ministerial duties. The leading case arose upon a petition for a mandamus to the postmaster-general to compel him to credit applicants with certain sums of money on mail contracts as provided by special act of congress. The Circuit Court for the District of Columbia took jurisdiction and ordered the mandamus to issue. Upon appeal this decision was affirmed though not without vigorous dissent on the part of three members of the court. The cases holding that the Circuit Courts in the several States had no jurisdiction to issue mandamus except in the exercise of a jurisdiction already otherwise acquired, were distinguished upon the ground that congress had not conferred upon them all of the judicial power of the United States as it had upon the Circuit Court for the district; and the decision was rested mainly upon the ground that as the common law of Maryland passed with the ceded territory and continued a part of the law of the District of Columbia, this law, unless repealed in some way, continued in force and gave a right to the remedy of mandamus wherever such a right existed at common law. Kendall v. U. S., 12 Pet. 617, 618, 621, 651, 9 L. 1218, 1219, 1231; affirming U. S. v. Kendall, 5 Cr. C. C. 163, 175, 183, 187, 190, 259, F. C. 15,517. See also State ex rel. v. Cunningham, 81 Wis.

503, 51 N. W. 736. Mandamus and the other State writs have issued from that court to the executive officers of the Federal government in a great variety of cases, which it is not necessary to note at greater length in this connection.

Supreme Court may mandamus inferior Federal courts.— But although the decision in the leading case frustrated the intention of congress to confer upon the Supreme Court power to mandamus executive officers of the United States, the prohibition of the Constitution was held to offer no impediment to the issuance of the writ to other Federal courts. And this, because cases in which mandamus issues to such courts are cases involving the exercise of appellate and not original jurisdiction. Ex parte Crane, 5 Pet. 200, 8 L. 96; Ex parte Newman, 14 Wall. 165, 20 L. 879; Virginia v. Rives, 100 U. S. 327, 25 L. 672. The citations do not lead us into an extensive discussion of the circumstances under which mandamus issues in accordance with the principles and usages of law to lower courts. In one of the citations it issued to compel a judge to sign a bill of exceptions. Ex parte Crane, 5 Pet. 189, 8 L. 92. And in another to the Federal Circuit Court at the instance of the Virginia State court to compel the removal of a cause of which the Federal court had improperly taken cognizance, into the State tribunal. Virginia v. Rives, 100 U. S. 313, 25 L. 667. But it will not issue to control the discretion of a lower court. Ex parte Newman, 14 Wall. 166, 20 L. 879. In that case Mr. Justice Clifford, speaking for the court, thus states the rule: "Applications for mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the causes, refuses to render judgment or enter a decree in the case; but the principles and usages of law do not warrant mandamus to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act, or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy." 14 Wall. 152, 165-166, 20 L. 879. In a learned opinion in Virginia v. Rives, 100 U. S. 313, 329, 25 L. 673, Mr. Justice Field also enters into a discussion of this point and holds that "It is well settled that the writ of mandamus will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction and

there is no other remedy. 'It issues,' says Blackstone, 'to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of all those judicial or ministerial powers with which the crown or the legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice.' 3 Bl. Com. 110." Accordingly it was there held the proper remedy to reinstate the jurisdiction of a State court where a Federal Circuit Court had improperly allowed a removal.

Jurisdiction of the Supreme Court to issue habeas corpus, etc.—Although concerned primarily with the question of jurisdiction to issue mandamus, the reasoning of the leading case extends equally to the writ of habeas corpus; and the issuance of that writ by the Supreme Court, except in those cases in which it has original jurisdiction, must be justified as an exercise of appellate jurisdiction, Ex parte Bollman, 4 Cr. 100, 106, 2 L. 563, 565; Ex parte Watkins, 7 Pet. 572, 8 L. 788; In re Matter of Metzger, 5 How. 191, 12 L. 111; In re Kaine, 14 How. 119, 128, 14 L. 351, 355; Ex parte Wells, 18 How. 317, 15 L. 426; Ex parte Yerger, 8 Wall. 97, 19 L. 336; Ex parte Virginia, 100 U. S. 341, 25 L. 677; Ex parte Clarke, 100 U. S. 408, 25 L. 728; In re McDonald, 16 F. C. 25. It has, however, uniformly been held that the issuance of this writ does involve an exercise of appellate jurisdiction. "It is a revision of a decision of an inferior court by which a citizen has been committed to jail," observed Chief Justice Marshall in one of the earliest of these cases; "It has been demonstrated at the bar that the question brought forward on habeas corpus is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated and may be decided in different courts. The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature." Ex parte Bollman, 4 Cr. 101, 4 L. 563. In a later case Mr. Justice McLean was of opinion that "there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus," In re Metzger, 5 How. 191, 12 L. 111; though he makes no question but that such was the settled rule of law. The case decided that the writ would not issue to inquire into an order of commitment made by a district judge at chambers, as the court had no appellate supervision over such an order; but the authority of the case "has been much shaken." In re Kaine, 14 How. 103, 14 L. 345; Ex parte Yerger, 8 Wall. 85, 19 L. 332; Ex

parte Virginia, 100 U. S. 341, 25 L. 677. And it seems to be regarded as sporadic and not in harmony with the general tendency of the cases which rather incline to an extension of the jurisdiction to issue habeas corpus to all commitments made by officers exercising any part of the judicial power of the United States.

In a number of cases habeas corpus has issued to the Circuit Courts. Ex parte Wells, 18 How. 317, 15 L. 426; Ex parte Watkins, 7 Pet. 572, 8 L. 788; Ex parte Yerger, 8 Wall. 85, 19 L. 332; Ex parte Clarke, 100 U. S. 408, 25 L. 728. The writ of habeas corpus may even issue in cases not made cognizable by writ of error, Ex parte Clarke, 100 U. S. 408, 25 L. 728; or appeal, Ex parte Yerger, 8 Wall. 85, 19 L. 332. It has also issued "in favor of liberty" where error would admittedly have been a more appropriate method of procuring a review. Ex parte Virginia, 100 U. S. 343, 25 L. 678. And it has been held that a writ issued returnable to a justice of the Supreme Court, might be tried by the whole court if it was a proper case for the exercise of its appellate jurisdiction. Ex parte Clarke, 100 U. S. 408, 25 L. 728.

In denying the argument that certiorari is coextensive with mandamus, the Supreme Court of New Jersey remarked in an early case that while the right to mandamus the secretary of State was decided by the leading case, it could scarcely be held that certiorari would have been a proper method of reviewing the action of that officer, had he erroneously granted Mr. Marbury's commission. Whitehead v. Gray, 12 N. J. L. 36, 40.

The original jurisdiction of the Supreme Court not exclusive — dictum of the leading case qualified.— As has been seen above, Marbury v. Madison settled the proposition that the original jurisdiction of the Federal Supreme Court cannot be enlarged by congress. The reasoning of the case goes further, however, and denies the right of congress to give appellate jurisdiction where the Constitution confers original.

This second proposition the courts have had to modify and explain. A case came before the Supreme Court, on appeal, a few years after the decision in Marbury v. Madison, in which the State of Virginia and one of its citizens were parties, the question at issue involving the construction of an act of congress. It was urged that as the Supreme Court had original jurisdiction in cases in which a State was a party, this excluded its appellate jurisdiction. But the court held otherwise, and decided that the original jurisdiction of the Supreme Court in cases in which a State was a party, referred only to those cases in which the Supreme Court obtained jurisdiction by reason of the character of the parties, and not at all to those cases in which the Federal jurisdiction attached, because the question involved arose under the Constitution, treaties or laws of the United States. Referring to the Constitution, based upon Marbury v. Madison, the court, speaking again by Chief Justice Marshall, observed: "The truth is that where the words confer

only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

"It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would in some instances defeat the obvious intention of the article. * * * The court may imply a negative from affirmative words where the implication promotes, not where it defeats the intention." Cohens v. Virginia, 6 Wheat. 397-398, 5 L. 289, 11 Wheat. 472, n., 6 L. 523. Again, speaking directly of the leading case, the chief justice observes: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Ibid., pp. 399, 400, 5 L. 290.

Further modifications in later cases.— Later cases have not, however, left even this much of the doctrine of an exclusive original jurisdiction. The judiciary act of 1789 invested the District Courts of the United States with "jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls." And this provision was early declared constitutional, notwithstanding the fact that the Constitution confers upon the Supreme Court original jurisdiction. Gittings v. Crawford, Taney, 1, F. C. 5,465. See also U. S. v. Ravara, 2 Dall. 297, 1 L. 388; State v. De La Foret, 2 Nott & McC. 217, 224; Davis v. Packard, 7 Pet. 284, 8 L. 687, 11 Wheat. 472, n., 6 L. 523; Bors v. Preston, 111 U. S. 258, 28 L. 421, 4 S. Ct. 410; contra, Com. v. Kosloff, 5 Serg. & R. 545, 549. In Gittings v. Crawford, Chief Justice Taney observed, after an elaborate review of the authorities, that "the true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter." Taney, 1, 9, F. C. 5,465. And the following significant language is used by Chief Justice Waite in Ames v. Kansas: "In view of the practical construction put on this provision of the Constitution by congress at the very moment

of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate we are unwilling to say that the power to make the grant does not exist." 111 U. S. 469, 28 L. 490, 4 S. Ct. 447.

Jurisdiction of State courts not barred.— Neither does the grant to the Supreme Court of original jurisdiction in cases in which a State is a party preclude the Supreme Court of a State from taking jurisdiction of a case between a State and a citizen of another State. Delafield v. State of Illinois, 26 Wend. 215; affirmed, 2 Hill, 168. Nor does the fact that the Supreme Court is given appellate jurisdiction in cases in which the United States is a party preclude the United States from coming in as a party in an original controversy between two States before the Federal Supreme Court. Florida v. Georgia, 17 How. 505, 509, 15 L. 199, 201.

It thus appears, that the proposition that the original jurisdiction of the Supreme Court is exclusive practically fails. This conclusion, however, in nowise affects the decision in Marbury v. Madison, though it fixes important limitations upon the language used — limitations which Chief Justice Marshall was himself the first to point out.

The interpretation of jurisdictional questions in the State courts — principles of the leading case applied.— Not unnaturally the State courts have upon occasion found a helpful analogy in Marbury v. Madison when confronted with similar jurisdictional questions in the interpretation of their own Constitutions and laws. Thus, in deciding as to the right to issue mandamus and habeas corpus in the exercise of their original jurisdiction, the highest courts of the States have in several instances resorted to the reasoning and followed the conclusions set forth in the leading case. The provision of the first Constitution and statute of California upon the subject of the State writs was identical with that of the national Constitution and laws, and the State court accordingly followed Marbury v. Madison in holding that mandamus to an officer of another department of the government was an exercise of original jurisdiction and inadmissible, but that it might properly be directed to a judge of a subordinate court. People v. Turner, 1 Cal. 146, 52 Am. Dec. 298. Subsequently, this law was changed, and under the second and third Constitutions the court had power to issue the prerogative or State writs in original causes. In thus deciding the

construction of the third Constitution the court was divided, one of the judges holding that it was intended to authorize the issuance of these writs only in aid of the court's appellate jurisdiction, and citing the leading case to the point that mandamus is often used as an incident of appellate jurisdiction. Hyatt v. Allen, 54 Cal. 353, 364. Again it is cited in several cases to the point that the right to issue the common-law writs is one of the inherent powers of an appellate court, and, therefore, that the constitutional grant of power to issue them must mean a grant of such power in the exercise of original jurisdiction. Wheeler v. N. C. Irrigation Co., 9 Colo. 251, 11 Pac. 104; State v. Archibald, 5 N. Dak. 362, 66 N. W. 236. And see Attorney-General v. R. R. Co., 35 Wis. 515.

Elsewhere it has been held that the mere grant of appellate jurisdiction to a court would "give it a right to issue the common-law writs," and that as appellate jurisdiction "revises and corrects" a cause in a lower court, mandamus could issue in that limited class of cases only. Ex parte White, 4 Fla. 171; Jared v. Hill, 1 Blackf. 155, 156, n. See, also, Fannin v. Hightower, 9 Tex. Civ. App. 298, 29 S. W. 190; Dobson v. Westheimer and others, 5 Wyo. 36, 36 Pac. 626. By a later Constitution the Supreme Court of Florida was given this right. State v. Gleason, 12 Fla. 190, 206. That courts of appellate jurisdiction have no power to issue mandamus in original causes was deemed by the Supreme Court of Iowa to have been settled by Marbury v. Madison, and accordingly it was held that the court had not the power to mandamus the board of election commissioners. U. S. ex rel. v. Comrs. of Dubuque Co., Morris (Ia.), 36. To the same effect is a Virginia case. Sharpe v. Robertson, 5 Gratt. 636. Somewhat similarly the Texas Court of Civil Appeals, having appellate jurisdiction only, refused to mandamus a lower court to proceed with the trial of a cause, holding that as the refusal was interlocutory and not appealable, mandamus in such a case would be an exercise of original jurisdiction. Fannin v. Hightower, 9 Tex. Civ. App. 298, 29 S. W. 190. But the Supreme Court of Texas has affirmed the validity of a statute providing that the Court of Civil Appeals might certify to it certain questions for adjudication without first deciding upon them; although Stayton, C. J., dissenting, relied upon the leading case to the contrary. Darnell v. Lyon, 85 Tex. 470, 22 S. W. 311. And the Supreme Court of Wisconsin, in an early case, held that it had no original jurisdiction to issue a mandamus under a Constitution conferring upon it appellate jurisdiction only, even though another section gave it power to issue the common-law writs. State ex rel. v. Farwell, 3 Pinney, 393, 415. Later, however, the court was given express power to issue the common-law writs in all cases appellate and original. Attorney-General v. Blossom, 1 Wis. 317, 331. See, generally, Taylor v. Governor, 1 Ark. 23.

The proposition that courts of appellate jurisdiction have no power to issue writs in original causes, merges itself in the broader

proposition that a court of purely appellate jurisdiction may not exercise original jurisdiction at all. To this point Marbury v. Madison is cited in several cases. Ex parte Floyd, 40 Ala. 120; Chumasero v. Potts, 2 Mont. 242, 292; Daniel v. Ct. of Warren, 1 Bibb (Ky.), 496, 500.

Appellate jurisdiction.— It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. The issuance of mandamus by the Supreme Court against the secretary of State would be the exercise of original not appellate jurisdiction, p. 175.

The proposition that affirmative words are often to be understood in an exclusive sense applied in construction of State Constitutions.— The influence of the principle laid down in the leading case to the effect that affirmative words must often be understood in a negative or exclusive sense in order to carry out the intended meaning, is apparent in other connections than in questions arising out of the construction of the national Constitution by the Federal courts. It has been applied in the construction of provisions of the State Constitutions. Thus the Constitution of Florida conferred upon the Supreme Court power to issue writs of prohibition, and the same power upon the County Court when necessary to the complete exercise of its jurisdiction. Under the foregoing rule this was held to exclude the right of the County Court to issue the writ as part of its original jurisdiction. Singer Mfg. Co. v. Spratt, 20 Fla. 125. The organic law of Nebraska extends the original jurisdiction of the Supreme Court to mandamus, quo warranto and habeas corpus, and this was held to negative original jurisdiction to issue prohibition. State v. Hall, 47 Neb. 583, 66 N. W. 643. The Constitution of Nevada conferred upon the Supreme Court appellate jurisdiction in a number of cases, and the court followed Marbury v. Madison in holding this an exclusion of original jurisdiction. Lake v. Lake, 17 Nev. 238, 239, 30 Pac. 880. To the same effect was a decision of the Supreme Court of New Mexico in a case involving the construction of the organic law of that territory, and the court held that it had not power to issue mandamus in original causes. Territory v. Ortiz, 1 N. Mex. 13. The Constitution of Rhode Island vested the judicial power in the courts of the State, and this was held under the above rule to imply a prohibition against the exercise of such power by the legislature. A law setting aside certain judgments was, therefore, declared invalid. Taylor v. Place, 4 R. I. 357, 358. The Supreme Court of Utah has also invoked this rule in holding that the organic law by implication prohibited to it the issuance of injunction in original proceedings. Godbe v. Salt Lake City, 1 Utah, 78. And the Supreme Court of Colorado Territory recognized and followed this principle in holding that the organic law did not authorize a legislative provision for appeals from Probate to District Courts. Cass v. Davis, 1 Col. 48.

Various other applications of the principle.— This rule of construction has also been applied in other connections. It has been held that a statute providing for the review of a case by appeal impliedly excluded all other means of bringing it before an appellate tribunal. Thompson v. Lea, 28 Ala. 459, 463. A court rule permitting a rehearing after decree entered, within ten days after such entry, prohibits such action at any later time. The Illinois, 1 Brown Adm. 13, 30, F. C. 13,602. The exemption of certain things from the operation of a statute of limitation during a certain period, also carries the implication that the statute is to operate fully as to all matters not excluded. Coleman v. Holmes, 44 Ala. 124, 129, 4 Am. Rep. 121. When a statute requires a judge to mark all requests for charge to a jury "given" or "refused," it is inadmissible for the judge to insert qualifying words. Lyon v. Kent, 45 Ala. 656, 665. Finally the rule has been invoked in holding that a statute granting a certain remedy against the official bond of a sheriff, prohibits and repeals a certain other remedy granted by an earlier law. Shaeffer v. Jack, 14 Serg. & R. 429.

The cases discussed above, in which mandamus and habeas corpus have issued from the Supreme Court, serve in part to illustrate this definition of appellate jurisdiction, and it seems well settled on the authority of Marbury v. Madison that mandamus or habeas corpus to lower courts, awarded according to the usages and practices of law, is generally an exercise of appellate jurisdiction. See, in addition to the cases discussed above, Ex parte White, 4 Fla. 165, 171; People ex rel. v. Bacon, 18 Mich. 247, 253; People ex rel. v. Spiers, 4 Utah, 387, 10 Pac. 610; State v. Bermudez, 14 La. 478, 482. Though an early case falls into the error of holding that mandamus can never be issued by a court of appellate jurisdiction at all. Howell v. Crutchfield, Hemp. 100, F. C. 6,778a.

Various applications of the definition.— In addition there are other cases among the reports in which this definition has been applied. Thus it has been held by a divided court that the issuance of an injunction by the Supreme Court in a case where the Circuit Court was divided in opinion as to its propriety, is an exercise of appellate jurisdiction. Mr. Justice Catron dissenting, defined appellate jurisdiction as meaning "to re-examine and to reverse or affirm the judgment, sentence, order or decree of an inferior court — to pass on that which has been adjudged." U. S. v. Chicago, 7 How. 197, 12 L. 666. A revision of the acts of an officer not exercising a part of the judicial power of the United States is not an exercise of the appellate jurisdiction of the national Supreme Court. In re Kaine, 14 How. 119, 128, 14 L. 351, 355. It is not sufficient that there has been a decision by some officer, but it must be one with judicial authority and acting in a judicial capacity. Dunn v. State, 2 Ark. 229, 257, 35 A. D. 70. An act providing for an appeal from the decision of a county board of clerks authorized to appraise

taxes, to a Supreme Court having only appellate jurisdiction, is, therefore, unconstitutional, since such a board exercises no part of the judicial power. Auditor v. Atchison, etc., R. R., 6 Kan. 500, 506, 7 Am. Rep. 578. And to mandamus a board of penitentiary inspectors would be to exercise an original jurisdiction. Ex parte Allis, 12 Ark. 105. Courts of law do not themselves always and in all jurisdictions act in a judicial capacity; but it is only when they are so acting that mandamus to control those acts is an exercise of appellate jurisdiction. Lavergne's Heirs v. Elkins' Heirs, 17 La. 227. Again, where the tribunal to be mandamused is not properly a subordinate court, but a distinct tribunal, such as a court of chancery, mandamus from the highest law court has been held original and not appellate jurisdiction. Sharpe v. Robertson, 5 Gratt. 636. And it has been held in reliance upon this principle, that it would not be an exercise of appellate jurisdiction to consider a cause brought up by appeal from a pro forma decree entered below by consent. Darden v. Lines, 2 Fla. 572.

It would be error for a court having only appellate jurisdiction to allow some one not a party below to prosecute a writ of error, Arnett v. McCain, 47 Ark. 412, 1 S. W. 873; or to substitute upon a mandamus the successor in office of the original defendant. U. S. v. Boutwell, 17 Wall. 609, 21 L. 722, 3 MacA. 177, 178. But it is not an exercise of original jurisdiction to mandamus a subordinate judge to restore certain attorneys to the right to practice, of which they had been deprived. People v. Turner, 1 Cal. 143, 146, 147, 52 A. D. 298. Or to compel a lower court to take jurisdiction and proceed in a proper case. State v. Bermudez, 14 La. 478, 482. A court which passes upon the propriety of the action of an inferior tribunal which dismissed a suit on the ground that it had no jurisdiction, is exercising an appellate and not an original jurisdiction. Nichol v. Patterson, 4 Ohio, 200, 203.

Other matters of Federal jurisdiction on which Marbury v. Madison is authority.— The leading case has also had some further influence as authority for general points in the matter of the jurisdiction of Federal courts. Thus it is cited to the point that for the appellate jurisdiction of the Supreme Court to attach the Constitution must give a capacity to take and an act of congress supply the requisite authority. Daniels v. R. R. Co., 3 Wall. 254, 18 L. 225. And again, to the point that the judicial power of the United States cannot be enlarged by congress. Ex parte Clarke, 100 U. S. 408, 25 L. 728. It is cited in the Circuit Court to the point that Federal courts are courts of limited jurisdiction, which must be exercised in the mode pointed out by the Constitution; that acts of congress directing differently are void; and that the enumeration of cases in which the Federal courts may act is exclusive of all others. Baker v. Biddle, Baldw. 394, 406, F. C. 764. And in holding a case arising under the national bankruptcy laws, removable to the Federal court,

it is cited as authority for the proposition that a case or suit involving a question under the Constitution, treaties or laws of the United States, is cognizable in the courts of the nation. Connor v. Scott, 4 Dill. 242, 246, F. C. 3,119. The Supreme Court of New Hampshire also cites Marbury v. Madison to the point that cases arising under the laws of the United States are "such as grow out of the legislation of congress within the scope of its constitutional authority, whether they constitute the right, privilege or claim, or protection or defense of a party in whole or in part by whom they are asserted." Beavins' Petition, 33 N. H. 89, 91. In this case the court upheld a law providing that naturalization proceedings should be cognizable only in the Court of Common Pleas.

Miscellaneous points.— There remain under this topic a few citations which are of a general or miscellaneous nature and illustrate no one of the points upon which the leading case lays especial emphasis. In holding that an action appealed to an appellate court might not be remanded to chancery again, the Supreme Court of Alabama cites Marbury v. Madison to the point that it had no inherent power to grant such a motion. Sanders v. Cabaniss, 43 Ala. 190. Marbury v. Madison is cited to the point that appellate jurisdiction revises and corrects proceedings in a cause already instituted, in a case holding that a law prohibiting appeals in certain actions under $25 did not conflict with the constitutional provision that the Supreme Court was to have appellate jurisdiction of all cases — it was pointed out that there was still a method of review by certiorari. Tierney v. Dodge, 9 Minn. 170. Another case cites it as a general authority on questions of jurisdiction, and yet another as defining the jurisdiction of the Federal courts. Connor v. Scott, 4 Dill. 246, F. C. 3,119; White v. Kendrick, 1 Brev. (S. C.) 473. In holding a provision of the judiciary act of 1789 void, the Supreme Court of Virginia remarked that the national Supreme Court had itself found the act invalid in another particular, citing Marbury v. Madison. Hunter v. Martin, 4 Munf. 28. Again, the leading case is cited as illustrating the point that there is no general principle forbidding the grant of additional jurisdiction to a court created by a fundamental law, and that such a principle must be inferred from something else in the Constitution indicating an intention not to allow the increased jurisdiction. Ex parte Towles, 48 Tex. 452, opinion of Gould, J. In holding that an act of the legislature, authorizing the Court of Civil Appeals to certify questions to the Supreme Court for decision was invalid, because the Constitution gave to the Supreme Court only appellate jurisdiction, and this was not an exercise of appellate jurisdiction, Stayton, C. J., in his opinion in the foregoing case, quotes at length from Marbury v. Madison in defining appellate jurisdiction. And again, the Mississippi Supreme Court remarked the limitations upon the original jurisdiction of the Federal Supreme Court as decided in

Marbury v. Madison in holding a grant of original jurisdiction by the legislature of that State, not invalid. Blanchard v. Buckholt, Walker (Miss.), 64.

Mandamus.— To entitle an applicant to the writ, he must have (1) a clear legal right to have the thing done which he thus seeks to compel, and (2) no other adequate legal remedy. Mandamus may issue even against high executive officers to compel the performance of ministerial duties, imposed by law, and involving the exercise of no discretion; for it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. And upon the same principle it may issue against an inferior court in ministerial matters, pp. 169-173.

Mandamus defined.— Before proceeding to a discussion of the point more particularly involved, viz.: The right to mandamus an executive officer, it is in order to note briefly some of the citations which serve to outline the general nature of the writ of mandamus. It has been defined as "a command issuing from a common-law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." High on Extraordinary Legal Remedies, § 1. The definitions of Lord Mansfield and of Blackstone, quoted in the leading case, are also to be found in the citations, the former credited by one court to Marbury v. Madison. Harris v. State, 2 Ga. 292.

Conditions prerequisite to its issuance — the legal right.— The leading case lays down the principle, that in order to entitle an applicant to the writ two things must concur: First, a clear legal right to have the thing done, to compel the doing of which the writ is sought; and second, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced. Ex parte Mackey, 15 S. C. 336. See also Wood on Mandamus, §§ 68, 84, 89, 110; Brown v. Bragunier, 79 Md. 236, 29 Atl. 8; State v. Larrabee, 3 Pinney, 168; Baker v. Johnson, 41 Me. 20; State v. Holliday, 8 N. J. L. 206, 208. If, therefore, the statute conferring the right be unconstitutional, this may be argued in defense and will defeat the application. Hoover v. McChesney, 81 Fed. Rep. 483; Van Horn v. State, 46 Neb. 82, 64 N. W. 372; State v. Auditor, 47 La. Ann. 1694, 18 So. 751. In accordance with this rule, also, an appellate court has declined to command a subordinate tribunal to strike out a certain portion of a decree which did not alter its legal effect and so interfered with no specific right of the applicant, State ex rel. v. Larrabee, 3 Pinney, 166, 168; or to man-

damus a road commission to grant petitioner a ferry license, since it did not appear that he owned the land on both sides of the stream as required by statute. State v. Com. of Roads, 3 Porter, 416. And this doctrine means not only that he must show a clear duty on the part of the defendant to perform the act sought to be compelled, but, also, in general, some personal or special interest of his own in the subject-matter, as a foundation of his right to the relief. High on Extraordinary Legal Remedies, § 431. To this rule, however, there is an exception where the duty sought to be enforced is a public one, and the petitioner need not show the same degree of interest in the performance of this duty as is required where the relief is sought merely for the protection of private rights. In general it is sufficient in such a case for the petitioner to show that he is a citizen and as such interested in the execution of the laws. Wise v. Bigger, 79 Va. 273; State v. Ware, 13 Or. 384, 10 Pac. 887. A fortiori it is competent for any one specially interested in the performance of a public duty to apply for mandate to compel its observance — as for instance, for a telephone company to mandamus an electric railway to maintain guard wires above its trolleys as required by city ordinance. State ex rel. v. Janesville Str. R. R., 87 Wis. 79, 41 Am. St. Rep. 28, 57 N. W. 972.

Absence of other adequate remedy.— The second half of the proposition, viz., that there must be no other adequate remedy existent, is also illustrated by the citations, and is unquestioned law. Upon this and other grounds mandamus to a State auditor to compel payment of a claim was refused, there being a plain, speedy and adequate remedy, so the court declared, in an application to the legislative assembly. State ex rel. v. Kenney, 9 Mont. 389, 24 Pac. 97. To the same effect is Reeside v. Walker, 11 How. 292, 13 L. 701. So, also, mandamus to a State governor to issue a commission to office has been refused upon the ground, among others, that the claimant had a remedy by legal contest under a State statute. Brown v. Bragunier, 79 Md. 236, 29 Atl. 8. If it appears that resort to the ordinary form of relief would cause delay, and consequent injury to the complainants' rights, this will sometimes justify the exercise of this form of extraordinary relief. Hatch v. City Bank, 1 Rob. (La.) 495. In general, mandamus is not the proper method of trying title to an office against one actually in possession under color of law, but rather quo warranto proceedings which serve at once to remove the incumbent in a proper case, and install the proper officer. French v. Cowan, 79 Me. 426, 10 Atl. 340; Brown v. Turner, 70 N. C. 93, 106; Supervisors v. O'Malley, 46 Wis. 59, 50 N. W. 525. But one legally elected to an office may mandamus the incumbent, so it has been held, to deliver over the office and books to him, on the ground that quo warranto would merely procure defendant's removal and would not be adequate. Harwood v. Marshall, 9 Md. 83, 98. And see Conklin v. Cunningham, 7 N. Mex.

466. And elsewhere it has been allowed against one who had no color of title to the office in favor of one with prima facie title. State v. Archibald, 5 N. Dak. 362; and see Manor v. State ex rel., 149 Ind. 318, 49 N. E. 163. So, also, injunction may be a proper remedy to prevent one holding an office from being forcibly removed. Butler v. White, 83 Fed. Rep. 582, 588.

Moreover, courts will not grant the writ unless it appears that it would accomplish the desired purpose. Accordingly an application for mandamus to a board of election canvassers to compel them to count certain ballots was refused by the Supreme Court of South Carolina, as it appeared that the board would go out of existence before the mandate could be granted. Ex parte Mackey, 15 S. C. 336. And see Brown v. Bragunier, 79 Md. 236, 29 Atl. 8.

In the code States the cases in which mandamus is admissible are generally provided by statute, the scope of the enactments being sometimes more sometimes less extensive than at common law. Thus mandamus is admissible in Louisiana, not only where there is no adequate remedy, but also where the legal remedy is likely to produce great delay or defeat the ends of justice. Hatch v. City Bank, 1 Rob. (La.) 497.

Mandamus may issue against an executive officer to compel performance of ministerial duty involving no discretion.— The first case calling definitely for a decision upon this question of the right to mandamus an executive officer arose in 1837. As has been seen above (p. 11), the courts early decided that the Circuit Court for the District of Columbia was empowered to issue the writ in original causes. And this case came before the Supreme Court upon appeal from a judgment of that tribunal awarding mandamus against the postmaster-general. One Stokes and others, having certain contract claims against the post-office department, payment of which was refused, applied to congress for relief, and succeeded in procuring the passage of an act of congress, providing, among other things, "that the solicitor of the treasury do examine into and adjust the said claims therein specified, and that the postmaster-general credit said contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them on account of such service or contract." In accordance with this act the solicitor of the treasury did make an award which, however, the postmaster-general refused to credit in full to the relators, as directed by the act, and as recommended by a subsequent senate resolution. In an elaborate opinion the decision below was affirmed and the mandamus allowed. "There are certain political duties imposed upon many officers in the executive department," observed the court, per Thompson, J., "the discharge of which is under the direction of the president. But it would be an alarming doctrine that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured

and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president, and this is emphatically the case where the duty enjoined is of a mere ministerial character." Kendall v. U. S., 12 Pet. 610, 9 L. 1215. And again, "the act required by the law to be done by the postmaster-general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise definite act, purely ministerial, and about which the postmaster-general had no discretion whatever. * * * There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is in every just sense a mere ministerial act," pp. 613, 614, 9 L. 1216. This reasoning was affirmed in Decatur v. Paulding, 14 Pet. 497, 10 L. 559, which was an application for mandamus against the secretary of the navy to compel him to pay certain pension claims. The mandamus was there refused, however, as the act sought to be compelled was held to involve the exercise of discretion, and the judiciary had no power to control an executive officer in an executive duty.

Since the decision of these cases there have been a variety of causes before the national courts involving the question of the power of the court to control and direct certain acts of the executive department; and all recognize and emphasize the doctrine announced by the foregoing cases. "It is elementary law," observed the Supreme Court, per Mr. Justice White in a recent case, "that mandamus will only lie to enforce a ministerial duty, as contradistinguished from a duty that is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in Marbury v. Madison, 1 Cr. 137, and has since been many times reasserted by this court." U. S. ex rel. v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 98. The general principle is more fully stated by Mr. Justice Bradley in another case: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but where they refuse to act in a case at all, or where by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them." U. S. ex rel. v. Black, 128 U. S. 48, 32 L. 357, 9 S. Ct. 14. And the statement of the principle in other cases differs in the wording only, and its authority is well established. See, in particular, Noble v. Union, etc., R. R., 147 U. S. 171, 37 L. 125, 13 S. Ct. 272; Mississippi v. Johnson, 4 Wall. 498, 18 L. 441; Gaines v. Thompson, 7 Wall. 349, 19 L. 64; U. S. v. Schurz, 102 U. S. 395, 26 L. 171; Redfield v. Windom, 137 U. S. 643, 34 L. 814, 11 S. Ct. 199; N. O. Natl. Bank v. Merchant, 18 Fed. Rep. 850; Taylor

v. Kercheval, 82 Fed. Rep. 499; Hoover v. McChesney, 81 Fed. Rep. 482; Cunningham v. Macon, etc., R. R., 109 U. S. 453, 27 L. 994, 3 S. Ct. 297; Houston, etc., R. R. v. Comr., 36 Tex. 411; Brown v. Turner, 70 N. C. 105, 106; Treat v. Middletown, 8 Conn. 247; Ex parte Echols, 39 Ala. 700, 88 Am. Dec. 751; Ex parte Hill, 38 Ala. 485; Dudley v. James, 83 Fed. Rep. 345, 347; Ex parte Reeside, 20 F. C. 458; McElrath v. McIntosh, 16 F. C. 79.

The verdict of the State courts seems to be equally unanimous as to executive officers, other than the State governors themselves. See, in particular, McCauley v. Brooks, 16 Cal. 41; Pacheco v. Beck, 52 Cal. 10; Bledsoe v. Int. R. R., 40 Tex. 537, 556; Bonner v. State, 7 Ga. 482; Swann v. Buck, 40 Miss. 268, 290; Chumasero v. Potts, 2 Mont. 242, 256; State v. Lord, 28 Or. 525, 43 Pac. 478; Howell v. Cooper, 2 Colo. App. 531, 31 Pac. 523; State v. Auditor, 47 La. Ann. 1686, 18 So. 748.

The rule then is that mandamus will only lie when the act sought to be compelled is a mere ministerial duty. The party must, of course, show the lack of other adequate remedy and establish in himself a clear right to the thing sought. So, also, the obligation to perform the duty sought to be enforced, must be both peremptory and plainly defined. The law must not only authorize but require the act to be done. U. S. v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 98; Reeside v. Walker, 11 How. 292, 13 L. 701. And the duty must exist at the time the application for the mandamus is made. U. S. v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 98.

What is a mere ministerial duty.— It is not always easy to decide when an official duty is merely ministerial, imposed by law, and involving the exercise of no discretion, and when it is one which the courts have no right to enforce or control. As was said by Mr. Justice Catron, dissenting in Decatur v. Pauiding, 14 Pet. 518, 10 L. 569: "Any sensible distinction applicable to all cases it is impossible to lay down; such are the refinements and mere verbal distinctions as to leave an almost unlimited discretion to the court." "A ministerial act," in the words of the Supreme Court of Kansas, "is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own opinion concerning the propriety or impropriety of the act to be performed." Martin v. Ingham, 38 Kan. 651, 17 Pac. 168. Most of the duties of an executive officer are not mere ministerial duties. "The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from time to time required to act. If he doubts, he has a right to call on the attorney-general to assist him with his counsel." Decatur v. Paulding, 14 Pet. 515, 10 L. 568, per Taney, Ch. J.

It may safely be affirmed that the courts will control the acts of executive officers only in a clear case; and that the deference due to a co-ordinate department of the government will lead them to indulge every reasonable doubt in favor of the freedom of executive action. One case goes to the extent of asserting that not all ministerial acts may be controlled by mandamus. Redfield v. Windom, 137 U. S. 643, 34 L. 814, 11 S. Ct. 199. And while the proposition seems scarcely tenable, it indicates the reluctance often manifested by the courts in granting mandamus against an executive officer.

There are among the citations numerous other attempts at a definition of ministerial duties. The distinction between ministerial and other acts has been pointed out as follows: "When the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial." Comr. v. Smith, 5 Tex. 479. It is but going over the same ground to say of the duty for whose performance the mandamus is asked tnat it must be "a simple definite duty arising under conditions admitted or proved to exist and imposed by law," Mississippi v. Johnson, 4 Wall. 498, 18 L. 441; or that it must be "clear and indisputable," Knox Co. Comrs. v. Aspinwall, 24 How. 376, 16 L. 735; or that it must be "peremptory and plainly defined," U. S. ex rel. v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 98. And see State v. Lord, 28 Or. 525, 43 Pac. 478; Enterprise, etc. v. Zumstein, 67 Fed. Rep. 1007, 37 U. S. App. 71; State ex rel. v. Meier, 143 Mo. 446, 43 S. W. 307.

Mandamus has been likened to injunction with respect to the propriety of its issuance against an executive officer. "In the one case," said Mr. Justice Miller, in Gaines v. Thompson, 7 Wall. 352-353, 19 L. 65, "the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction." See also Noble v. Union, etc., Co., 147 U. S. 171, 37 L. 125, 13 S. Ct. 272; Enterprise Savings Assn. v. Zumstein, 67 Fed. Rep. 1007, 37 U. S. App. 71; Lane v. Anderson, 67 Fed. Rep. 565; Dudley v. James, 83 Fed. Rep. 349.

The matter can be elucidated further only by illustrations taken from the decided cases. Aside from Kendall v. U. S. and Decatur v. Paulding, supra, which are often referred to as well illustrating the line of demarcation, there are many cases among the citations in which the courts have been compelled to decide whether a given

duty was or was not merely ministerial. The case of U. S. v. Black, 128 U. S. 40, 32 L. 354, 9 S. Ct. 12, offers a further admirable illustration of the difference between executive and ministerial duties. It was there held that the commissioner of pensions, by receiving the application of a pensioner for an increase in his pension, as provided by act of June 16, 1880, by considering it and the evidence in support of it, and by deciding adversely to the petitioner, performed an executive act which the courts have no right to control, either by mandamus or on appeal. If, however, this decision of the commissioner of pensions had been afterwards overruled by the secretary of the interior, and the commissioner had then refused to carry out the command of his superior, then the court declared that mandamus might properly have issued to compel compliance with such command.

The leading case declares the delivery of a judicial commission, duly signed and sealed, to be a mere ministerial duty imposed by law upon the secretary of state. Such also is the duty of the secretary of the interior in delivering over the patent to lands, although he has first to determine by scrutiny of the seal, signatures, etc., that the document is valid and genuine. U. S. v. Schurz, 102 U. S. 395, 399, 402, 26 L. 171, 172, 174. The Supreme Court of California has decided that the governor might be mandamused to perform the ministerial duty of signing a similar patent to certain lands. Middletown v. Low, 30 Cal. 601. And in a Colorado case the writ issued against the same officer for the delivery of a patent for public lands. Greenwood v. Routt, 17 Colo. 169, 31 Am. St. Rep. 294, 28 Pac. 1129. If an executive officer issue an erroneous deed, he may be compelled by mandamus to correct it. McCready v. Sexton, 29 Iowa, 381, 4 Am. Rep. 222. The duty of a secretary of state in placing the great seal of the State upon a commission issued by the governor is also ministerial. State ex rel. v. Crawford, 28 Fla. 476, 508, 511, 10 So. 120, 128, 129. And it has been held that the duty of the same officer in issuing notices for an election is merely ministerial, so that he may be enjoined from issuing such notices under a void apportionment act. State ex rel. v. Cunningham, 81 Wis. 503, 51 N. W. 736. So, also, a secretary of state has been required to count votes for congressman transmitted to him from the various counties, and issue a commission to the candidate receiving the greatest number. Pacheco v. Beck, 52 Cal. 3, 10. This same duty of canvassing a vote cast has been compelled when reposed in the governor, marshal and secretary of state, the court holding that it involved the exercise of no more discretion than adding a column of figures. Chumasero v. Potts, 2 Mont. 256, 292.

The duty of a State auditor or comptroller in drawing warrants upon the State treasurer is often ministerial. So that he may be compelled to issue such a warrant for the payment of the salary of another executive officer, as a secretary of state, Page v. Hardin,

8 B. Mon. 652; State v. Hickman, 9 Mont. 377, 23 Pac. 742; or a district attorney, Swann v. Buck, 40 Miss. 268, 290; or a comptroller, Thomas v. Owens, 4 Md. 189; or a court stenographer's salary, Pickle v. McCall, 86 Tex. 218, 24 S. W. 265; or of an allowed claim, State v. Auditor, 47 La. Ann. 1686, 18 So. 748; and to pay a State printer for work done, there being no dispute as to the amount of the claim. Fish v. Cuthbert, 2 Mont. 593, 605. But the right to compel an auditor by mandamus to issue a warrant upon the State treasurer for the payment of a reward offered has been questioned. State ex rel. v. Auditor, 61 Mo. 263, 268.

The duty imposed upon other officers, such as a State board of education, directed by statute to draw warrants upon the State treasurer for the payment of obligations incurred, is also ministerial in some instances, and may be controlled by mandamus. Granville, etc., Board v. State Bd. of Education, 106 N. C. 83, 10 S. E. 1002. So, also, the governor of a State may be mandamused in the performance of this duty in those jurisdictions where mandamus to that officer is allowed. Cotten v. Ellis, 7 Jones (N. C.), 550.

Sometimes also the act of the register of a government land office in preparing and signing the patents for public lands may be enforced by mandamus. This is true where all necessary conditions have been complied with by the claimant. State ex rel. v. Nicholls, 42 La. Ann. 223, 7 So. 744. In a Texas case this duty was compelled where the grant of land was to a railroad company upon condition that a certain portion of its road was first to be completed, though the court was divided in opinion and the leading case was called in question by the dissentients. Kuechler v. Wright, 40 Tex. 632, 651, 652, 659, 685, 689. And see Houston, etc., R. R. v. Comr., 36 Tex. 382, 411. But it has been held by Mr. Justice Miller at circuit, that the duty of a register and receiver of the land department in acting upon claims to pre-emption of land is not a mere ministerial duty. "They have first to determine whether the land which is the subject of the claim belongs to the government, and is not already taken up under some superior claim, and then whether the party claiming has made the requisite improvement, and has shown the required residence on the land. All these questions are to be investigated in a manner which requires the exercise of judicial judgment and discretion, and are the very reverse of ministerial." Litchfield v. Register, 1 Woolw. 309, F. C. 8,388. Accordingly he refused to issue an injunction restraining the issuance of patents to such lands. Ibid.; affirmed, 9 Wall. 575, 19 L. 681. In another case the national Supreme Court held that the act of the secretary of the interior in ordering the cancellation of an entry under which defendants claimed an equitable interest in certain lands, was not at all a ministerial act subject to control by mandamus or injunction. "The action of the officers of the law department," said the court, per Mr. Justice Miller, referring to minis-

terial acts, "with which we are asked to interfere in this case, is clearly not of this character. The validity of plaintiff's entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of congress. It has been for a long time before the department, and has received the attention of successive secretaries of the interior, and has been found so difficult as to justify those officers in requiring the opinion of attorney-general. It is far from being a ministerial act under any definition given by this court." Gaines v. Thompson, 7 Wall. 353, 19 L. 65. A later case in the same court, however, decided that the secretary of the interior might be enjoined from revoking a grant of a right of way through certain lands which his predecessor had given, it being a plain violation of private rights. Noble v. Union, etc., Co., 147 U. S. 171, 37 L. 125, 13 S. Ct. 272. But it has been held that the courts are without jurisdiction to enjoin an order of the postmaster-general, prohibiting a certain corporation from using the money-order department, he having, in the exercise of a discretionary duty imposed by congress, decided that the corporation was using the mails in the conduct of a lottery. Enterprise, etc., v. Zumstein. 67 Fed. Rep. 1007, 37 U. S. App. 71.

Nor may they mandamus the speaker of the State assembly to compel him to transmit a bill to the State senate. Ex parte Echols, 39 Ala. 700, 88 Am. Dec. 751.

Elsewhere it has been held that the duty of a county clerk in making out notices for an election, naming the offices to be filled, was ministerial and enforceable by mandamus. Fisher v. Dabbs, 6 Yerg. 152. As also the duty of a court clerk to issue an order of sale upon a judgment rendered. Moore v. Muse, 47 Tex. 210, 216. And the duty of the overseers of a highway in opening a certain road to the public, State v. Holliday, 8 N. J. L. 206, 208; or in paying assessed damages on a highway laid out by them, Treat v. Middletown, 8 Conn. 243, 247. A purchaser at execution sale may mandamus the proper officer to compel delivery of a deed at the expiration of the redemption period. Whiting v. Butler, 29 Mich. 122, 139. A North Carolina statute required the treasurer of the State to deliver over to a railroad company certain railroad mortgage bonds upon tender of State bonds; and this was held a ministerial duty, although there were many kinds of State bonds on the market and it was suggested that there might be some discretion as to which the treasurer was to accept. Raleigh, etc., R. R. v. Jenkins, 68 N. C. 502, 504. While an executive officer or board may be vested with discretion as to the manner of discharging certain duties, they may sometimes still be mandamused to exercise that discretion. Howell v. Cooper, 2 Colo. App. 531, 31 Pac. 523. The president of a municipal council may be compelled by mandamus to sign an ordinance where his refusal rested solely upon

an assumption of fact as to its irregularity, which the records showed to be erroneous. State ex rel. v. Meier, 143 Mo. 446, 43 S. W. 307.

If the law not mandatory, the act to be done may be merely discretionary.— But where the terms of the statute prescribing the duty whose performance is sought to be secured by mandamus are not peremptory and mandatory, the conclusion is that the officer is invested with discretion in the matter. Accordingly, where a statute requires a State treasurer to pay out money, if, "in his opinion" the amount is due, the duty of the treasurer in that connection is a discretionary one. Louisiana College v. State Treasurer, 2 La. 394, 396. So, also, a statute declaring that "the postmaster may, upon evidence satisfactory to him," that a person is conducting any fraudulent lottery, deny to such person the privileges of the registered letter and money-order system, reposes a discretion which may not be controlled by injunction. Enterprise, etc., Assn. v. Zumstein, 64 Fed. Rep. 840, 37 U. S. App. 71. See also N. O. Natl. Bk. v. Merchant, 18 Fed. Rep. 851. The Supreme Court of Idaho decided that mandamus would not lie to compel the secretary of the territory to deliver over to the speaker of the house the house journal, in order that certain corrections might be made therein, it being the duty of the secretary to keep such journal, and no statutory provision requiring its delivery under such circumstances. Burkhart v. Reed, 2 Idaho, 483, 22 Pac. 6.

The duty of the president of the nation in carrying out the laws is, of course, clearly not a ministerial duty, although the question was considered sufficiently doubtful to warrant a test in the Federal Supreme Court. Mississippi v. Johnson, 4 Wall. 498, 18 L. 441. An injunction was there sought and refused against President Johnson to restrain him from signing and carrying out an act of congress alleged to be unconstitutional. The appointment and removal of officers and employees involves the exercise of judgment or discretion, and is not controllable by mandamus. Taylor v. Kercheval, 82 Fed. Rep. 499. Mandamus to a State officer to compel the payment of coupons upon State bonds, has also been held to be an interference with the political department of the government, and the duty devolving upon such officer something more than a mere ministerial duty. Louisiana v. Jumel, 107 U. S. 743, 27 L. 459, 2 S. Ct. 154. The duty of choosing a site for public buildings, and purchase of land therefor, is not ministerial. State v. Lord, 28 Or. 525, 43 Pac. 478. Finally, it may be added that in applications for mandamus against an executive officer, the courts will consider the practical consequences of its issuance, and refuse it if the result would be to subvert some well-recognized principle of the law; as that the sovereign may not be sued except by consent. Reeside v. Walker, 11 How. 292, 113 L. 701. Or to lead to some absurd results, as to compel the secretary of war to sign a contract with a party

already under contract to perform the same service at a less amount. U. S. ex rel. v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 98. This is, of course, no more than saying that the applicant must establish in himself a legal right to the performance of the act sought, a principle underlying the issuance of the writ in all cases.

As to the right to mandamus the governor of a State.— The question of the right to mandamus the chief executive of a State presents so many features that are distinct from those involved in the question of mandamus to other executive officers, as to justify a separate examination. The courts seem to be about equally divided upon the question, some holding that the governor of a State may be mandamused to compel the performance of a mere ministerial duty involving the exercise of no discretion and which might as well have devolved upon another officer; and others, that under no circumstances will this remedy lie against so high an officer.

The citations show that Marbury v. Madison has been cited as authority upon both sides of this controversy; and in cases whose conclusions are directly contradictory. It is cited in the following cases, affirming the right to mandamus: Tennessee, etc., R. R. v. Moore, 36 Ala. 380, 381; McCauley v. Brooks, 16 Cal. 41, 44, 52; Middleton v. Low, 30 Cal. 601; Harpending v. Haight, 39 Cal. 210, 2 Am. Rep. 445; Greenwood, etc., Co. v. Routt, 17 Colo. 169, 31 Am. St. Rep. 294, 28 Pac. 1129; Martin v. Ingham, 38 Kan. 653, 657, 17 Pac. 169, 171; Magruder v. Swann, 25 Md. 209; Brown v. Bragunier, 79 Md. 236, 29 Atl. 8; Cotten v. Ellis, 7 Jones (N. C.), 545, 550; State ex rel. v. Chase, 5 Ohio St. 528, 535; Mott v. Pennsylvania R. R., 30 Pa. St. 9, 33; 72 A. D. 679; State ex rel. v. Marks, 6 Lea, 21; State v. Farwell, 3 Pinney, 438. And see Slack v. Jacob, 8 W. Va. 662; Woods v. Sheldon, Governor and others, 9 S. Dak. 407, 69 N. W. 607, 33 Am. Dec. 363, note, 13 Am. Rep. 128, note, 31 Am. St. Rep. 299, note, 66 Am. St. Rep. 555, note. It is relied on to the contrary in Hawkins v. Governor, 1 Ark. 584, 589, 33 Am. Dec. 349, 353; Niles v. Bradford, 22 Md. 184, 85 Am. Dec. 645; People ex rel. v. Morton, 156 N. Y. 141, 152, 66 Am. St. Rep. 550, 50 N. E. 792; distinguished in State ex rel. v. Drew, 17 Fla. 73, 74, 86; State ex rel. v. Warmoth, 22 La. Ann. 3, 2 Am. Rep. 714; Dennett, Petitioner, 32 Me. 511, 54 Am. Dec. 603; White Creek, etc., Co. v. Marshall, 2 Baxter, 123; Bates v. Taylor, 87 Tenn. 332, 11 S. W. 269; and rejected and criticised as dictum in Hovey v. State, 127 Ind. 595, 22 Am. St. Rep. 668, 27 N. E. 177; People ex rel. v. Governor, 29 Mich. 320, 327, 18 Am. Rep. 95; Pacific R. R. v. Governor, 23 Mo. 359, 66 Am. Dec. 677; State ex rel. v. Fletcher, 39 Mo. 394; State v. Governor, 25 N. J. L. 331, 352; all of which deny the right to mandamus the chief executive of a State. To the same effect, also, are State v. Lord, 28 Or. 525, 43 Pac. 478; Low v. Towns, 8 Ga. 372. On the whole, therefore, while courts affirming the

existence of the right to mandamus a State governor, place much weight upon it as authority, courts holding to the contrary seek rather to deny its applicability in the matter at all. Certainly the specific question of the right to mandamus a State governor was not at all in the mind of Chief Justice Marshall in the leading case, but it is made undeniable by the citations that the courts affirming the existence of the right have placed reliance upon certain expressions in the opinion which may well be considered as fully applicable, and calculated to sustain their position. Thus, where, after disclaiming all intention to interfere in the political affairs of the government, the court observes: "But if this be not such a question, * * * if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty not depending on executive discretion but on particular acts of congress and the general principles of law." And again: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined." "Notwithstanding this proposition has been characterized as obiter," said the Supreme Court of Colorado, referring to the foregoing in affirming the right to mandamus the State governor, "it has served as a text for numerous judicial decisions, State and Federal." Greenwood, etc., Co. v. Routt, 17 Colo. 167, 31 Am. St. Rep. 292, 28 Pac. 1128.

Mandamus to a lower court.—Marbury v. Madison has also been cited as authority with respect to the cases in which a subordinate court or judge may be mandamused by a higher court. It has been seen above, supra, that courts possessing only appellate jurisdiction may issue the writ in such cases; and that the leading case settled the proposition that this is an exercise of appellate jurisdiction. The terse principle propounded by Chief Justice Marshall, that it is not the person to whom the writ is directed, but the nature of the thing to be done that determines the propriety of its issuance, has also been followed by the courts in determining when it may properly issue to a subordinate court or judge. Here, too, we find that it is a cardinal rule that mandamus is not to be made a means for controlling and directing discretionary matters. Ex parte Newman, 14 Wall. 165, 20 L. 879; People v. Pearson, 2 Scam. 204, 33 Am. Dec. 448; Ex parte Harris, 52 Ala. 90, 23 Am. Rep. 560; Jelley v. Roberts, 50 Ind. 1, 4. It may issue to compel the performance of a mere ministerial duty, or to compel a court to act in cases in which it has jurisdiction and refuses to do so. As to compel a circuit judge to take cognizance of a case properly ap-

pealed from the District Court. Insurance Co. v. Comstock, 16 Wall. 270, 21 L. 498. But when a court has acted, and exercised its judicial discretionary power, this remedy is not a proper method of obtaining a review, even though there be no other. Ex parte Newman, 14 Wall. 152, 20 L. 877. Nor is it proper to use the writ to re-examine a judgment or decree of a subordinate court; or to direct what judgment or decree shall be entered. Ibid.

May be compelled to sign a bill of exceptions.— The rule is best illustrated by those cases in which it is sought to compel a subordinate court or judge to sign and settle a bill of exceptions. This is a ministerial act, and it is well settled that its performance may be compelled by mandamus. Ex parte Crane, 5 Pet. 189, 8 L. 92; Jelley v. Roberts, 50 Ind. 1, 4; People v. Pearson, 2 Scam. (Ill.) 204, 33 Am. Dec. 448. But the appellate court cannot go further and specify the contents of a bill, or direct the signing of a particular bill, unless the trial judge has admitted its entire accuracy. "All that a judge can be required to do is to sign such a bill as presents the facts in accordance with his knowledge and recollection, since this must necessarily be the test in determining what particular bill shall be signed." High Ext. Legal Remedies, § 202, quoted in Jelley v. Roberts, 50 Ind. 1, 5. Nor will a judge, having signed and sealed one bill of exceptions, be compelled to sign a second, where he alleges the first to be correct and denies the accuracy of the second. Ibid. Or where the first was inaccurately drawn and an amended bill subsequently offered, the judge having meantime forgotten the circumstances and so being unable to vouch for the accuracy of the bill as amended. People ex rel. v. Anthony, 129 Ill. 223, 21 N. E. 781.

And to do various other acts.— But the applicability of mandamus as a remedy where the actions of a lower court are concerned is not limited to bills of exceptions. Elsewhere it has issued from the Supreme Court of the United States to the Federal Circuit Court to compel the removal of a cause into a State tribunal. Virginia v. Rives, 100 U. S. 327, 25 L. 672. A judge has been thus compelled to approve the bond of a tax collector, there being no other objection than the delay of the officer in offering the same. State ex rel. v. Ely, 43 Ala. 576. So, also, the bond of a sheriff. Ex parte Harris, 52 Ala. 87, 90, 23 Am. Rep. 560. The Supreme Court of Louisiana has compelled a probate judge, by mandamus, to appoint a tutor for certain minor children, State v. Bermudez, 14 La. 478; and to admit a certain will to probate, Succession of Wedderburn, 1 Rob. (La.) 265; while the Supreme Court of Tennessee has compelled the clerk of the Probate Court to transmit a certain record to the County Court, Fisher v. Dabbs, 6 Yerg. 152; though refusing mandamus to a judge who had refused to grant a writ of habeas corpus. State v. Elmore, 6 Cold. 531.

Appointments to office.— A right to an appointive office is complete when the appointing power has done everything to be performed by him. Neither delivery of the commission, nor acceptance, is necessary to complete an appointment. When complete it is irrevocable, pp. 154–162.

Appointment is complete upon performance of last act of appointing power.— The citations show that the propositions of law above laid down have been extensively relied on in later decisions. The rule that an appointment is complete when the last act to be done by the appointing power has been performed, has been followed and approved in many cases. Conger v. Gilmer, 32 Cal. 79; People v. Perkins, 85 Cal. 513, 26 Pac. 247; Morgan v. Vance, 4 Bush (Ky.), 323, 328; State ex rel. v. Love, 39 N. J. L. 14, 21; People ex rel. v. Fitzsimmons, 68 N. Y. 518; State v. Hamilton Co., 7 Ohio, 145; Lane v. Commonwealth, 103 Pa. St. 485; Seaman v. Northwestern Mutual Life Ins. Co., 86 Fed. 497. It holds true whether the appointing power be a single officer, as in Marbury v. Madison, or an executive board, such as a board of supervisors, Conger v. Gilmer, 32 Cal. 79; or a mayor and board of aldermen, State ex rel. v. Dews, Charlt. (Ga.) 425, 430; or a municipal board of finance and taxation, State ex rel. v. Love, 39 N. J. L. 21. It is not at all necessary that the appointing power be at the time aware that its acts are final. A nomination to an office, made under the erroneous impression that the approval of another body was necessary, has been held a valid appointment, because the appointing power had performed the last act necessary. People ex rel. v. Fitzsimmons, 68 N. Y. 519. And in a Virginia case a board of bank directors had proceeded to a second election thinking the first to have been ineffective. Booker v. Young, 12 Gratt. 309.

The test is always whether the final act has really been performed, not whether the appointing power so intended its acts — provided, of course, that there be no fraud or undue influence. A Connecticut case will illustrate this point. A municipal common council, authorized to appoint a prosecuting attorney, met for that purpose and voted "to proceed to ballot for a prosecuting attorney." A ballot having been taken and one Coogan having received a clear majority of all the votes cast, and this result being announced by the presiding officer, a resolution was offered that Coogan be declared elected. This resolution was lost. Two resolutions were then offered and adopted, one declaring the ballot to be void by reason of errors (which it was found did not exist), and the other declaring that one Barbour be deemed "elected and appointed prosecuting attorney." The court decided that the first vote taken, there being no fraud of any kind, was valid and binding; and that the result was to confer upon Coogan a right to the office. State ex rel. v. Barbour, 53 Conn. 89, 22 Atl. 689. This, however, is not

to be understood as depriving a deliberative body of a right to reconsider its acts when any just ground for so doing exists, as an illegal vote, or a participation of those not qualified. Ibid.

It is, of course, immaterial that the appointment is not to take effect until some future day, for when the appointment has once been made it is final and irrevocable, and the appointing power may not choose another before the first appointee enters upon his duties. Whitney v. Van Buskirk, 40 N. J. L. 470.

If anything remains to be done the appointment is incomplete. — But the right to the office is incomplete so long as anything remains undone by the appointing power, for it is still possible by refusal to perform such act to render the whole proceeding nugatory. An Ohio case illustrates this proposition. There the question was as to the validity of an appointment to the office of clerk of a County Court. The claimant rested his case upon a certain writing signed by three of the four judges, in form following: "We agree to the appointment of Samuel H. Goodwin to the office of clerk of the Court of Common Pleas," etc.; and upon the order given for the entry of this appointment in the minute-book of the court. The entry was in fact never made, and the appointment was later repudiated. A statute required that the minutes of the court should be publicly read before every adjournment, corrected, and then signed by the presiding judge; and that "no proceedings, orders, judgments or decrees * * * shall be in force or valid until so recorded and signed." The court, therefore, held that the appointment was not completed by the writing, that something yet remained to be done, and that until the signing of the minutes containing the appointment the court might reconsider and recall its former actions. State v. Hamilton Co., 7 Ohio, 134.

Acceptance unnecessary to complete the right. — In the proposition that an appointment is complete upon the performance of the last act of the appointing power, is involved the further proposition that the acceptance of such appointment is unnecessary. This is undeniably true so far as the right to the office is concerned. The Supreme Court of Alabama also argued, therefrom, that the resignation of an officer might be effective before acceptance. State ex rel. v. Fitts, 49 Ala. 402.

But an appointee who does not accept is not completely inducted into office. — But the citations have not interpreted the leading case as holding that the appointee is completely inducted into office for all purposes. In an early New Hampshire case it became material to determine whether the office of collector of taxes was filled by one J., who had been appointed but had not taken the oath of office, or by a later appointee whose appointment was, of course, invalid if J. was actually incumbent. The court declared, per Woodbury, J., that "In no case can the office itself be con-

sidered as filled till the acceptance of the appointment by the person chosen." Johnston v. Wilson, 2 N. H. 203, 9 Am. Dec. 51. And, again, in a California case, the successful candidate for the office of State comptroller had meanwhile been appointed surveyor-general by the Federal government though he had not accepted or qualified as such. The State Constitution prohibited his holding both offices, and the unsuccessful candidate, therefore, claimed the commission as State comptroller. But the court held that as his competitor had not accepted or qualified for the Federal office, he did not hold such office within the meaning of the constitutional prohibition. People ex rel. v. Whitman, 10 Cal. 38, 43, 44. "To constitute the holding of an office, within the meaning of the Constitution," observed the court, per Burnett, J., "there must be the concurrence of two wills — that of the appointing power, and that of the person appointed. If the mere tender of a commission could produce this result, then it would be in the power of the president to disqualify any person from holding a State office without his consent." Ibid. 44. "To a complete investiture of an office," said Mr. Justice Field in the same case, "the acts of the appointing power and of the person appointed must in some instances concur. The appointment is complete when the commission is signed by the president, but it is competent for congress to require the performance of certain acts by the appointee, such as the execution of security, the taking of the oath of office, and the like, before he can enter upon the possession of the office." Ibid. 47.

Practice of Federal executive as showing their understanding of effect of appointment.— As has been seen above, Chief Justice Marshall sought further to justify the proposition that acceptance was not necessary to complete the appointment by declaring that such was the understanding of the government upon the question, calling attention to the fact that the salary of an officer commenced from the appointment and not from the transmission or acceptance of his commission; and also observing, that where an appointee refuses to accept, the successor is nominated in his place, and not in place of the one originally creating the vacancy. The latter as well as the former of these propositions seems to refer to a mere custom of the executive department of the government. Justice, etc., v. Clark, 1 T. B. Mon. 85. Both have upon occasion been misunderstood and regarded as holdings of the court in the leading case. In two Maryland cases the statement, that the salary of an officer began from the time of his commission, was made the basis of a claim for salary from the date of an election, rather than the day when the duties of the office were formally undertaken. And in both, the Supreme Court of Maryland criticised this "dictum" of Marbury v. Madison as inaccurate, in holding that salary properly began from the time when the appointee qualified. Thomas v. Owens, 4 Md. 220, 227; Jump v. Spence, 28 Md. 1, 11.

Elsewhere the statement is more accurately interpreted as the custom of the Federal government, Haight v. Love, 39 N. J. L. 479, 23 Am. Rep. 236; or the common-law rule applicable in the absence of statute indicating a contrary intent. Burks v. Hinton, 77 Va. 37.

The second statement, that an appointee before acceptance is regarded as so far invested with the office that in case of his refusal to accept the successor is nominated in his place, has also been cited as though a proposition of law laid down by the court. Johnson v. U. S., 5 Mason, 438, F. C. 7,419; Booker v. Young, 12 Gratt. 309. Mr. Justice Story so interpreted it, suggesting as a possible deduction that a new appointment, before acceptance by the appointee, would operate as a complete removal from office of the incumbent. Johnson v. U. S., 5 Mason, 425, 438, F. C. 7,419. The true purport of the statement is properly understood in a Kentucky case, and by the reporter's note it appears that the practice of the State executive department is similar. "There is obviously," said the court, "in the practice of the general government, an intrinsic fitness and propriety; for, otherwise, as an appointment may be refused verbally, there would be nothing in the records of the executive department to show the refusal, and two or more appointments would appear to have been made to fill the same vacancy." Justices of Jeff. Co. v. Clark, 1 T. B. Mon. 82, 85.

Conclusions as to necessity of acceptance.— It thus appears from the foregoing, that while an appointment to office is complete when the last act of the appointing power has been performed, yet that until acceptance and proper qualification the appointee is not to be regarded as actually holding the office for all purposes. The unilateral act of the appointing power cannot be made the means of fastening upon such appointee obligations or duties which he has not undertaken, and of which perhaps he is entirely ignorant. For certain incidental or administrative purposes indeed, the appointment does suffice in legal contemplation to make the appointee the incumbent of such office. But it is safe to say, that while it is binding upon the appointing power, and while it confers upon the appointee a right, it may not be made an instrument of injustice to the one upon whom it is bestowed.

Delivery not necessary.— Delivery of the commission is no more necessary to confer a right to an office than is acceptance of the appointment. Such we have seen to be the rule laid down in Marbury v. Madison. The proposition is of more extensive application than to the case of the commission to an office. "In all cases of letters-patent," observed Chief Justice Marshall, "certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument, a formal delivery to the person is not among them." 1 Cr. 137, 159-160. See Conklin v. Cunningham, 7 N. Mex. 460, 38 Pac. 174. None of the citations on this point are concerned with commissions to an office, though several

cases cite the leading case in holding that delivery is not necessary to the validity of a patent to public lands. Sayward v. Thompson, 11 Wash. 709, 40 Pac. 380. Accordingly title passes when the patent has been duly signed and sealed, without delivery. U. S. v. Schurz, 102 U. S. 395, 26 L. 171; Le Roy v. Clayton, 2 Sawy. 493, 496, 497, F. C. 8,268. An entry made in a public record of a grant by the Spanish government in the early days has been held operative to pass title. Lavergne's Heirs v. Elkins' Heirs, 17 La. 227. So, also, an entry made by a town alcalde in the official book. Donner v. Palmer, 31 Cal. 513. The principle of the leading case has also been applied to the case of a prosecution for failure to obtain a steamboat license. It appeared that the license had been duly executed, sealed, signed, dated and numbered, but not actually delivered to the party; and the court held delivery unnecessary so far as the prosecution was concerned. Steamboat Planter, Newb. 267, F. C. 16,054.

An executive pardon has been held to differ from other letters-patent and to require delivery for its validity. In re De Puy, 3 Ben. 316, F. C. 3,814. A delivery by transmission to the warden of a penitentiary has been held sufficient upon the analogy of Marbury v. Madison, Ex parte Powell, 73 Ala. 522, 49 Am. Rep. 76; though delivery to a United States marshal has been deemed inoperative to deprive of the right of withdrawal again. In re De Puy, 3 Ben. 316, F. C. 3,814.

But delivery may be made a prerequisite condition.— While, however, delivery is not generally necessary to the validity of an appointment, there may be circumstances under which, by the terms of the appointment, delivery is necessary to its completion. Thus, where an appointment of a guardian is made upon the express condition that it is to be delivered to the appointee when the proper bond is filed, and the instrument of appointment is so indorsed, the appointee may not assume to act without compliance with such condition. Fay v. Hurd, 8 Pick. 531.

Appointment when complete is irrevocable.— Where the appointee is to hold at will the appointment is, of course, at any time revocable, Parsons v. United States, 167 U. S. 337, 42 L. 189, 190, 17 S. Ct. 884, 885; but in all other cases the appointing power has no further control over the appointment after the performance of the last act necessary to its validity. In other words, the appointment is then irrevocable. Marbury v. Madison has been cited to this point in a variety of cases. Speed v. Common Council, 97 Mich. 207, 56 N. W. 573; Brady v. Howe, 50 Miss. 621; Myers v. Chalmers, 60 Miss. 772, 789; State ex rel. v. Love, 39 N. J. L. 21; Whitney v. Van Buskirk, 40 N. J. L. 470; People ex rel. v. Murray, 70 N. Y. 526; Ewing v. Thompson, 43 Pa. St. 372, 375; State ex rel. v. Barbour, 53 Conn. 85, 86, 55 Am. Rep. 68, 69, 22 Atl. 688, 689. The appointee has a vested right to the office which the law will protect. Butler v.

White, 83 Fed. Rep. 578, 582, 588. And when the power of appointment has once been exercised it is exhausted, and a subsequent appointment, in the absence of a proper revocation, is void. State ex rel. v. Finnerud, 7 S. Dak. 245, 64 N. W. 124. The remedy of an aggrieved appointee is often mandamus to compel the performance of those ministerial acts necessary to invest the appointee with the evidence of office which may be necessary in the particular case. As to compel the approval of a bond by a board of aldermen. Speed v. Common Council, 97 Mich. 207, 56 N. W. 573. In a proper case injunction will lie to restrain a subsequent unlawful appointee from taking possession of the office, books, etc. Ewing v. Thompson, 43 Pa. St. 372, 375. And see Butler v. White, 83 Fed. Rep. 578, 588. Or where the purpose is to oust from office one improperly installed, and to secure the place for the lawful appointee, quo warranto is the proper proceeding to try the title to such office. Brady v. Howe, 50 Miss. 621; State ex rel. Haight v. Love, 39 N. J. L. 21; Haight v. Love, 39 N. J. L. 479; S. C., 23 Am. Rep. 236; State ex rel. Whitney v. Van Buskirk, 40 N. J. L. 470; People ex rel. v. Murray, 70 N. Y. 526.

Where the office is elective and not appointive.— In the foregoing discussion of the irrevocability of appointments and of the precise time when an appointment becomes complete and irrevocable, no particular reference has been made to cases in which the title to an office is acquired by election rather than by appointment. Nor is there any distinction to be drawn between the two classes of cases so far as the present discussion is concerned. In each the essence of the act is choice. And in both instances this choice is irrevocably made, in accordance with the principle of the leading case, whenever the person or body aggregate, invested with the power to choose, has performed the last act required of it by law. Accordingly the authorities have extended the doctrine of the principal case to controversies as to the title to an elective office. State ex rel. v. Barbour, 53 Conn. 83 et passim, 55 Am. Rep. 65, 22 Atl. 687; Sprowl v. Lawrence, 33 Ala. 674, 689; Wright v. Lanckton, 19 Pick. 290; State v. Johnson, 17 Ark. 414.

The right to an elective office rests, therefore, upon the choice of the electors and not upon the commission, just as an appointment depends upon the act of the appointing power and not the actual execution and delivery of the commission. Accordingly, when a candidate has received a majority of the votes polled, been declared elected by the election judges, and commissioned by the governor, he is, nevertheless, not duly elected if it appear that the majority arises because of the votes of electors not properly qualified. It is the free choice of the qualified electors that confers a right to the office. State v. Johnson, 17 Ark. 414. So, also, where an academic board of trustees votes that a certain degree be conferred, this vote operates to confer such degree, and is not merely

an authority to the president or other competent officer to do so. Wright v. Lanckton, 19 Pick. 290. Nor can the failure of a secretary of state to deliver the returns of an election for governor to the speaker of the house of representatives deprive the party elected of his right to the office. Ex parte Smith, 8 S. C. 519. "If there be a commission, or an oath of office, or any ceremony or inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage or positive statute may or may not render them indispensable." Johnson v. Wilson, 2 N. H. 202, 9 Am. Dec. 50, Woodbury, J. The filing of a bond on oath of office or other ceremony is, therefore, not a condition precedent to the vesting of a title to an office, but rather a condition subsequent whose nonperformance may or may not operate as a defeasance. Sprowl v. Lawrence, 33 Ala. 689-690. But it may and will be a condition precedent to the right to enter upon the duties of an office. State ex rel. v. Moffit, 5 Ohio, 366.

The principle is, of course, the same whether the election be by popular vote or the vote of a deliberative or other assembly. A board, commission or other small executive body is generally held to appoint rather than elect. The same has been held of a municipal council. State ex rel. v. Barbour, 40 N. J. L. 76.

Power of removal as incident to power of appointment.— A few citations upon this point may be briefly considered. The leading case is cited to the point that if an office is created and the term of office fixed for a certain definite period by congress the executive may not remove him from office before that time has expired. People ex rel. v. Jewett, 6 Cal. 292. A proposition which seems clearly to follow from the reasoning of Chief Justice Marshall. But even where a statute fixes the term of office for a definite time, it may yet be the intent of the statute to invest the executive with the further power of removal within that time. The act of congress providing that United States district attorneys should hold office for four years has been so construed. Parsons v. U. S., 167 U. S. 335, 337, 42 L. 189, 190, 17 S. Ct. 884, 885; and the power of removal has been somewhat similarly exercised in the case of judges of the Alaska territorial court. McAllister v. U. S., 141 U. S. 188, 189, 35 L. 698, 11 S. Ct. 954, 955. And these cases would seem to impair the authority of the leading case upon this point very materially. The citations do not warrant an extended discussion of the question as to the right of removal in the case of an officer whose term is not fixed by statute and who on the other hand is not declared to be removable at will. It appears to be a mooted point, McDougal v. Guigon, 27 Gratt. 136; and Marbury v. Madison has certainly not been regarded as a direct authority upon the question. An Illinois case, however, cites it, in holding that the governor might not remove from office a secretary of state whose term was not prescribed, upon the ground that the legislature has given him no express authority to do so. Field v. People, 2 Scam. 93, 129.

Miscellaneous points respecting appointments.— Before proceeding to a discussion of the citations respecting the nature and legal effect of a commission to office, a few further citations remain to be considered under the head of appointments. Marbury v. Madison is cited to the point, that the power of making appointments is in general an executive rather than a judicial or legislative function. State ex rel. v. Barbour, 53 Conn. 85, 55 Am. Rep. 68, 22 Atl. 688; State ex rel. v. Moores, 76 N. W. 190, dissenting opinion; State ex rel. v. Denny, 118 Ind. 465, 21 N. E. 279. And see State v. Boucher, 3 N. Dak. 403, 56 N. W. 147. And, accordingly, a statute creating a fire department in a town, and naming the first board of commissioners, is defective for this reason, as well as because inconsistent with the right of local self-government. State ex rel. v. Denny, 118 Ind. 465, 21 N. E. 279. And see State ex rel. v. Moores, 76 N. W. 176. But a somewhat similar provision in the charter of a municipal corporation in which the legislature named the initiatory board of trustees was held valid, it being declared that an appointment is not necessarily or essentially an executive act. State v. Swift, 11 Nev. 136. And see Collins v. State, 8 Ind. 351; State v. Boucher, 3 N. Dak. 403, 56 N. W. 147. These cases would seem to indicate a conflict among the authorities on this point, into which we may not enter. The validity of an appointment, however, is clearly a judicial question; and an Indiana case cites Marbury v. Madison to this point. Rice v. State, 7 Ind. 335. A Louisiana case makes it authority for the proposition, that an officer appointed for an unexpired term does not hold beyond that term. Andrews v. Saucier, 13 La. Ann. 303. In citing and quoting from Marbury v. Madison to the point that an appointment must be evidenced by some "open unequivocal act" (1 Cr. 137, 157), the Kentucky Court of Appeals held, that a writing was not necessary to an appointment made by the judges of a court under a statute prescribing no particular method of making the appointment; and declared that an oral appointment was valid and binding. Hoke v. Field, 10 Bush, 146, 19 Am. Rep. 59. Again the principal case is cited, to the point that "nominate" means to recommend for confirmation, whence the Supreme Court of Montana argued that the appointment of a governor without the requisite consent of the legislative council was ineffective. Territory ex rel. v. Rodgers, 1 Mont. 259. And in Lapeyre v. U. S., 17 Wall. 205, 21 L. 610, the dissenting judges found it necessary to distinguish the principal case, the majority having held a proclamation of the chief executive operative when signed and sealed without publication.

The commission of an appointee to an office is mere evidence of his title and not necessary to its vestiture. As against the appointing power it is conclusive evidence, pp. 156–159.

Commissions.— The rule of the leading case, that a commission to office is merely evidence of title and not necessary to the vest-

ing of a right to the office, has often been cited. Sprowl v. Lawrence, 33 Ala. 689; State ex rel. in re Strawbridge, 39 Ala. 367, 386; State ex rel. v. Peelle, 124 Ind. 520, 24 N. E. 442; Allen v. M'Neel, 1 Mills, 459, 463; State v. Toomer, 7 Rich. L. 216, 227; Billy v. State, 2 Nott & McC. 361. See also 63 Am. St. Rep. 192, note. Accordingly, it has been held that the proceedings of a justice of the peace, duly appointed, but without his commission, are not thereby invalidated. Billy v. State, 2 Nott & McC. 361. And that an exemption from military duty having been duly declared, the mere failure to make out the certificate would not make such exemption inoperative. State ex rel. in re Strawbridge, 39 Ala. 386.

The proposition that a commission is conclusive evidence of title, as against the appointing power, has also been cited. Quimby v. Boyd, 8 Colo. 207, 6 Pac. 470. Whence it has been argued that a commission is conclusive evidence that the appointment has been regularly made; and that a clerical error in the date affixed to the commission of a notary public was inoperative to defeat a conveyance of land in the execution of which the notary participated. Quimby v. Boyd, 8 Colo. 207, 6 Pac. 470. But if the title to the office is derived from some other source it is held only prima facie evidence. State ex rel. v. Peelle, 124 Ind. 520, 522, 24 N. E. 442. So, also, as against another claimant it is merely prima facie evidence, and as such enables the possessor to hold the office pending a judicial settlement. Supervisors, etc. v. O'Malley, 46 Wis. 59, 50 N. W. 525.

Being in the nature of "best evidence" of title to an office its production is sometimes necessary to prove that one is an officer de jure, as well as de facto. Thus, it has been required of the officer of a ship claiming prize money as an officer, that he produce his commission, the court holding that proof of his having acted as officer was insufficient. Allen v. M'Neel, 1 Mills, 463.

The fact that no valid commission has been issued to an officer cannot be set up as a defense in an action upon his bond, if it appear that otherwise he has been duly appointed. State v. Toomer, 7 Rich. L. 227.

Commission duly ordered to be recorded is to be considered as recorded, p. 161.

In the leading case it was held, that when the recording of a commission had been duly ordered, the instrument was to be considered as recorded, although "the manual labor of inserting it in a book kept for that purpose may not have been performed." 1 Cr. 131, 161. The learned chief justice also intimated, that this rule is of more extended application than to commissions; and hold good of "any instrument whatever" required to be recorded. The Supreme Court of Ohio has adopted and acted upon this view. King v. Kenny, 4 Ohio, 83. In that case the question was whether

a certain public highway had been legally established. The statute provided that the proposed road should be viewed and surveyed, "and that the survey and report of the viewers" be recorded, and from thenceforth such road should be a public highway. Through the fault of the clerk of the commission no such record had been made, but the court held that this ministerial nonfeasance should not be allowed to render the whole proceeding nugatory. The same court has also held immaterial a failure of a town clerk to record a special permit granted by the town trustees and by them ordered recorded. Ratcliff v. Teters, 27 Ohio St. 81. In still another case it intimated, in accordance with this principle, that the failure of a county clerk to file the power of deputy of a deputy sheriff would not operate so as to invalidate the power. Lessee of Haines v. Lindsey, 4 Ohio, 90, 19 Am. Dec. 588. So, also, where the recording of a will has been ordered by a probate judge, and every act performed save the actual recording, the will is deemed in law as recorded. McClaskey v. Barr, 47 Fed. Rep. 170. While the Supreme Court of North Carolina, by a questionable extension of the principle, has held that a deed of trust duly proved but not registered within six months as required, owing to the death of the register, though registered upon the appointment of his successor thereafter, was to be considered as duly registered. Moore v. Collins, 3 Dev. 140. This case, however, seems to lack the essential element upon which the soundness of the principle rests. An instrument is considered as recorded when it has been so ordered by a competent power, because the issuance of the order by a superior power to an inferior ministerial officer with no choice but to obey, is the real fact which makes the record binding at law. The foregoing is a case where the registering of the deed was a duty imposed upon an individual for his own protection and is plainly distinguishable.

Constitutional law — limits of judicial investigation respecting executive acts.— The courts have no authority to inquire into and control political matters left by law to the executive discretion, pp. 169, 170.

Under the head of Mandamus, is discussed the attitude of the judiciary respecting one very large class of cases in which its relations with the executive are involved; and the influence of the case on this point in subsequent decisions is considered. There remain a few cases in which the courts have considered Marbury v. Madison as a helpful authority in the settlement of some of the other manifold questions growing out of this peculiar feature of our government. They make it plain that the courts have adhered to the rule of the leading case which disclaims all right to intermeddle in the political or discretionary duties of the executive. In re Kaine, 14 How. 119, 128, 14 L. 351, 355; Durand v. Hollis, 4 Blatchf. 454, F. C. 4,186; State v. Churchill, 48 Ark. 443, 3 S. W.

860; Burch v. Hardwicke, 23 Gratt. 51, 60; Druecker v. Salomon, 21 Wis. 629, 94 Am. Dec. 577; Worthington v. Scribner, 109 Mass. 487, 490, 12 Am. Dec. 739; Morton v. Green, 2 Neb. 455; Tennant's case, 3 Neb. 409, 429, 19 Am. Rep. 634. And see Slack v. Jacob, 8 W. Va. 662; Woods v. Sheldon, Governor, and others, 9 S. Dak. 407, 410, 69 N. W. 607, 608. Accordingly in an action of false imprisonment against a State governor for enforcing a draft of soldiers ordered by the president of the United States, the court declined to consider the question whether the executive was justified in calling out troops, holding that in such a matter the judgment and discretion of the executive was supreme. Druecker v. Salomon, 21 Wis. 629, 94 Am. Dec. 577. Neither will a court of law, at the suit of a municipal corporation court, stay an investigation instituted by the municipal executive into the conduct of the chief of police. Burch v. Hardwicke, 23 Gratt. 60. An order of the executive through the secretary of the navy for the bombardment of a certain port is a political act; and an action for damages will not lie against the latter for the destruction of the private property of a neutral in the bombarded town. Durand v. Hollins, 4 Blatchf. 454, F. C. 4,186. So, also, in arresting and surrendering over an English fugitive from justice, a United States commissioner would seem to be acting politically so that habeas corpus will not lie to review the detention. In re Kaine, 14 How. 119, 128, 14 L. 351, 355. Again, a department of the executive, such as the treasury, cannot be compelled to divulge the name of the informant who procured the prosecution of a charge for defrauding the revenue. The case has been likened to that of official or cabinet secrets which the leading case intimates are not the subject of judicial investigation. Worthington v. Scribner, 109 Mass. 490, 12 Am. Rep. 739. And it has been held that a public officer of the United States cannot be garnisheed as to moneys due from the United States to a private individual. Averill v. Tucker, 2 Cr. C. C. 545, F. C. 670.

A State governor is acting politically in issuing a proclamation calling for a convention of the legislature; and the act may not be called in question in a court of law. Tennant's case, 3 Neb. 429. Until the granting or refusal of a patent to land by the land department there is no ground for judicial interference. Morton v. Green, 2 Neb. 441, 455. But the question of eligibility to political office is a legal and not a political question. State v. Gleason, 12 Fla. 260.

An early case tried before Chief Justice Cranch in the Circuit Court for the District of Columbia is interesting as illustrating the extent to which the theory of the immunity of the executive from judicial supervision was at one time sought to be carried. The case was an indictment for obtaining money by false pretenses, against the fourth auditor of the United States, in which were alleged certain frauds perpetrated against the government by that officer in the discharge of his duties. For the defendant it was argued,

among other things, that in deciding his guilt or innocence it was necessary to inquire into the extent of his powers and duties as fourth auditor; that no judicial tribunal had power to question his official acts unless they violated the vested rights of some individual; and that so long as they affected the public only they must be left to the control of his superior executive officer. Marbury v. Madison was cited in support of this position, which, it is scarcely necessary to say, was not accepted as sound by the court. Clearly the acts were not exclusively official acts and such as involved no breach of a specific duty imposed by law. U. S. v. Watkins, 3 Cr. C. C. 441, 589, F. C. 16,649.

From the proposition that in those matters within the discretion of the executive department that discretion is supreme and unlimited, except politically or so far as controlled by the dictates of conscience; and from other similar holdings respecting the legislative and judicial departments, the Federal Supreme Court in a later case drew a generalization which has been quoted in an interesting line of cases. "It is a universal principle," declared the court, per Baldwin, J., "that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise * * * are power in the officer and fraud in the party. All other questions are settled by the decision made or the acts done by the tribunal or officer; whether executive (Marbury v. Madison, 1 Cr. 137), * * * legislative * * * judicial * * * or special * * * unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." U. S. v. Arredondo, 6 Pet. 729, 8 L. 561.

It has been made authority in cases involving the question of the validity of a grant of land from the State or sovereign, for the proposition that such a grant made by an officer of the government, within the apparent scope of his authority, was presumptively sufficient to pass the government title in the premises. U. S. v. Arredondo, 6 Pet. 729, 8 L. 561; Ryder v. Innerarity, 4 Stew. & P. 30; McConnell v. Wilcox, 1 Scam. 351. This presumption, however, has been held to be insufficient as against parties claiming a pre-existing adverse and paramount title in themselves. Sabariego v. Maverick, 124 U. S. 282, 31 L. 439, 8 S. Ct. 472. If the grant is to be upon certain conditions it is conclusive upon the point that those conditions are performed. U. S. v. California, etc., Land Co., 148 U. S. 44, 37 L. 360, 13 S. Ct. 463. So, also, it is cited to the point that a court has the power to determine its own jurisdiction, and that its judgments are not void but voidable. Borden v. State, 11 Ark. 548, 54 Am. Dec. 217, 238.

Constitutional law.— It is not only the right but the duty of the judiciary to pass upon and declare void statutes in conflict with the organic law, otherwise constitutional limitations would be vainly imposed. Ours is a government of laws, not of men. The courts may not investigate matters left to the legislative discretion, pp. 176–180.

As between legislative and judiciary.—We find that Marbury v. Madison has also been recognized as an authority of considerable importance, respecting the relations of the judicial and legislative departments, though an accurate delimitation of the scope of legislative powers would be equally, if not more difficult than in the case of the executive. Marbury v. Madison does not attempt that, and its citations do not, therefore, take us far into the many vexed problems which are continually arising in this connection. It is certain, however, that the principal case has exerted a very marked influence in establishing the equality of the judicial with the other departments, and in settling many important points respecting the relations between the department which declares what the law is and the department which declares what the law is to be. It is difficult to carry oneself back to a time when the power of the court to examine into the validity of a legislative appointment because an exercise of political power was denied, State ex rel. v. Paul, 5 Stew. & P. 40, 51; overruled in State ex rel. v. Porter, 1 Ala. 688, 704; and its power to question or annul legislation because in conflict with the organic law, controverted with zeal and argument by those opposed to the exercise of so dangerous a function. But it is only by doing so that we can estimate the progress that has been made towards a complete adjustment of the relations between the co-ordinate branches of the government, and the place of Marbury v. Madison in the development of this distinctive feature of American law. In finally settling the principle that it is not only the right, but the duty of the judiciary to pass upon the constitutionality of legislative enactments and declare them void if in conflict with the fundamental law, Marbury v. Madison performed a service which has called forth exalted eulogies from later jurists.

It cannot be claimed for Marbury v. Madison, that it is the first case in this country in which this point was involved and adjudicated in favor of the authority of the judiciary. Judge Dillon, in his lectures on Laws and Jurisprudence, has collected the early cases on this point, and finds Holmes v. Walton, referred to in State v. Parkhurst, 4 Halst. (N. J.) 444, decided by the Supreme Court of New Jersey, in 1780, to be the first case on the question. Other early cases are Commonwealth v. Caton, 4 Call. (Va.), 5 (1782); "Case of the Judges," id. 135 (1788); Kamper v. Hawkins, 1 Va. Cas. 20; Bowman v. Middleton, 1 Bay (S. C.), 252; Trevett v. Weeden (decided by the Superior Court of Rhode Island in 1786;

see Cooley Const. Lim. [6th ed.], p. 193, n.); Bayard v. Singleton, 1 Martin (N. C.), 48; Ogden v. Witherspoon, 2 Hayw. 227. See also In re Davis, 58 Kan. 385, 49 Pac. 165.

All these cases, however, seem important, historically rather than legally. There is nothing to indicate that they, or any of them, were considered as settling the question, while it is undeniable that the courts have always accorded this distinction to Marbury v. Madison. "Since the case of Marbury v. Madison, 1 Cr. 137," said the Supreme Court of Missouri, in 1822, "this question has been generally looked upon as settled." Baily v. Gentry, 1 Mo. 167, 13 Am. Dec. 485. The Supreme Court of New Jersey has observed: "The question is elaborately discussed in the Federalist, and it was not set at rest until it received the lucid exposition of the great mind of Chief Justice Marshall, in Marbury v. Madison." Moore v. State, 43 N. J. L. 244, 39 Am. Rep. 558. And see Van Horn v. State, 46 Neb. 82, 64 N. W. 372. A decision contemporary with Marbury v. Madison, and holding that the courts have power to declare void an unconstitutional statute, was Emerick v. Harris, decided by the Supreme Court of Pennsylvania, in 1808. Yeates, J., in his opinion remarked that it had been drawn up previous to the publication of the decision by the Federal Supreme Court. 1 Binney, 423.

While there would seem to be no case in the reports holding to the contrary of Marbury v. Madison, it would be a mistake to suppose that all argument on the question was immediately silenced by that decision. As late as 1825, Judge (afterwards Chief Justice) Gibson of Pennsylvania characterized the reasoning and opinion of Chief Justice Marshall as "inconclusive;" and while conceding the right to declare void laws in conflict with the Federal Constitution, he was for denying the right to avoid legislation, in conflict with the Constitution of a State. Eakin v. Raub, 12 Serg. & R. 346.

The principle is so clearly and so firmly settled, and is now so elementary in our law, that it is entirely unnecessary to prolong this discussion. The following cases citing Marbury v. Madison to this point, are, for the most part, early decisions. Certainly no court to-day can feel it necessary to append authority to so axiomatic a statement; and it is noteworthy that the Supreme Court cites it to this point but once (Pollock v. F. L. & T. Co., 157 U. S. 554, 39 L. 810, 15 S. Ct. 679) in its subsequent decisions annulling laws, either State or Federal: Bonaparte v. Camden & A. R. R., Bald. 219, F. C. 1,617; In re Bogart, 2 Sawy. 406, F. C. 1,596; Dale v. Governor, 3 Stew. 418; Demott v. Swaim, 5 Stew. & P. 308; Fulmore v. Brady, 44 Ala. 223; Noble v. Cullom, 44 Ala. 560; Ex parte Selma, etc., R. Co., 45 Ala. 728, 6 Am. Rep. 727; Rison v. Farr, 24 Ark. 168, 87 Am. Dec. 56; Caulfield v. Hudson, 3 Cal. 390; Nongues v. Douglass, 7 Cal. 80; Dawson v. Shaver, 1 Blackf.

207; Beebe v. State, 6 Ind. 508; Seymour v. State, 51 Ala. 53; Robinson v. Schenck, 102 Ind. 319, 1 N. E. 705; Reed v. Wright, 2 G. Greene, 30 Koehler v. Hill, 60 Iowa, 656, 15 N. W. 635; Crescent City, etc., Co. v. N. O., etc., Co., 27 La. Ann. 143, 146; La. Ice Co. v. State Natl. Bank, 32 La. Ann. 597, 598; Anderson v. Baker, 23 Md. 563; Baily v. Gentry, 1 Mo. 167, 13 Am. Dec. 485; State v. Fray, 4 Mo. 178; Wilcox v. Saunders, 4 Neb. 579; Merrill v. Sherburne, 1 N. H. 202, 8 Am. Dec. 55; Moore v. State, 43 N. J. L. 244, 39 Am. Rep. 558; Griffith v. Comrs., etc., 20 Ohio Append. 5; Cincinnati, etc., R. R. v. Commissioners, 1 Ohio St. 82; Eakin v. Raub, 12 Serg. & R. 330; Lonas v. State, 3 Heisk. 301; Lewis v. Woodfolk, 2 Baxt. 47; Stockton v. Montgomery, Dall. (Tex.) 480, 485 (cases collected); Ex parte Rodriguez, 39 Tex. 757; Wise v. Bigger, 79 Va. 269, 273; State v. Auditor, 47 La. Ann. 1694, 18 So. 751; In re Davis, 58 Kan. 385, 49 Pac. 165; In re Klein, 14 Fed. Cas. 719; Magill v. Brown, 16 Fed. Cas. 419.

Marbury v. Madison is also cited in several cases as one of the three instances in which acts of congress have been declared void by the Supreme Court, the others being Dred Scott v. Sandford, 19 How. 393, 15 L. 691, and Ex parte Garland, 4 Wall. 333, 18 L. 366; U. S. v. Rhodes, 1 Abb. (U. S.) 28, 52, F. C. 16,151, Seymour v. State, 51 Ala. 53; In re Bogart, 2 Sawy. 406, F. C. 1,596. Before the court will declare a statute void it must clearly appear that it is incompatible with the organic law. Marbury v. Madison is also cited to this point. Simpson v. Savings Bank, 56 N. H. 469, 22 Am. Rep. 493.

Aside from the foregoing, the citations afford us further illustrations of the extent to which the judiciary deem it their right to go in an examination of acts of the legislative department. These citations are based in part upon specific expressions in the opinion in the leading case, but many of them rather reflect the general tone of firmness which characterizes the principal case in its assertion of the rights of the judiciary. Thus we find that courts have quoted the words: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?" etc. 1 Cr. 137, 176–177. And they have held, that although the legislature may have expressly declared that a certain statute is passed for the benefit of the public health and morals, this does not avail to preclude an inquiry as to whether it be such in fact. Mugler v. Kansas, 123 U. S. 661, 31 L. 210, 8 S. Ct. 297; McCullough v. Brown, 41 S. C. 243, 19 S. E. 471. The fact that a statute is intended as an exercise of the police power does not preclude a judicial inquiry as to whether it be a valid exercise of that power. McCullough v. Brown, 41 S. C. 243, 19 S. E. 471; In re Jacobs, 98 N. Y. 112, 50 Am. Rep. 645. So, also, a statute making

certain acts a criminal misdemeanor, is not, therefore, conclusively a valid exercise of the police power. Ah Lim v. Territory, 1 Wash. 178, 24 Pac. 594. In other words, it is immaterial what may have been the opinion of the legislature as to the extent of its powers under the Constitution, so long as it does, in fact, exceed them. Maize v. State, 4 Ind. 345.

On the other hand the judiciary has no power to question legislation on any other than constitutional grounds. Ex parte Screws, 49 Ala. 66.

There are, also, other portions of the opinion whose general tenor is the same. In the terse saying, that ours is a "government of laws and not of men" (1 Cr. 137, 163), Chief Justice Marshall epitomizes what is now very firmly established as the attitude of the courts upon the difficult questions of constitutional law. In the leading case this assertion was followed by a clear statement of the proposition that executive officers are not beyond the control of the courts of law, simply because part of a co-ordinate department of the government. "The truth is," says Mr. Justice Field, in an early California case, "no officer, however high, is above the law." McCauley v. Brooks, 16 Cal. 41. The citations above, especially those upon the subject of mandamus, and the right to declare void unconstitutional statutes, show how steadily the courts have adhered to this principle. Other cases also quote these "impressive and weighty words" of the great chief justice. Poindexter v. Greenhow, 114 U. S. 298, 29 L. 195, 5 S. Ct. 918; Louisiana v. Jumel, 107 U. S. 743, 27 L. 459, 2 S. Ct. 154; Standeford v. Wingate, 2 Duvall (Ky.), 457; People ex rel. v. Governor, 20 Mich. 327, 18 Am. Rep. 95.

While the leading case affirmed the power of the courts in certain of its relations with the legislative department, on the other hand it disclaimed any pretensions to control any of those acts in which the discretion and power of the legislature was exclusive. We have seen above (pp. 26, 51), that the court recognized certain executive acts as discretionary, or political in character, and others as properly reviewable in the courts, and that subsequent cases have followed this doctrine in their rulings. The citations also disclose a few cases in which similar questions have arisen, respecting legislative acts which were claimed to be beyond the control of the courts. Here, also, we may note that the influence of Marbury v. Madison has been to encourage a vigorous assertion of judicial power. In an early Alabama case the court decided that it had no power to review a legislative appointment of a judicial officer, and quoted Chief Justice Marshall's words in the leading case, disclaiming all desire to interfere in political questions. State ex rel. v. Paul, 5 Stew. & P. 51. But this decision was speedily overturned and the contrary doctrine established, Marbury v. Madison being again cited, this time as illustrating the extent and variety

of the questions into which the courts may inquire. State ex rel. v. Porter, 1 Ala. 704. This latter citation more accurately indicates the general tendency noticeable in the other citations on this point. Thus the dissenting judges in an Indiana case of more recent date, cite Marbury v. Madison to the point that the validity of an appointment is essentially a judicial question, although it was then held that the court could not interfere to try the title to the office of lieutenant-governor, that power having been conferred by the Constitution on the general assembly. Robertson v. State, 109 Ind. 90, 10 N. E. 582. Again, it has been vigorously maintained that legislative enactments apportioning the State into districts for electoral purposes were not subject to review, respecting the propriety of these apportionments. But these acts have in several instances been declared inconsistent with some constitutional provision; and in two cases the analogy of Marbury v. Madison has been relied upon in asserting that a judicial question was involved in such legislation. Parker v. State ex rel. 133 Ind. 185, 32 N. E. 838; State ex rel. v. Cunningham, 83 Wis. 136, 35 Am. St. Rep. 44, 53 N. W. 53. So, also, in deciding which of two contestants is the duly elected speaker of a legislative assembly, the court is dealing with a proper judicial question, although it be necessary, in so doing, to pass upon the credentials of the members of the house. In re Gunn, 50 Kan. 265, 32 Pac. 967.

It remains to note under this head that in the leading case attention is called to the attempt of congress to impose certain duties as pension commissioners on the Federal judges, and the refusal of the judges so to act. 1 Cr. 137, 171. Marbury v. Madison is cited to this point in a Dakota case, which decided that the only questions which might be brought before the Supreme Court upon certiorari to a county board of commissioners, were judicial and not political or executive questions. Champion v. Commissioners, 5 Dak. Terr. 429, 41 N. W. 742; Territory v. Cox, 6 Dak. Terr. 505.

Miscellaneous citations.— A few citations do not belong under any of the foregoing heads, and serve little more than to illustrate the great number of points to which the leading case has been cited. Three of them, decided in the Supreme Court of Indiana, "follow the precedent set by the Supreme Court of the United States in Marbury v. Madison," in discussing the case at bar on its merits, although it was possible to dispense with it temporarily upon a technicality. Beal v. Ray, 17 Ind. 559; State ex rel. v. Allen, 21 Ind. 516, 520, 83 A. D. 367, 369; Robertson v. State, 109 Ind. 90, 99, 10 N. E. 582, 592. In several others the citation occurs in a quotation from Cohens v. Virginia on the subject of dictum, where the court was making a similar effort to get away from a questionable doctrine. Leisy v. Hardin, 135 U. S. 135, 34 L. 141, 10 S. Ct. 693; State ex rel. v. Doyle, 40 Wis. 190, 22 Am. Rep. 695; Ex parte Young Ah Gow, 73 Cal. 449, 15 Pac. 81; Cooper v. Freeman L. Co., 61 Ark.

44, 32 S. W. 494; Carroll v. Carroll, 16 How. 287, 14 L. 941; Mats v. Chicago & A. R. R. Co., 85 Fed. Rep. 183. Two others, decided in the Supreme Court of Louisiana, cite the leading case to the point that where a right is clearly established and no remedy at law, one was to be found in equity. Crescent City, etc., Co. v. N. O., etc., Co., 27 La. Ann. 143, 146; State ex rel. v. Dubuclet, 28 La. Ann. 708. Still others cite it to the point that the courts are bound to take judicial notice of the statutes, enacted by the legislative department. State v. Coosaw Min. Co., 45 Fed. Rep. 809; Turner's Adm. v. Patton, 49 Ala. 411.

The remaining citations all differ one from another. One is that that construction of a Constitution is to be favored which makes all parts operative. Ex parte Lusk, 82 Ala. 525, 2 So. 144. Another that the granting of divorces by parliament, in England, is an exercise of a judicial power. State v. Fry, 4 Mo. 144. A third, that in cases arising under Federal law, the State courts cannot allow a defense which the Federal courts have not allowed. Hall v. Hall, 43 Ala. 503, 94 Am. Dec. 713, 2 So. 144. The Supreme Court of Massachusetts makes Marbury v. Madison authority for the statement that the act of the legislature substituting a bridge franchise for the ferry franchise of Harvard College, was, undoubtedly, a taking of private property, but that compensation has been made and its adequacy had not been questioned. Charles River Bridge v. Warren Bridge, 7 Pick. 452. It is also cited to the point that the Federal Constitution had not been lavish in endowing even the Federal court with jurisdiction in national matters, in holding that a State court had no jurisdiction to try the title to the office of director of a national bank. State ex rel. v. Curtis, 35 Conn. 382, 95 Am. Dec. 268. In declaring void a portion of the judiciary act of 1789, the Supreme Court of Virginia remarked that the Federal court had itself found the act invalid in another respect, citing Marbury v. Madison. Hunter v. Martin, 4 Munf. 28. Another citation of Marbury v. Madison is appended to the statement that upon the approval of an act of congress by the president, it becomes law. American, etc., Co. v. Glens Falls, etc., Co., 4 Fish. Pat. 561, 566, F. C. 321a. Another to the statement that when the powers of one department are granted to another, such grant must be strictly construed. Robertson v. State, 109 Ind. 94, 10 N. E. 589. In an early New York case, it is cited to the point that a public officer is not personally liable for public debts incurred by him officially. Osborne v. Kerr, 12 Wend. 180. Marbury v. Madison is included in a numerous list of authorities cited in a Federal case to sustain the proposition that a witness will not be compelled to answer a question tending to disgrace him. United States v. White, 5 Cr. C. C. 459, F. C. 16,679. And finally the Supreme Court of Georgia cites it in declaring that the laws of the State were made up as follows and in the following order: (1) Constitution of the United States,

(2) treaties, ((3) acts of congress, (4) State Constitution, (5) State statutes, (6) common law of England. Flint River, etc., Co. v. Foster, 5 Ga. 205, 48 Am. Dec. 257; and in Averill v. Tucker, 2 Cr. C. C. 545, F. C. 670, on question of liability of public agent.

1 Cr. 181-194, 2 L. 74, CLARK v. YOUNG.

Payment.— The giving of a note for an antecedent debt is conditional payment merely, p. 192.

This rule is approved and followed in Wright v. First, etc., Co., 1 N. H. 282, 8 Am. Dec. 69, remarking further that if creditor transfers note it becomes absolute payment; Lover v. Bessenger, 9 Baxt. 396, holding note not payment unless such was intended; Austin v. Curtis, 31 Vt. 73, holding indorser on overdue note not discharged by taking new note as collateral Cited arguendo in dissenting opinion, Winship v. Bank of U. S., 5 Pet. 568, 8 L. 230. Approved and followed in Patapsco Ins. Co. v. Smith, 6 Harr. & J. 170, 14 Am. Dec. 269; Griffith v. Grogan, 12 Cal. 322; Merrick v. Bowry, 4 Ohio St. 66; Wade v. Staunton, 5 How. (Miss.) 635; Knox v. Gerhauser, 3 Mont. 278.

Distinguished in Harris v. Johnston, 3 Cr. 319, 2 L. 453, holding that where the note is negotiated by the creditor this extinguishes the original debt; Roach v. Hullings, 16 Pet. 326, 10 L. 981, as inapplicable to case respecting presumption of payment from nonproduction of note. Cited in The Betsy & Rhoda, 2 Ware (Davies), 115, F. C. 1,366, noting that Maine rule makes such note prima facie payment; Smith v. Bettger, 68 Ind. 258, 34 Am. Rep. 258, remarking conflict among authorities and holding that Indiana rule is contra.

Payment.—Where note is given as conditional payment of antecedent debt, want of due diligence in enforcing its payment will discharge the debtor. But suit on the note is unnecessary in case of insolvency of maker or other good cause, pp. 192, 193.

Approved in Russell v. Hester, 10 Ala. 536, holding failure of creditor to preserve liability of indorser on such note made him liable in damages to the debtor for the full amount of the note; Weston v. Reading, 5 Conn. 270, holding creditor liable for loss from delay in enforcing such note. Cited approvingly in general discussion on this question: Hanna v. Pegg, 1 Blackf. 184; Hoffman v. Johnson, 1 Bland Ch. 107; Watkins v. Worthington, 2 Bland Ch. 541; Cochran v. Wheeler, 7 N. H. 205, 26 Am. Dec. 734; Tobey v. Barber, 5 Johns. 73; Whitin v. Paul, 13 R. I. 44; Ringgold v. Newkirk, 3 Ark. 109. Cited in Pope v. Nance, 1 Stew. 370, 18 Am. Dec. 63, discussing rationale of the rule; Trotter v. Crockett, 2 Port. 409; Chilton v. Comstock, 4 Ala. 59, and Cocke v. Chaney, 14 Ala. 66, all discussing rule and the duties of creditor respecting the note in order to preserve the liability on the original debt. Cited in Kep-

hart v. Butcher, 17 Iowa, 246, holding that true test is whether in respect to the note the creditor has been guilty of any omissions actually injuring the debtor; and in Watkins v. Worthington, 2 Bland Ch. 527, arguendo.

Distinguished in Stocking v. Conway, 1 Port. 262, holding that even where maker of note is insolvent, demand and every effort to collect must be made.

Res judicata.— Judgment in favor of defendant indorser of a note on technical grounds, held not a bar to suit against same defendant on original contract for which note was given, p. 193.

Principle applied in Davenport v. Chicago, etc., R. R., 38 Iowa, 640, holding judgment in suit for one year's taxes not a bar to similar suit for taxes of another; Embden v. Lisherness, 89 Me. 579, 56 Am. St. Rep. 444, 36 Atl. 1102, collecting cases on proposition that judgment to be a bar must have been on same subject-matter and on the merits, and holding judgment in one tax suit not on the merits and so not a bar to a second.

Payment.— It is not necessary to reassign a note received as conditional payment before suit on the original debt, p. 194.

1 Cr. 194–211, 2 L. 79, WILSON v. LENOX.

Debt.— In action of, the declaration should state the amount with certainty. A declaration in debt for principal, interest, damages and costs of bill of exchange is, therefore, bad, which does not specify the amount of costs, p. 211.

Followed and applied under similar Kentucky statute in similar actions, Johnson v. Bank, 5 T. B. Mon. 120; Pendleton v. Bank, 2 J. J. Marsh. 149. Cited also in Musson v. Lake, 4 How. 282, 11 L. 975, and Dunbar v. Breese, 1 Pinn. 111, but not in point.

1 Cr. 212–214, 2 L. 85, CLARKE v. BAZADONE.

Writ of error from Supreme Court to general court of Northwest Territory not authorized by act of congress, p. 214.

Cited in dissenting opinion, U. S. v. Circuit Judges, 3 Wall. 677, 18 L. 113, arguing against the holding of majority that appeal lay from Circuit Court in certain case, although not specially authorized by congress; dissenting opinion, Tennessee v. Davis, 100 U. S. 290, 25 L. 659, and Warner v. Steamer Uncle Sam, 9 Cal. 736, declaring that appellate jurisdiction of Supreme Court is restricted to cases authorized by congress; U. S. v. New Bedford Bridge, 1 Wood. & M. 435, F. C. 15,867, declaring that congress and the Constitution must both unite to give Federal courts jurisdiction. Principle applied in Dismukes v. Stokes, 41 Miss. 435, dismissing appeal not authorized

by statute; Robinson v. Baillieul, 2 Tex. 161, holding no appeal from interlocutory judgment until authorized by legislature; Yarbrough v. State, 2 Tex. 527, holding no appeal lies from order refusing bail.

1 Cr. 214–239, 2 L. 86, HOOE v. GROVERMAN.

Charterparty construed, and held that letting of tonnage of a vessel did not make hirer the owner pro hac vice. Accordingly the owner and not the hirer was responsible for delays, resulting from the captain's breach of covenant, pp. 237–239.

In the following cases it is held that a charterparty is to be construed only as a contract of affreightment, and the charterer is not owner for the voyage, citing the principal case: Marcardier v. Chesapeake Ins. Co., 8 Cr. 50, 3 L. 484, holding, therefore, that the master who was owner could not have committed barratry: The Aberfoyle, Abb. Adm. 251, F. C. 16; Donahoe v. Kettell, 1 Cliff. 138, F. C. 3,980; Kleine v. Catara, 2 Gall. 76, F. C. 7,869; Eames v. Cavaroc, Newb. 530, F. C. 4,238; The Volunteer, 1 Sumn. 568, F. C. 16,991; The Nathaniel Hooper, 3 Sumn. 577, F. C. 10,032; Palmer v. Gracie, 4 Wash. Cir. Ct. 119, 122, F. C. 10,692; The L. L. Lamb, 31 Fed. Rep. 32; Swift v. Tatner, 89 Ga. 668, 32 Am. St. Rep. 107, 15 S. E. 844; Slark v. Broom, 7 La. Ann. 341; State v. Baltimore Co., 13 Md. 190; Clarkson v. Edes, 4 Cow. 478, 480; Hagar v. Clark, 78 N. Y. 51, overruling S. C., 12 Hun, 529; Schr. Argyle v. Worthington, 17 Ohio, 465; Bramble v. Culmer, 78 Fed. Rep. 502, 42 U. S. App. 303. In U. S. v. Shea, 152 U. S. 187, 38 L. 406, 14 S. Ct. 521, a charterparty is held to operate as a demise of the vessel, citing the principal case. But see Richardson v. Winsor, 3 Cliff. 399, F. C. 11,795, remarking that courts incline to regard such a contract as not a demise of the ship. Cited in Thwing v. Great Western Ins. Co., 103 Mass. 405, 4 Am. Rep. 571, holding that charter of the whole tonnage of a ship transfers only the cargo space.

1 Cr. 239–252, 2 L. 94, WOOD v. OWINGS.

Deeds.— At common law a deed is complete when sealed and delivered, and a Maryland deed executed and delivered, but not recorded, is a deed within the meaning of the bankruptcy act provision as to fraudulent deeds, although a Maryland statute declares acknowledgment and recording necessary to make a deed operative, pp. 250–252.

Cited in De Lane v. Moore, 14 How. 266, 14 L. 265, and Moore v. Thomas, 1 Overt. 203, applying the principle in holding unrecorded deed binding between the parties; as also in Salmon v. Clagett, 3 Bland Ch. 172, and Taylor v. Holter, 1 Mont. 711, the latter holding further that a defective acknowledgment does not destroy the deed as between the parties. Cited arguendo, Hutchins v. Taylor, 12 F. C. 1081; Clagett v. Salmon, 5 Gill & J. 325, not in point.

1 Cr. 252-259, 2 L. 98, UNITED STATES v. SIMMS.

This case is an instance of the exercise of appellate jurisdiction by the Supreme Court in a criminal case; but the court later denied its right to this jurisdiction, declining to be bound by this precedent. U. S. v. Moore, 3 Cr. 172, 2 L. 401. See dissenting opinion, Ex parte Bollman, 4 Cr. 104, 2 L. 564; U. S. v. Sanges, 144 U. S. 319, 321, 36 L. 449, 450, 12 S. Ct. 612, 613, reviewing the question of the Supreme Court's appellate jurisdiction. Darden v. Lines, 2 Fla. 580, approves the course of the Supreme Court in declining to be bound by this case. Commonwealth v. Cummings, 3 Cush. 218, 50 Am. Dec. 737, cites the case in holding that the State may not maintain writ of error in criminal cases. It is cited in dissenting opinion, Ex parte Crane, 5 Pet. 203, 8 L. 97, arguing that Supreme Court may not issue mandamus.

District of Columbia.— The act of congress respecting the District authorizing United States to sue in its own name for penalties provided by Virginia statute in part of ceded territory, does not authorize the United States to recover penalties awarded by a Virginia statute to individuals who should prosecute therefor qui tam, pp. 256-259.

District of Columbia.— The supplemental act of 1801, respecting the District, gives no new remedy for recovery of penalties, but leaves that prescribed by the State law in force, pp. 256-257.

The rule is applied in the following cases respecting indictments in the District, dismissing them as not according to the State statute; U. S. v. Ellis, 1 Cr. C. C. 125, F. C. 15,046; U. S. v. Pickering, 2 Cr. C. C. 117, F. C. 16,042; U. S. v. Rounsavel, 2 Cr. C. C. 134, F. C. 16,199. Cited in U. S. v. Evans, 4 Cr. C. C. 106, F. C. 15,065, holding that on conviction under gaming indictment, judgment for statutory penalty may be entered. U. S. v. Laescki, 29 Fed. 700, holding indictment for counterfeiting improper and that informer must sue for penalty. Cited on this general point in U. S. v. The C. B. Church, 1 Woods, 277, F. C. 14,762. Cited in U. S. v. Abbott, 24 F. C. 744, and U. S. v. Tillotson, 28 F. C. 180, holding that a prescribed statutory remedy cannot be varied from.

District of Columbia.— Laws of Maryland and Virginia were left in force there in the respective portions of the District ceded by those States.

Cited on this point in U. S. v. Eliason, 16 Pet. 301, 10 L. 972.

Miscellaneous.— Cited In re Buell, 3 Dill. 118, F. C. 2,102, holding libel in the District an offense against the United States; and State v. Cummings, 33 Conn. 264, 89 Am. Dec. 209, on point that common law is in force in the District.

1 Cr. 259–282, 2 L. 101, FENWICK v. SEARS.

District of Columbia.— Administrators appointed in Maryland before the District was ceded cannot sue in the District without first obtaining letters of administration therein, p. 282.

This case is a recognized authority upon the point that a foreign administrator or executor may not sue in the domestic court without first obtaining letters. The following cases cite and so apply it: Vaughn v. Northup, 15 Pet. 6, 10 L. 641; Noonan v. Bradley, 9 Wall. 400, 19 L. 759, remarking unanimity of authorities; Trecothick v. Austin, 4 Mason, 32, F. C. 14,164, doubting whether English administration authorized suit in the colonies before the revolution; Embry v. Miller, 1 A. K. Marsh. 302, 10 Am. Dec. 735; Lusk v. Kimball, 87 Fed. 547, collecting cases and holding suit so instituted a mere nullity which cannot be cured by subsequently obtaining letters and amending pleadings. The principle is relied upon in arguing against the right of a foreigner to act as beneficiary heir in Louisiana. Le Cesne v. Cottin, 2 Mart. (N. S.) 486. Elsewhere Fenwick v. Sears is recognized as authority for the proposition that executors and administrators have no authority outside the State where they are appointed: Leavens v. Butler, 8 Port. 401, St. James Church v. Walker, 1 Del. Ch. 293; Davis v. Smith, 5 Ga. 296, 48 Am. Dec. 295; Southwestern R. Co. v. Paulk, 24 Ga. 371; Naylor v. Moody, 2 Blackf. 248, note; Lucas v. Tucker, 17 Ind. 44; Moore v. Tanner, 5 T. B. Mon. 46, 17 Am. Dec. 39; Haven v. Foster, 9 Pick. 134, 19 Am. Dec. 362; In re Stockman, 71 Mich. 193, 38 N. W. 881; Winter v. Winter, Walker, 212; Sabin v. Gilman, 1 N. H. 193; Taylor v. Barron, 35 N. H. 495; Pelletreau v. Rathbone, 1 N. J. Eq. 333; Haight v. Executors, 15 N. J. L. 185; Morrell v. Dickey, 1 Johns. Ch. 156; Campbell v. Tousey, 7 Cow. 68; Leake v. Gilchrist, 2 Dev. 81; Plummer v. Brandon, 5 Ired. Eq. 194; Vaughn v. Barrett, 5 Vt. 336, 26 Am. Dec. 307; Crumlish v. Shenandoah R. Co., 40 W. Va. 650, 22 S. E. 99. The principal case is also cited and its doctrine applied in Mellus v. Thompson, 1 Cliff. 128, 131, F. C. 9,405, holding that an executor appointed in California cannot be substituted for the decedent in an equity suit in Massachusetts abated by decedent's death; Eels v. Holder, 2 McCrary, 622, 12 Fed. Rep. 669, holding that under Kansas statutes, a mortgage on Kansas lands, made by a Kansas mortgagor to an Ohio mortgagee, is assets in the hands of the mortgagee's administrator in Ohio; Greer v. Ferguson, 56 Ark. 330, 19 S. W. 967, holding that a foreign executor appearing and defending a suit against the decedent does not confer jurisdiction, nor does a statute authorizing foreign executors to sue include the right to be sued; Louisville R. Co. v. Brantley, 96 Ky. 304, 49 Am. St. Rep. 295, 28 S. W. 478, holding that a statute authorizing foreign administrators to sue for accounts due intestates, does not allow an action by an Indiana administrator to recover damages for a tort causing the death of his intestate.

Distinguished in Glassell v. Wilson, 4 Wash. C. C. 60, F. C. 5,477, holding that Pennsylvania practice permits suit by foreign executor or administrator.

Miscellaneous.— The principal case is cited to the point that remedies and proceedings are governed by the law of the place where suit is brought, in Scobey v. Gibson, 17 Ind. 580; Shaffer v. Bolander, 4 Greene, 202; Union Bank v. Smith, 4 Cr. C. C. 36, F. C. 14,362. Cited but not in point in Jones v. Gibson, 1 N. H. 268; Hinkley v. Marean, 3 Mason, 90, F. C. 6,523; Riddle v. Bedford County, 7 Serg. & R. 392, and State v. Clark, 4 Strobh. L. 315.

1 Cr. 282-290, 2 L. 109, THOMPSON v. JAMESON.

Variance.— In a suit upon a decree declaring for the amount of the decree, without interest, there is a fatal variance where the decree when put in evidence includes also interest, p. 289.

Cited in Pearsall v. Phelps, 3 Ala. 527, applying the principle in holding that a declaration averring a judgment in "the county of Richmond" is not supported by proof of a judgment in "the city of Albany;" Griffin v. Ganaway, 6 Ala. 152, holding that a difference of one-fourth of a cent between amount of an attachment alleged and amount proven is immaterial; Caldwell v. Bell, 3 Ark. 422, holding that an averment of judgment with costs, naming the costs, is not sustained by proof of a judgment with costs, not naming the amount; Rapelye v. Bailey, 3 Conn. 444, 8 Am. Dec. 201, holding that a contract of guaranty must be proved as laid; Williams v. Preston, 3 J. J. Marsh. 606, 20 Am. Dec. 185, holding that a variance between the declaration and proof, as to amount and character of a judgment, is fatal; and in Tilford v. Oakley, Hemp. 197, F. C. 14,038a, holding that an action of debt, not a bill in chancery, is the proper remedy to enforce a decree for payment of a specific sum of money. Cited in 4 Hayw. (Tenn.) 54, but not in point.

1 Cr. 290-299, 2 L. 112, MANDEVILLE v. RIDDLE.

Bills and notes.— By Virginia law assignee of a note may sue maker in debt; he may also sue his immediate assignor in assumpsit but not a remote assignor for want of privity, p. 298.

The same case was before the court again in Riddle v. Mandeville, 5 Cr. 328, 3 L. 116, where it was held that the assignee might, however, sustain such a suit in equity. The rule of the syllabus is followed in Bank of U. S. v. Weisiger, 2 Pet. 347, 7 L. 447, remarking that the doctrine is peculiar to Kentucky and Virginia, and holding that every effort must first be made to collect from maker before suing indorser; by majority holding in Dunlop v. Harris, 5

Call, 55, and in Caton v. Lenox, 5 Rand. 42, and Drake v. Johnson, Hardin (Ky.), 230. Cited in Drane v. Scholfield, 6 Leigh, 396, and Long v. Pence, 98 Va. 587, 25 S. E. 594, noting that subsequent Virginia statute conferred right to sue remote assignor at law. Cited and apparently followed in McCarty v. Rhea, 1 Blackf. 55; cited in dissenting opinion, Hunter v. Hempstead, 1 Mo. 70, arguing for the rule. Cited on point that action of debt lies on a promissory note in Natl. Bank v. Abell, 63 Me. 349; De Proux v. Sargent, 70 Me. 271, and Payne v. Smith, 12 N. H. 41. Considered arguendo in Moses v. Bank, 149 U. S. 303, 37 L. 745, 13 S. Ct. 901, discussing question under statute of frauds. Cited in Hurd v. Hall, 12 Wis. 136, on question of warranty by assignee of a chose in action.

Distinguished in Clifford v. Keating, 3 Scam. 252, holding that statute authorized suit against remote indorser; Walker v. Brooks, 125 Mass. 245, upon general question of right of assignee to sue in equity; Banking Co. v. Myer, 12 N. J. L. 147, and Watson v. Hahn, 1 Colo. 495, on statutory grounds; Smith v. Harley, 8 Mo. 560, holding may sue remote indorser in equity. See appendix, 1 Cr. 367–461, 2 L. 139, the opinion of Cranch, J., at circuit, in Dunlop v. Silver, 1 Cr. C. C. 27, F. C. 4,169, reversed by the principal case; and citations of the same infra, 1 Cr. 367–461, 2 L. 139.

1 Cr. 299–309, 2 L. 115, STUART v. LAIRD.

Constitutional law.— Congress may establish such inferior courts as it sees fit and transfer a cause from one such to another. Accordingly the act of 1802, abolishing one court and transferring forthcoming bonds pending therein to another is valid, p. 309.

Cited to this point in U. S. v. Haynes, 29 Fed. 696, 697, where indictment was remitted from District to Circuit Court.

Practice.— A forthcoming bond is an appendage to the cause, p. 309.

Cited and applied in White v. Crump, 19 W. Va. 593, holding supersedeas bond not a contract within the obligation clause. State v. Blair, 29 W. Va. 476, 2 S. E. 334, holding that supersedeas to original judgment will supersede a judgment on a delivery bond.

Statutes.—Construction of, is sometimes fixed by contemporaneous construction evidenced by practice thereunder, followed and acquiesced in for a period of years. Right of supreme judges to hold Circuit Court affirmed on this ground, p. 309.

Stuart v. Laird is a leading case on this proposition, and the citations show a large number of cases approving and applying the principle. In the following cases a construction of a statute or a practice argued to be correct has been denied on the ground that the contrary construction or practice is settled by long usage and acqui-

escence: U. S. v. Ship Recorder, 1 Blatchf. 223, F. C. 16,129, as to construction of importation in foreign vessels law; U. S. v. Richardson, 28 Fed. 71, adhering to settled practice in summoning of grand jurors; Rand v. U. S., 38 Fed. 667, requiring treasury department to adhere to practice of paying certain commissioners' fees; Schell v. Fauché, 138 U. S. 572, 34 L. 1043, 11 S. Ct. 380, sustaining the validity of prospective protests against duties charged; McPherson v. Blacker, 146 U. S. 27, 36 L. 874, 13 S. Ct. 7, as to practice under presidential elector law; In re Warfield, 22 Cal. 71, 83 Am. Dec. 58, affirming a certain probate practice, although contrary to the letter of the statute; People v. Loewenthal, 93 Ill. 204, sustaining a corporate charter, although prescribed formalities had been neglected; Fall v. Hazelrigg, 45 Ind. 585, 14 Am. Rep. 282, applying the rule to certain portion of statute of frauds; Board of Comrs. v. Bunting, 111 Ind. 145, 12 N. E. 151, collecting authorities and affirming power of county commissioners to build a jail, as well settled by usage; State v. Harrison, 116 Ind. 307, 308, 19 N. E. 149, 150, collecting authorities and upholding settled view as to amount of salaries authorized by certain laws; Hovey v. State, 119 Ind. 388, 21 N. E. 890, collecting cases and declaring right of general assembly to appoint certain trustees upon ground of settled practice; Parvin v. Wimberg, 130 Ind. 565, 30 Am. St. Rep. 258, 30 N. E. 791, approving construction of election law, which election commissioners had taken upon advice of leading lawyers; Maxent v. Maxent, 1 La. 469, 470, affirming practice, commonly used, of recording family meetings in French; Newton v. Griffith, 1 Har. & G. 138, sustaining a construction of act of descents on ground of long acquiescence; Opinion of Justice, 126 Mass. 594, 595, applying the rule of contemporaneous construction in determining meaning of "money bill" in the Constitution; Winchester v. Glazier, 152 Mass. 323, applying this rule of interpretation to partnership articles; Clark v. Mowyer, 5 Mich. 468, disregarding certain alleged irregularities in notices of tax sale because long acquiesced in; Franklin v. Kelley, 2 Neb. 87, approving a construction of pre-emption law of thirty years' standing; State v. Glenn, 18 Nev. 45, 1 Pac. 191, upholding settled practice of the signing of bills by assistant secretary of senate; State v. Gray, 21 Nev. 389, 32 Pac. 194, sustaining practice of publishing constitutional amendments in statutes and not in newspapers, as sufficient; Fritts v. Kuhl. 51 N. J. L. 201, 17 Atl. 105, affirming a temporary appointment to office by the executive as settled practice; Attorney-General v. Bank, 5 Ired. Eq. 72, denying claim that stockholders should pay tax under the statute since corporation had for years paid without question; Jack v. Shoemaker, 3 Binn. 285, applying the rule to construction of statute respecting summons; Pennsylvania R. R. v. Pittsburgh, 104 Pa. St. 558, denying claim for municipal tax against certain railroad property on ground of contrary construction settled for twenty years; Billis v. State, 2 Mc-

Cord, 15, holding State bank notes valid because legality long acquiesced in; Laval v. De Lieserline, 4 McCord, 75, sustaining power of municipality to appoint sheriff, from long user; Smith v. Hickman, Cooke (Tenn.), 336, sustaining settled construction of act, in land case; Cox v. Breedlove, 2 Yerg. 502, sustaining, from long user, practice of appointing special judges where regular ones disqualified; Hampton v. Allison, 9 Humph. 115, approving settled interpretation of act respecting process in Justice Court; Hillebrand v. McMahan, 59 Tex. 455, holding similarly as to act respecting jurisdiction in same; Treasurer v. Kelsey, 4 Vt. 388, upholding act authorizing recognizance to be proved before assistant county judge from long usage thereunder, although literally unconstitutional; Emerson v. Washburn, 8 Vt. 14, approving settled practice allowing execution for costs; Boyden v. Brookline, 8 Vt. 286, holding rule that town officers not entitled to fees for services, settled by long usage; dissenting opinion, Gilman v. Morse, 12 Vt. 558, maintaining State power to organize militia from long exercise thereof; France v. Connor, 3 Wyo. 463, 27 Pac. 575, construing certain congressional territorial legislation as to dower; Comrs. v. Gwin, 136 Ind. 572, 36 N. E. 240, collecting cases and holding that established usage required Circuit Courts to be held in county seat; Com. v. Lockwood, 109 Mass. 339, 12 Am. Rep. 713, holding that by settled practice governor may pardon after verdict and before sentence; People v. Mayor, etc., 25 Wend. 38, justifying the holding that aldermen may sit as judges in New York, from settled usage; Simpson v. Willard, 14 S. C. 195, deciding that under settled usage appointee upon death of incumbent held for unexpired term merely; Trout, etc., Club v. Mather, 68 Vt. 354, 35 Atl. 329, in dissenting opinion collecting authorities and arguing as to meaning of "boatable waters" in the Constitution; Lafayette, etc., R. R. v. Geiger, 34 Ind. 203, upholding statute authorizing municipal aid to railroads; Detroit v. Chapin, 108 Mich. 143, 66 N. W. 589, affirming as valid signature by governor to bill after adjournment from settled practice though possibly not strictly authorized; U. S. v. Reindeer, 27 Fed. Cas. 761, upholding settled interpretation of vessel license law against its letter.

It is cited and applied in the following cases, upholding the validity of a variety of laws upon the ground of long acquiescence: Prigg v. Pennsylvania, 16 Pet. 621, 10 L. 1091, the fugitive slave law; The Laura, 114 U. S. 416, 29 L. 148, 5 S. Ct. 883, statute authorizing secretary of treasury to remit steamboat penalties; McPherson v. Blacker, 146 U. S. 27, 35 L. 874, 13 S. Ct. 7, sustaining Michigan presidential elector law; Ex parte Gist, 26 Ala. 164, affirming Federal statute as to commitment by justice of peace; McElvain v. Mudd, 44 Ala. 54, 4 Am. Rep. 110, as to slave legislation of congress; Rogers v. Beiler, 3 Mart. (La.) (O. S.) 670, sustaining early act of territorial governor creating office of special administrator; State

v. New Orleans Co., 11 Mart. (La.) (O. S.) 311, affirming power of congress to govern the territories; Holmes v. Hunt, 122 Mass. 516, 23 Am. Rep. 385, sustaining validity of reference of account to auditor; dissenting opinion, Parsons v. Russell, 11 Mich. 124, arguing that statute was valid from acquiescence; Detroit Ry. v. Mills, 85 Mich. 646, 48 N. W. 1009, affirming municipal right to authorize electric railways; Bell v. West Point, 51 Miss. 276, applying the rule in considering jurisdiction of Justices' Courts under the statutes; Newcomb v. Smith, 2 Pinn. 138, upholding mill-dam law; U. S. v. Mackenzie, 30 Fed. Cas. 1166, upholding act of 1800, as to crimes in navy.

In the following cases the rule is applied in sustaining various statutes upon the ground that the legislation attacked was similar to other statutes which had been upon the statute books for years: Cooley v. Board, 12 How. 315, 13 L. 1003, upholding half pilotage law; Auffmordt v. Hedden, 137 U. S. 329, 34 L. 680, 11 S. Ct. 109, provision of tariff act making merchant appraiser's decision final; Field v. Clark, 143 U. S. 691, 36 L. 309, 15 S. Ct. 504, of same law, giving president power to suspend certain duties; Weaver v. Templin, 113 Ind. 301, 14 N. E. 601, where municipal corporations were held authorized to make repairs without notice; Bloodgood v. R. R., 18 Wend. 48, 31 Am. Dec. 345, sustaining right of eminent domain for railroad as similar to turnpike; Knoxville R. R. v. Hicks, 9 Baxt. 451, affirming legislative power to exempt corporations from taxation; Bridges v. Shallcross, 6 W. Va. 576, involving a statute respecting State penitentiary. The leading case is cited in dissenting opinion, Scott v. Sandford, 19 How. 616, 15 L. 788, arguing as to congressional power over slavery in the territories; Stewart v. Supervisors, 30 Iowa, 23, 1 Am. Rep. 248, sustaining act authorizing municipal aid to railroads; Cooper Co. v. Ferguson, 113 U. S. 733, 28 L. 1138, 5 S. Ct. 741, applying the principle in holding a constitutional clause may be interpreted in the light of a contemporaneous statute; dissenting opinion, Sparf v. U. S., 156 U. S. 169, 39 L. 384, 15 S. Ct. 319, arguing that by early construction of law, juries in criminal cases might disregard court's instructions as to the law, majority sustaining later cases, contra; Ridgeley v. Iglehart, 3 Bland Ch. 548, in general discussing of laws respecting real property liens. See also 13 Am. St. Rep. 145, note.

Distinguished in O'Donnell v. Glenn, 9 Mont. 463, 23 Pac. 1020, on the ground that the usage must be uniform and not a total disregard of the law; dissenting opinion, State v. Kelsey, 44 N. J. L. 49, discussing extent and limits of the rule and arguing it inapplicable there because the meaning of the act was plain; State v. Wrighton, 56 N. J. L. 206, 208, 28 Atl. 64, reviewing the cases elaborately, and holding rule inapplicable where statute clear; Egnew v. Cochrane, 2 Head, 332, where no evidence of usage appeared in record, and the usage relied upon to overcome statute was by those interested in evading it.

1 Cr. 309–318, 2 L. 118, HAMILTON v. RUSSELL.

Statute of frauds.— A sale of personalty without transfer of possession is fraudulent, per se, not merely presumptively so, pp. 317–318.

In the Federal courts the foregoing rule is applied in Meeker v. Wilson, 1 Gall. 423, F. C. 9,392, reviewing the authorities and holding attempted assignment void; Moore v. Ringgold, 3 Cr. C. C. 434, F. C. 9,773, in instruction to jury that sale of horse is void without delivery; Hamilton v. Franklin, 4 Cr. C. C. 730, F. C. 5,981, sale of slave invalid on this ground; Durham v. Ashton, 8 F. C. 130, no opinion reported; In re Hussman, 2 N. B. R. 437, 12 F. C. 1076, denying bankrupt's discharge for such fraudulent sale; The Romp, Olc. 203, F. C. 12,030, respecting a mortgage of a vessel; Wyoming etc., Bank v. Dayton, 1 Wyo. 347, holding sale of certain wood fraudulent because no change of possession. The rule is followed in California and expressly incorporated into its statutory law; Stevens v. Irwin, 15 Cal. 506, 76 Am. Dec. 502, holding, however, that the rule was not violated if at a subsequent time the vendor was given custody of the chattels sold; Woods v. Bugbey, 29 Cal. 476, a sale of kiln of bricks held fraudulent for want of change of possession; Bunting v. Saltz, 84 Cal. 172, 24 Pac. 168, declaring sale of farming implements void on this ground. As, also, in Colorado by statute; Finding v. Hartman, 14 Colo. 599, 23 Pac. 1005, collecting cases and discussing, but not deciding, the point; Roberts v. Hawn, 20 Colo. 80, 36 Pac. 887, affirming the rule, but holding transfer after the execution of a conditional bill of sale and before levy of attachment sufficient. The Florida courts have nominally followed Hamilton v. Russell, but assert that vendor's continued possession is merely presumptive fraud; Gibson v. Love, 4 Fla. 239; Holliday v. McKinney, 22 Fla. 165. The principal case is followed in Kentucky, Dale v. Arnold, 2 Bibb, 606, and applied in holding fraudulent a sale of a slave without transfer; Grimes v. Davis, 1 Litt. 242, a similar case; Goldsbury v. May, 1 Litt. 256, sale of a horse held fraudulent on this ground; Laughlin v. Ferguson, 6 Dana, 119, holding sale of slaves fraudulent for this reason; Foster v. Grigsby, 1 Bush, 98, resting decision on other ground. See distinguishing Kentucky cases, infra. The Missouri courts adopted the rule in Sibly v. Hood, 3 Mo. 299, applying it in holding such sale of slaves fraudulent even though conditional and not absolute; later cases departed from it, but by act of 1865, it was practically restored; Claflin v. Rosenberg, 42 Mo. 448, 97 Am. Dec. 338; Pattison v. Letton, 56 Mo. App. 331, 332, 333.

It is adopted by statute in Montana: Dodge v. Jones, 7 Mont. 141, 14 Pac. 715, holding branding of horses in a common pasture sufficient transfer. The New Hampshire court follows the rule with a slight modification, holding that continued possession is prima facie, and if

unexplained, conclusive evidence of fraud; Coburn v. Pickering, 3 N. H. 425, 428, 14 Am. Dec. 378, 380; Shaw v. Thompson, 43 N. H. 132, collecting cases and applying rule to mortgage of personalty; Putnam v. Osgood, 52 N. H. 156, reviewing cases. See, however, Haven v. Low, 2 N. H. 17, 9 Am. Dec. 28. Chancellor Kent practically indorsed the rule in Sturtevant v. Ballard, 9 Johns. 339, 6 Am. Dec. 282, reviewing the authorities, but conceding there may be special exceptions. But later cases and act of 1830 established a modified rule making the presumption conclusive only when possession unexplained; Hall v. Tuttle, 8 Wend. 388; Stoddard v. Butler, 20 Wend. 519, 533; Cole v. White, 26 Wend. 520; Hanford v. Artcher, 4 Hill, 309. In North Carolina the rule is followed in Gaither v. Mumford, Tayl. 167 (604, 605), avoiding a bill of sale of a slave, though with some doubt; afterwards it was denied; Trotter v. Howard, 1 Hawks, 323, 9 Am. Dec. 642; Smith v. Niel, 1 Hawks, 343. Oregon court followed the rule in Monroe v. Hussey, 1 Or. 190, 75 Am. Dec. 553, holding a mortgage in form of absolute bill of sale invalid. Rule followed in Clow v. Woods, 5 Serg. & R. 284, 287, 9 Am. Dec. 354, 356, avoiding a mortgage on this ground; Hower v. Geesaman, 17 Serg. & R. 254, collecting cases, and annulling a deed of assignment; Young v. McClure, 2 Watts & S. 151, holding there must also be a continued change of possession; Milne v. Henry, 40 Pa. St. 358; Stephens v. Gifford, 137 Pa. St. 229, 21 Am. St. Rep. 871, 20 Atl. 543, reviewing authorities and reaffirming rule. Followed in Ragan v. Kennedy, 1 Overt. 98, 100, but denied in later case, Callen v. Thompson, 3 Yerg. 476, 24 Am. Dec. 588. Vermont follows the rule in two early citing cases, Weeks v. Wead, 2 Aiken, 68; Fuller v. Sears, 5 Vt. 531. In Virginia, Hamilton v. Russell is followed and applied in Fitzhugh v. Anderson, 2 Hen. & Munf. 302, 303, 3 Am. Dec. 628, 629; Land v. Jeffries, 5 Rand. 606, with some explanation and distinctions; Glasscock v. Batton, 6 Rand. 83, 18 Am. Dec. 706; Clayton v. Anthony, 6 Rand. 304, affirming rule expressly and collecting cases; Burchard v. Wright, 11 Leigh, 470, applying rule by analogy in case sustaining executrix sale of property of legatee left in her possession; afterwards overthrown in Davis v. Turner, 4 Gratt. 434, 460, 461, 462. See 14 Am. Dec. 309, note, on this subject.

Cited in general discussion reviewing cases, Huntley v. Kingman, 152 U. S. 533, 38 L. 543, 14 S. Ct. 691, upholding a deed of trust preferring certain creditors; Howland v. Dews, Charlt. (Ga.) 386, arguendo; Ramsey v. Stevenson, 5 Mart. (O. S.) 23, incidentally; Irwin v. Wells, 1 Mo. 12, in general discussion; Hall v. Snowhill, 14 N. J. L. 20, in general discussion holding such sale good between the parties; Hudnal v. Wilder, 4 McCord, 297, 17 Am. Dec. 746; Salmon v. Clagett, 3 Bland Ch. 172, holding such mortgage good between the parties; Halbert v. Grant, 4 T. B. Mon. 587, avoiding a conveyance from father to son. See also note in 12 Am. Dec. 470.

Criticised in Warner v. Norton, 20 How. 459, 460, 461, remarking that weight of authority was contra, and distinguished on ground that there was constructive change of possession. Distinguished in U. S. v. Hooe, 3 Cr. 89, 2 L. 375, upholding mortgage to secure further indebtedness where no change of possession; Etting v. Bank of U. S., 11 Wheat. 75, 6 L. 422; Brooks v. Marbury, 11 Wheat. 81, 82, 6 L. 424, where deed of trust to secure certain creditors was upheld although donor remained in possession; Merrill v. Dawson, Hempt. 602, F. C. 9,469, holding possession by mortgagor not per se fraudulent; Howard v. Prince, 1 Hughes 242, 11 N. B. R. 326, F. C. 6,762, on ground that court was bound by local law which had in Davis v. Turner, 4 Gratt. 423, abandoned the rule of the principal case; Howe Co. v. Claybourne, 6 Fed. 440, on ground that Michigan statute made fraud a question of fact; Malone v. Hamilton, Minor, 289, on ground that it was there not an absolute conveyance but in trust merely. Denied in Alabama, adopting rule that continued possession only presumptive fraud, Hobbs v. Bibb, 2 Stew. 60, 61; Ayres v. Moore, 2 Stew. 342, 343, 344 (attempting to reconcile the cases); Killough v. Steele, 1 Stew. & P. 273; Blocker v. Burness, 2 Ala. 356; Planters' Bank v. Borland, 5 Ala. 547. Denied in Connecticut, Burroughs v. Stoddard, 3 Conn. 434, holding it a question of fact whether the leaving of attached property in defendant's possession made it fraudulent; Swift v. Thompson, 9 Conn. 68, 69, 21 Am. Dec. 722, 723, holding it a question of fact; Osborne v. Tuller, 14 Conn. 539, elaborately reviewing the cases and declaring fraud a question for the jury but under the court's direction. In Indiana the leading case is distinguished in Chinn v. Russell, 2 Blackf. 173, where goods were not left with a debtor vendor but with another; and in Watson v. Williams, 4 Blackf. 29, 28 Am. Dec. 39, reviewing and collecting authorities and the limitations on the rule, it is held that a mortgagor's continued possession of the chattels may be explained by evidence. Distinguished in Greathouse v. Brown, 5 T. B. Mon. 282, 17 Am. Dec. 68, affirming the general rule but holding it inapplicable where the purchase was at public auction; by dissenting judge in Yoder v. Standeford, 7 T. B. Mon. 510, on the same ground; Head v. Ward, 1 J. J. Marsh. 283, holding it inapplicable to deed of trust of realty; Hundler v. Webb, 3 J. J. Marsh. 646, 20 Am. Dec. 192, approving the rule but holding it inapplicable to conditional sales; Breckenridge v. Anderson, 3 J. J. Marsh. 713, 714, holding it inapplicable to sales under process of law. Somewhat criticised in New Hampshire in Haven v. Low, 2 N. H. 17, 9 Am. Dec. 28, but afterwards nominally followed. In New Jersey, Runyon v. Groshen, 12 N. J. Eq. 89, inclines to rule of prima facie presumption. The rule is denied in North Carolina, Trotter v. Howard, 1 Hawks. 323, 9 Am. Dec. 642 (overruling Gaither v. Mumford, Tayl. 167 (604, 605; Smith v. Niel, 1 Hawks. 343, holding fraud a question for the jury. Distinguished in Dawes

v. Cope, 4 Binn. 265, affirming the rule but noting exceptions and holding constructive delivery sufficient. Denied and the case distinguished in Nelson v. Good, 20 S. C. 233, reviewing authorities, and holding that possession may be explained. Denied in Callen v. Thompson, 3 Yerg. 476, 24 Am. Dec. 588 (overruling Ragan v. Kennedy, 1 Overt. 98), holding possession may be explained. Denied in Bryant v. Kelton, 1 Tex. 423, reviewing authorities at length. Distinguished in Rose v. Burgess, 10 Leigh, 197, upholding, under the recording law, a mortgage without change of possession. Criticised and denied in Davis v. Turner, 4 Gratt. 434, 460, 461, 462, reviewing and analyzing cases at length; followed by Howard v. Prince, 1 Hughes, 242, F. C. 6,762. Denied in Bindley v. Martin, 28 W. Va. 791, after a very elaborate review and collecting of cases, and remarking increasing tendency to abandon rule of the principal case.

Statute of frauds of Virginia and the English statute upon which it is based are declaratory of the common law, p. 316.

The following cases cited Hamilton v. Russell in affirmance of this general point: Sumner v. Hicks, 2 Black, 534, 17 L. 357, collecting authorities; Blackman v. Wheaton, 13 Minn. 330, holding similarly as to Minnesota statute; Rocheblave v. Potter, 1 Mo. 563, 14 Am. Dec. 307, deciding a case of fraud on common-law grounds; Pattison v. Letton, 56 Mo. App. 331, applying the rule to Missouri statute; Monroe v. Hussey, 1 Or. 190, 75 Am. Dec. 553; Davis v. Bigler, 62 Pa. St. 248, 1 Am. Rep. 396; Hudnal v. Wilder, 4 McCord, 297, 17 Am. Dec. 746, following rule as to South Carolina law; Meeker v. Wilson, 1 Gall. 423, F. C. 9,392; Bean v. Smith, 2 Mason, 276, F. C. 1,174; Hamilton v. Franklin, 4 Cr. C. C. 730, F. C. 5,981, holding as to Maryland statute; Howland v. Dews, Charlt. (Ga.) 386; Miller v. Marckle, 21 Ill. 153; Beal v. Warren, 2 Gray, 451; Drake v. Rice, 130 Mass. 413; Piper v. Johnson, 12 Minn. 66; Howe v. Waysmen, 12 Mo. 172, 49 Am. Dec. 128; Brice v. Meyers, 5 Ohio, 123; Clow v. Woods, 5 Serg. & R. 284, 287, 9 Am. Dec. 354, 356; Stephans v. Gifford, 137 Pa. St. 229, 21 Am. St. Rep. 871, 20 Atl. 543; Weeks v. Wead, 2 Aiken, 68; U. S. v. Church, 5 Utah, 543, 18 Pac. 88; Gibson v. Love, 4 Fla. 239; Gary v. Jacobson, 55 Miss. 206, 30 Am. Rep. 516; Doolittle v. Lyman, 44 N. H. 613; Beckwith v. Burrough, 14 R. I. 367, 51 Am. Rep. 393; Findley v. Cooley, 1 Blackf. 263, holding fraudulent deed good between the parties; similarly Springer v. Drosh, 32 Ind. 490, 2 Am. Rep. 360; Webb v. Roff, 9 Ohio St. 434, noting the contrary doctrine on this point; Nellis v. Clark, 20 Wend. 30, approving the rule of the leading case.

Appeal and error.— Instructions to jury upon abstract propositions of law, not relevant to the cause, are properly refused, p. 318.

The following citing cases approve and apply this holding: Halliday v. McDougall, 22 Wend. 273; Lewis v. State, 4 Ohio, 397, remarking further that to refuse proper instructions is error; Shep-

herd v. McQuilkin, 2 W. Va. 100, remarking that relevancy must affirmatively appear; King v. Kenny, 4 Ohio, 82; Sterling v. Ripley, 3 Pinn. 163, collating other rules and cases; Jones v. Thurmond, 5 Tex. 329; Proctor v. Hart, 5 Fla. 467; Dibble v. Truluck, 11 Fla. 140, 143, holding that instruction on abstract question, if misleading to jury, is error; State v. Chandler, 5 La. Ann. 491, 52 Am. Dec. 602; Clarke v. Baker, 7 J. J. Marsh. 197. See extended note, 72 Am. Dec. 540, collecting cases. Cited generally Frisbie v. Timanus, 12 Fla. 543.

Statute of frauds.— Virginia recording act does not comprehend absolute bills of sale so that recording validates them, p. 316.

Cited, and this construction of similar Kentucky statute adopted, in Dale v. Arnold, 2 Bibb, 606.

1 Cr. 318–320, 2 L. 121, UNITED STATES v. HOOE.

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Cited in Thompson v. Riggs, 5 Wall. 677, 18 L. 707, holding that in cases appealed from the Supreme Court of the District of Columbia a bill of exceptions is necessary; and to same effect in Stanton v. Embrey, 93 U. S. 555, 23 L. 984. Cited arguendo in U. S. v. Wonson, 1 Gall. 8, F. C. 16,750, noting other cases to same effect.

1 Cr. 321–332, 2 L. 122, HEPBURN v. AULD.

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This case was before the Supreme Court again in 5 Cr. 262, 3 L. 96, and 1 Wheat. 184, 185, 4 L. 67, which see. The doctrine of these cases was approved and applied in Morgan v. Morgan, 2 Wheat. 299, 4 L. 244, holding specific performance of contract for sale of land unenforceable because vendor could not give good title; reaffirmed in Park v. Kelly Co., 49 Fed. 626, 6 U. S. App. 26, where full tender of performance appeared; Powell v. Dayton R. Co., 14 Or. 359, 12 Pac. 667, holding that neither party to contract for contemporaneous delivery of deed and payment of price can sue without showing performance or offer.

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Principle applied in Wendell v. New Hampshire Bank, 9 N. H. 413, holding tender insufficient, because made conditional upon the giving of an assignment, not required by the contract.

1 Cr. 332-342, 2 L. 126, MARINE INS. CO. v. YOUNG.

Pleading.— Assumpsit will not lie upon insurance policy under seal, p. 342.

Cited in Heffleman v. Pennington Co., 3 S. Dak. 165, 52 N. W. 851, holding that a seal makes an instrument a specialty; Fresh v. Gilson, 16 Pet. 335, 10 L. 985, discussing cases where assumpsit will lie upon agreement substituted for original under seal.

1 Cr. 343, 2 L. 129, ABERCROMBIE v. DUPUIS.

Jurisdiction.— Citizenship of parties must be averred where jurisdiction dependent upon, p. 343.

The following citing cases apply this principle: Brown v. Keene, 8 Pet. 115, 8 L. 885, holding that the averment that defendant is "a citizen or resident of Louisiana" is insufficient; Marshall v. Baltimore & Ohio Co., 16 How. 340, 14 L. 964, where the averment that defendant is "a body corporate under an act of Maryland" is held sufficient by a majority of the court, but Daniel, J., dissenting, cites the principal case; Grace v. American Ins. Co., 109 U. S. 284, 27 L. 935, 3 S. Ct. 211, holds that "doing business and residing in New York" is not sufficient averment; Sherman v. Adams, 19 Blatchf. 315, 11 Fed. 852, description of plaintiff as "of C. in the State of Vermont" is held insufficient; Berlin v. Jones, 1 Woods, 639, F. C. 1,343, holds that alleging defendant to be "a citizen of the Southern District of Alabama" is equivalent to averring that he is a citizen of Alabama. In Merchants' Bank v. Brown, 4 Woods, 264, 17 Fed. 161, the citizenship of defendant was not averred, and the court dismissed the case on that ground; Stephenson v. The Francis, 21 Fed. 718, holds that description of a party as "of" a certain State is insufficient; Morrison v. Bennett, 1 McLean, 330, F. C. 9,843, holding failure to aver citizenship of one defendant ousted jurisdiction as to him; Speigle v. Meredith, 4 Biss. 126, F. C. 13,227, holding averment that citizenship of certain defendants is unknown an insufficient excuse and dismissing the bill; Prentiss v. Barton, 1 Brock. 392, F. C. 11,384, examining into the truth of allegations as to citizenship. The case is cited upon the doctrine that jurisdiction of Federal courts must affirmatively appear in North River Co. v. Hoffman, 5 Johns. Ch. 303, and Camp v. Wood, 10 Watts. 123; and the same doctrine is applied as to certain State courts in Com'rs Court v. Thompson, 18 Ala. 697; Ingraham v. Arnold, 1 J. J. Marsh. 407, and Donaldson v. Hazen, Hemp. 424, 425, F. C. 3,984. Cited, arguendo, in Dred Scott v. Sandford, 19 How. 473, 15 L. 728; Shaw v. Quincy,

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Distinguished in Allen v. Blunt, 1 Blatchf. 485, F. C. 215, holding rule inapplicable to patent cases because jurisdiction rests upon the subject-matter.

1 Cr. 343–345, 2 L. 130, LINDO v. GARDNER.

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Cited in Olive v. Napier, Cooke, 14, 20, on the point that assumpsit, not debt, lies by indorsee of a note against the maker; in Butcher v. Hixton, 4 Leigh, 528, and McIver v. Moore, 1 Cr. C. C. 91, F. C. 8,831, holding that the action of debt is no exception to the rule that the statute of limitations must be specially pleaded. See also appendix to 1 Cr. 462–466, 2 L. 178, citing further authorities on the question.

1 Cr. 345–365, 2 L. 130, HODGSON v. DEXTER.

Contracts made by a public agent pursuant to his duty and authority bind the government and not him personally, except when there is a very plain intent that he be liable personally, pp. 363, 364.

This is a leading case upon this point and the citations show a variety of applications of the principle. State prison commissioners have been held public agents, within the rule, and not liable personally, State v. McCauley, 15 Cal. 457; as also one authorized to make and repair a highway who employed assistants, Adams v. Whittlesey, 3 Conn. 566; a committee to build a bridge for a town, Perry v. Hyde, 10 Conn. 338; school trustees in employing teachers, Ogden v. Raymond, 22 Conn. 385, 58 Am. Dec. 432; a church building committee in contracting for church edifice, Hewitt v. Wheeler, 22 Conn. 562; justices of the peace in contracting for courthouse, no clear intent to bind themselves appearing, Ghent v. Adams, 2 Ga. 218; army quartermaster in employing clerk, Perrin v. Lyman, 32 Ind. 18; a municipal common council in contracting street improvements, though beyond their jurisdiction, Newman v. Sylvester, 42 Ind. 113; a congressional commissioner appointed to investigate a contested election. Brown v. Austin, 1 Mass. 219. Elsewhere a State prison warden has been held not liable for costs because a public agent, Bradford v. Rowe, 3 Pick. 18; a hospital trustee not personally chargeable because a State agent, Dewey v. Garvey, 130 Mass. 87; school trustees not liable even though their contract did not bind the school district, Sanborn v. Neal, 4 Minn. 139, 77 Am. Dec. 505; auditor of public accounts not bound personally on written promise to pay salary, Copes v. Matthews, 10 Sm. & M. 402; school trustees not liable upon written order for salary, Tutt v. Hobbs, 17 Mo. 489; surveyor-general not personally liable to one

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Cited in general discussion, Whiteside v. Jennings, 19 Ala. 789, remarking that doctrine as to liability of public agents is exception to general rule; Hovey v. Magill, 2 Conn. 683, 689, a case holding a certain private agent not liable; Merchants' Bank v. Central Bank, 1 Ga. 429, 44 Am. Dec. 668, discussing liability of corporate agent. Cited, arguendo, in holding congregational society bound by its agent's acts, Barlow v. Congregational Society, 8 Allen, 463; Stone v.

Wood, 7 Cow. 455, 17 Am. Dec. 531, a case of private agent; Commissioners v. Perry, 5 Ohio, 64, cited generally; Meyer v. Barker, 6 Binn. 234, cited arguendo, in holding private agent liable; Roberts v. Button, 14 Vt. 204, a case involving private agent's liability; as also, Devendorf v. West Va., etc., Co., 17 W. Va. 158; Sheets v. Selden, 2 Wall. 187, 17 L. 826, holding deed executed by governor and auditor sufficient to convey land for State; Bank v. Baldwin, 1 Cliff. 523, F. C. 892, a case of private agency; Potts v. Lazarus, 2 Car. L. Rep. 83 (180); 1 Bibb. 321, note. The case is cited to the point that if the agency appears in the body of the contract the form of signature is immaterial, in Ohio, etc., R. R. v. Middleton, 20 Ill. 637. Cited, but not in point, Rogers v. Omaha Co., 4 Neb. 57. Cited in elaborate discussion of liabilities of public agents in Belknap v. Schild, 161 U. S. 17, 40 L. 601, 16 S. Ct. 445, holding government agents may be personally sued for their personal infringement of patent rights.

Distinguished in Dwinelle v. Henriquez, 1 Cal. 392, holding public administrator not a public agent but personally liable for attorney fee; Sterling v. Peet, 14 Conn. 252, holding town warden and burgesses liable because not duly authorized and no clear intent not to bind themselves; Yulee v. Canova, 11 Fla. 47, where corporate officer was held personally bound because exceeding his authority in contracting for supplies; Wilson v. Fridenburg, 22 Fla. 151, holding executrix, borrowing money, under order of court, liable because order was invalid and she not a public agent; Cleaveland v. Stewart, 3 Ga. 297, holding academy trustees not public agents; Aven v. Beekom, 11 Ga. 6, holding administrator liable upon his warranty because not a public agent; Gillaspie v. Wesson, 7 Port. 461, 31 Am. Dec. 719, holding brigadier-general of militia had no power to bind United States for horses bought; Bank v. Sanders, 3 A. K. Marsh. 185, 13 Am. Dec. 150, where a clear intent to bind public agent did appear; Stinchfield v. Little, 1 Me. 234, 10 Am. Dec. 66, as inapplicable to private corporate agents; Sumner v. Williams, 8 Mass. 185, 212, 5 Am. Dec. 95, holding administrator of insolvent estate liable on covenant in deed; Simonds v. Heard, 23 Pick. 124, 34 Am. Dec. 42, on ground that contract was for a municipal corporation and defendants bound themselves personally; McClenticks v. Bryant, 1 Mo. 600, 14 Am. Dec. 312, holding town commissioners liable because they had exceeded their authority; Underhill v. Gibson, 2 N. H. 355, 356, 9 Am. Dec. 84, 86, holding town selectmen liable for same reason; Waldron v. Tuttle, 4 N. H. 150, holding one procuring warrant of arrest to be issued and promising to pay constable for serving it, liable because not a public agent; Sheffield v. Watson, 3 Caines, 73 (but see Walker v. Swartwout, 12 Johns. 448, 449, 7 Am. Dec. 336, 338), doubting the rule and holding public agents to have bound themselves personally; Gill v. Brown, 12 Johns. 388, holding that intent appeared to bind agents personally;

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1 Cr. 365–366, 2 L. 137, LLOYD v. ALEXANDER.

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Cited in National Bank v. Bank of Com., 99 U. S. 609, 25 L. 362, holding as to statute that it means that defendant shall have at least thirty days' notice before the hearing, and not that citation shall be served thirty days before the return day. Distinguished in Welsh v. Mandeville, 5 Cr. 321, 3 L. 114, holding that the principal case did not decide that the court would take up the case at the end of thirty days without defendant's consent. Cited in Knight v. Weiskopf, 21 Fla. 162, holding citation improperly served; and in Sammis v. Wightman, 25 Fla. 554, 6 So. 175, arguendo.

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Followed in Vallabolos v. U. S., 6 How. 90, 12 L. 356, collecting cases, and holding appeal taken without a citation, a nullity; Kitchen v. Randolph, 93 U. S. 87, 23 L. 810.

1 Cr. 367–461, Appendix A.

(An opinion by Cranch, J., in Dunlop v. Silver, 1 Cr. C. C. 27, F. C. 4,169, contra to Mandeville v. Riddle, 1 Cr. 290–299, 2 L. 112, supra.)

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The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

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To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien. It is not sufficient to say that they reside in different states.
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Marbury v. Madison, 176
2. An act of congress, repugnant to the constitution, cannot become a law. *Id.* *Ib.*
3. A cause may, by act of congress, be transferred from one inferior tribunal to another.
Stuart v. Laird, 299
4. Congress may constitutionally impose upon the judges of the Supreme Court of the United States, the burden of holding circuit courts.
Id. *Ib.*

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1. The Supreme Court of the United States has not the power to issue a mandamus to a Secretary of State of the United States, it being an exercise of original jurisdiction, not warranted by the constitution, notwithstanding the act of congress.
Marbury v. Madison, 137
2. An act of congress repugnant to the constitution cannot become a law. *Id.* 176
3. The courts of the United States are bound to take notice of the constitution. *Id.* 178
4. A contemporary exposition of the constitution, practiced and acquiesced under, for a period of years, fixes its construction.
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5. Congress may constitutionally impose upon the judges of the Supreme Court of the United States the burden of holding circuit courts.
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1. Delivery is not necessary to the validity of letters patent, as it is to that of a deed.
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1. Evidence on motion to discharge bail, must be by deposition and not viva voce.
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1. A writ of error lies upon a caveat from the district court of Kentucky district to the Supreme Court of the United States. *Wilson v. Mason,* 45
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2. By the command of the writ, the officer is to bring the money into court, there to be paid to the plaintiff. *Id.* *Ib.*
3. In Virginia, on a motion against a sheriff for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the next term succeeding that to which the execution has been returned. *Id.* *Ib.*
4. Money may be taken in execution, if in possession of the defendant. *Id.* 134
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Marbury v. Madison, 137
2. Congress have not power to give original jurisdiction to the Supreme Court, in other cases than those described in the constitution. *Id.* *Ib.*
3. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Id.* 175
4. To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien. It is not sufficient to say that they reside in different states.
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3. An act of congress, repugnant to the constitution, cannot become a law. *Id.* 176
4. The courts of the United States are bound to take notice of the constitution. *Id.* 178
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7. The President of the United States cannot authorise a Secretary of State to omit the performance of those duties which are enjoined by law.
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11. When a commission for an officer is signed by the President, the appointment is complete. *Id.* 157, 162.
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13. Nor is the acceptance of the office necessary to the validity of the appointment. *Marbury v. Madison,* 161
14. The possession of the commission is not necessary to authorise the officer to perform the duties of the office. *Id.* 160
15. When all the requisites have been performed which authorize a recording officer to record any instrument, and an order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. *Id.* *Ib.*
16. The keeper of a public record cannot erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law. *Id.* *Ib.*
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2. Money made on a *fi. fa.* does not become the goods and chattels of the plaintiff, until it has been paid over to him; while it remains in the hands of the officer he cannot apply it to the satisfaction of another *fi. fa.* against the former plaintiff. *Turner v. Fendall.* 117, 136
3. By the command of the writ the officer is to bring the money into court, there to be paid to the plaintiff. *Id.* Ib.
4. On a motion, in Virginia, against a sheriff, for not paying over money by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the next term succeeding that to which the execution has been returned. *Id.* *Ib.*
5. Money may be taken in execution if in the possession of the defendant. *Id.* 134
6. Although the creditor should have been discharged under the insolvent law of Virginia, yet the motion against the sheriff for not paying over money made on a *fi. fa.* must be in the name of such creditor. *Id.* 132
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10. Evidence on motion to discharge bail, must be by deposition and not viva voce. *Id.* *Ib.*
11. Subpœna in equity must be served 60 days before the return day. If the defendant, upon such service, shall not appear, the complainant may proceed ex parte. *Id.* *Ib.*
12. The plaintiff in error may show by affidavit, that the matter in dispute exceeds the value of 2,000 dollars. *Id.* xviii
13. When the defendant in error fails to appear, the plaintiff may proceed ex parte. *Id.* *Ib.*
14. If the writ of error issues within 30 days before the meeting of the court, the defendant in error may enter his appearance and proceed to trial; otherwise the cause must be continued. *Id.* *Ib.*
15. Where the writ of error appears to be brought for delay only, the judgment shall carry interest at 10 per cent. per annum, by way of damages. In other cases 6 per cent. *Id.* *Ib.*

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1. A commission is not necessary to the appointment of an officer by the executive. *Marbury v. Madison.* 178
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2. The President cannot authorise a Secretary of state to omit the performance of those duties which are enjoined by law. *Id.* 160
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1. When all the requisites have been performed which authorise a recording officer to record any instrument, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. *Marbury v. Madison,* 160
2. The keeper of a public record cannot erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law. *Id.* *Ib.*

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1804,

AND

FEBRUARY TERM, 1805.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. 1.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

SECOND EDITION.

REVISED AND CORRECTED BY THE AUTHOR.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.

The honorable WILLIAM CUSHING,
The honorable WILLIAM PATERSON,
The honorable SAMUEL CHASE,
The honorable BUSHROD WASHINGTON,
The honorable ALFRED MOORE, AND
The honorable WILLIAM JOHNSON,
} ASSOCIATE JUSTICES.

IN THE PLACE OF

The honorable ALFRED MOORE, *resigned.*

The only Judges who attended at February Term, 1804, were

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.

The honorable WILLIAM CUSHING,
The honorable SAMUEL CHASE, AND
The honorable BUSHROD WASHINGTON,
} ASSOCIATE JUSTICES.

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Supreme Court of the United States.

FEBRUARY TERM, 1804.

WOOD *v.* WAGNON.

The courts of the United States have not jurisdiction in cases between citizens of the United States, unless the record expressly states them to be citizens of different states.

ERROR from the circuit court of the district of Georgia.

The judgment was reversed, because it did not appear upon the record that the circuit court had jurisdiction of the case.

The proceedings stated, that "the petition of John Peter Wagnon, a citizen of the state of Pennsylvania, showeth,

"That James Wood, of the state of Georgia," &c.

The objection taken was, that it did not appear that the plaintiff and defendant were citizens of different states, and on that ground the judgment was reversed, upon the authority of *Bingham v. Cabot et al.*, 3 Dall. 382.

WILLIAMS AND HODGSON *v.* LYLES.

In Virginia, a forthcoming bond which in reciting the execution, states the cost to be 20 dollars, instead of 12 dollars, is not thereby vitiated, if the aggregate of debts and costs be truly stated, but will support a judgment on motion.

THIS was a writ of error to a judgment of the circuit court of the District of Columbia, sitting at Alexandria, upon a forthcoming bond, taken under the laws of Virginia.

The execution, upon which the bond was taken, was for "143 dollars and 67 cents, also twelve 10*] dollars and thirty-three *cents, and 355 pounds of tobacco at the rate of 13 shillings and 4 pence per cwt." The recital of the execution in the bond stated it to be for "143 dollars and 67 cents, also twenty dollars and thirty-three cents, and 355 pounds of tobacco, at the rate of 13 shillings and four pence per hundred weight; and marshal's fees and commissions, and all costs attending the execution of the said writ, 8 dollars and 11 cents, making in the whole the sum of one hundred and seventy-one dollars and ninety-nine cents." This aggregate sum was correct according to the execution, and not according to the recital, there having been a mistake in writing the word twenty for twelve. The court below, considering the recital as correct in substance, rendered judgment for the plaintiff. The defendants took a bill of exceptions, and brought their writ of error.

Youngs, for the defendant in error, cited 1 Call's Rep. 42, *Scott v. Hornsby;* and *Bell v. Marr*, p. 47, *Worsham v. Egleston*, p. 48, and *Wilkinson v. M'Lochlin*, p. 49.

Judgment affirmed, with 10 per cent. damages and costs.

FAW *v.* MARSTELLER.[1]

In a deed made in the year 1779, of land rendering an annual rent of 26 pounds current money of Virginia for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land, at the date of the contract, in specie, or in other money equivalent thereto, is to be ascertained by a jury.

THIS was an appeal by Faw, the original defendant, from a decree of the circuit court of the District of Columbia, sitting as a court of Chancery at Alexandria, in July, 1803.

The case, as stated by Marshall, Ch. J. in delivering the opinion of the Court, was as follows:

*In the month of May, 1779, the ex- [*11 ecutors of John Alexandria, in pursuance of a power contained in the will of their testator, set up to the highest bidder on a ground rent for ever, certain lots of land lying in the town of Alexandria.

One of these lots, containing half an acre, was struck off to a certain Peter Wise, at the rent of 26*l.* *per ann.* current money of Virginia. Wise bid for Jacob Sly, a citizen of Maryland, who transferred the lot to Abraham Faw, to whom the same was conveyed in fee-simple, by a deed bearing date the 5th of August, 1779, in which the said ground rent of 26*l.* per annum, current money of Virginia, was reserved.

In the year 1784, Abraham Faw divided the said half acre of ground into eight smaller lots, five of which he has sold, reserving a ground rent for ever, amounting to 84*l.* 12*s.* per annum. One of these lots was conveyed by Faw to Jacob Hess, in the year 1784, at the ground rent of 25*l.* 16*s.* per annum, which lot has been since purchased by Philip Marsteller, the ap-

1.—The counsel in this cause had not furnished the court with a statement of the points of the case, according to the rule of the court, *ante.* vol. 1, p. xvi. Being called upon by the court for such a statement, Swann observed that there was but a single point in the case, and therefore they had not supposed it necessary to reduce it to writing.

MARSHALL, *Chief Justice.* The court will proceed to hear this cause without having been furnished with a statement of the points; but they wish it to be understood that they always expect such a statement. If there is only one point, it is easier to state it.

pellee, who has also purchased from the devisee of John Alexander all his rights in, or issuing from, the half acre lot of ground conveyed to Abraham Faw. Thus Abraham Faw becomes liable to Philip Marsteller, for the rent accruing under the deed of August, 1779, who is himself liable to the said Faw for the rent accruing on part of the same lot, under the deed executed by Faw to Hess, in November, 1784.

In November, 1781, the legislature of Virginia passed an act calling paper money out of circulation, and also another act directing the mode of adjusting and settling contracts made in that currency.

The second section of this latter act, after stating, by way of preamble, that "the good people of the state would labor under many inconveniences for want of some rule, whereby to settle and adjust the payment of debts and contracts entered into, or made between the first day of January, 1777, and the first day of January, 1782, unless some rule should be by law established for liquidating and adjusting the same, 12*] so *as to do justice as well to the debtor as the creditor," enacts, that from and after the passing of the act, "all debts and contracts entered into or made in the current money of this state or the United States, excepting, at all times, contracts entered into for gold and silver coin, tobacco, or any other specific property, within the period aforesaid, now remaining due, and unfulfilled, or which may become due at any future day or days, for the payment of any sum or sums of money, shall be liquidated, settled, and adjusted agreeably to a scale of depreciation hereinafter mentioned and contained; that is to say, by reducing the amount of all such debts and contracts to the true value in specie, at the days or times the same were incurred or entered into, and upon payment of said value so found, in specie, or other money, equivalent thereto, the debtors or contractors shall be for ever discharged of and from the said debts or contracts, any law, custom or usage to the contrary, in any wise notwithstanding."

The fourth section establishes the scale of depreciation which shall constitute the rule by which the value of the debts, contracts and demands, in the act mentioned, shall be ascertained; and the fifth section enacts, "that where a suit shall be brought for the recovery of a debt, and it shall appear that the value thereof hath been tendered and refused; or where it shall appear that the non-payment thereof hath been owing to the creditor; or where other circumstances arise, which, in the opinion of the court, before whom the cause is brought to issue, would render a determination agreeable to the above table unjust; in either case it shall and may be lawful for the court to award such judgment as to them shall appear just and equitable.

The act then empowers the court to direct at what depreciation any judgment shall be discharged on a verdict given for damages, between the first day of January, 1777, and the first day of January, 1782, having "regard to the original injury or contract on which the damages are founded, and any other proper circumstances that the nature of the case will admit.

13*] *It was proved in the cause, that the contracts made by the executors of John Alexander excited at the time very great attention, and were the subject of general conversation. The prevailing opinion among the bidders was, that the rents would be paid in paper money so long as paper should be the circulating medium, after which they would be paid in specie. Such, too, was the opinion of Peter Wise, the purchaser of the particular lot which occasioned the existing controversy, and there is reason to suppose it was also the opinion of those who were disposing of the property; it was also thought the rent reserved was low, when considered as payable in paper, but high if to be paid in specie.

It was further proved, that a lot not more valuable than that which occasioned the present contest, was sold in 1774, on a ground rent of 13*l.* 5*s.* per annum, for ever, and that a lot less valuable was sold in the year 1784, on a ground rent of 35*l.* per annum. But it appeared from other parts of the testimony, that the lots which were sold in the year 1784, in Alexandria, on ground rent, were contracted for so much above the value they afterwards bore, that the lessors, in very many instances, were under the necessity of reducing the rents one half below the sum originally stipulated, and in some instances the reduction was still greater.

The circuit court decreed that the rents which accrued during the existence of paper money, should be reduced according to the scale for the time when they became payable, but that the subsequent rents should be paid in specie. From this decree Faw appealed, and the case was now argued by Swann and Mason, for the appellant; and by E. J. Lee, Jones and Key, for the appellee.

For the appellant, it was contended.

1. That this was a contract within the letter and spirit of the 2d section of the act of assembly of Virginia before mentioned, passed in November, 1781, c. 22, (Chancery Revision of the laws, p. 147,) and entitled, "An act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes;" and, therefore,

*1. It was not within the 5th section of [*14 that act.

1. This is a contract made in current money of the state, within the period contemplated by the act, payable at a future day or days, for the payment of money, and is, therefore, within the very words of the 2d section of the act. This point was decided by the Court of Appeals in Virginia, in the case of *Watson and Hartshorne v. Alexander*, 1 Wash. 340. The object of that section was to provide for contracts in which the fact of depreciation had increased the ideal value of the consideration of the contract. It is proved in the present case, that the rent was high if payable in specie. It is, therefore, a case within the spirit as well as within the words of the section; for it is reasonable to presume that the high rent was agreed to be given in consequence of the depreciated state of the paper currency.

2. The 5th section could not mean to provide for cases which were within the spirit of the 2d; because that would be to render the latter section a mere nullity. There would be no use in fixing a scale, if the court were to make a rule according to the circumstances of each particular case.

But the 5th section was intended for the benefit of debtors only. Every case of equity in favor of creditors was provided for by the exception in the 2d. The only two cases particularly specified in the 5th section to authorize the equitable interposition of the court, are, where the money has been tendered and refused, or where the non-payment is owing to the creditor. In both these cases, the equity is in favor of the debtor. The act then proceeds, "or where other circumstances arise, which in the opinion of the court would render a determination according to the above table unjust; in either case it shall be lawful for the court to award such judgment as to them shall appear just and equitable." The two cases are only put by way of example, to show the nature of those other circumstances which will justify the court in departing from the general rule.

15*] *In the present case there are no such other circumstances as come within the intention of the legislature; nothing like the examples which they have stated.

The act of assembly is founded upon the idea that every contract for the payment of current money made within the period described, is to be considered prima facie, a contract for the payment of paper money. This idea is founded in reason, because, during that period, it was almost the only circulating medium. Gold and silver were scarcely known.

But if the 5th section was intended for the benefit of creditors, as well as debtors, still it authorizes the court to interfere only in cases attended with extraordinary circumstances. No such circumstances appear in the present case. It was an ordinary and a common contract, not differing from the great mass of cases which the legislature intended to subject to the operation of the scale.

At the time when this contract was made, May, 1779, the parties could have had no idea of a scale of depreciation. It was even in a manner criminal to doubt the faith of the money. It might have appreciated until it gained the par of gold and silver. It was, therefore, natural that they should have had an expectation that the rents would at some future time be payable in specie. Such must also have been the expectation of all those who made contracts for the payment of current money at distant future periods, and, therefore, that circumstance cannot vary this case from all others, where the money was to be paid in future. The injury arising from that expectation was the very evil which the legislature intended to guard against.

Argument for the appellee.

1. This case is not within the letter or the spirit of the 2d section of the act.

2. It is within the 5th section.

1. It is not within the spirit or letter of the 2d section.

16*] *The object of the legislature was to prevent injury arising from the depreciation of paper money in cases where the contract was not made with a view to that currency, and where the parties had not guarded themselves from the effect of its depreciation. The act was not expected to do abstract justice in each case, but to fix a rule which should produce a general good effect. It was predicated upon the idea, that an equivalent ought to be paid for the consideration received. The consideration was presumed to pass at the time when the obligation was given, or the contract entered into; and if entered into between certain periods, the value of the consideration was supposed to have been measured by the paper medium. But where any thing on the face of the contract showed that paper money was not in contemplation, then the rule was not to apply as where the contract was made for gold and silver, tobacco, or other specific thing. A contract, therefore, in which the parties did not estimate the value of the consideration by the paper medium, was not a contract within the spirit of the 2d section of this act of assembly. So if the parties themselves had provided for the event of the depreciation and total failure of paper money, and had regulated the price accordingly, the case would be out of the spirit of the law; for the parties themselves had taken care to do the thing which the law supposed them to have neglected, and only for that reason provided a remedy.

Hence, in the construction of this act, courts have always traced the contract up to the time when the consideration first moved from the plaintiff to the defendant, as in the case of *Pleasants v. Bibb*, 1 Wash. 8, where the bond was dated 1st of February, 1780, with condition to pay 105*l.* on or before December 17, 1781, with interest thereon from the 16th of February, 1779, and it was decided that the debt arose in February, 1779, and was to be reduced by the scale for that month. By the same reason if the debt had been stated to have accrued before January, 1777, it would not have been reduced at all, yet it would, by the tender law, have been payable in paper money during its existence, but if not actually paid or tendered *in paper during that time, it would not [*17 come within the act of assembly of 1781.

Suppose a contract made in 1779, when the depreciation was twenty for one, and a bond given to pay 20*l.* current money on delivery of a horse worth 20*l.* current money in 1785. This is another case not within the spirit of the act.

Again, suppose a contract made in 1777, when the market price of wheat was 20*s.* a bushel, payable in paper money, by which A. should bind himself and his heirs, to deliver to B. and his heirs, 1,000 bushels of wheat per annum, for 1,000 years, for which B. agrees for himself and his heirs, to pay ten shillings current money of Virginia per bushel on delivery. Would this contract be within the spirit of the act?

In the present case the lease creates no debt; it is only inducement. The debt arises only from the enjoyment of the property; and *nil debet* is a good plea, which it would not be if the debt was due by specialty. The consideration of the rent due at the end of any one year was the enjoyment for that year; and if the tenant should be evicted by a paramount title, the rent would not be recoverable. The consideration for all the rents since 1781 has accrued since the passage of the law.

If the debt in 1800 arises from the enjoyment of the preceding year, is it possible to measure the value of that enjoyment by the depreciated paper of 1779?

No consideration passed at the date of the deed, and no debt was then created.

It is impossible to conceive that an interminable contract, when a new debt is always rising

from a new enjoyment, should be measured by the paper money and the enjoyment of 1779.

The act must have meant temporary, and not interminable contracts.

It could not have been the understanding of the parties at the date of the deed, that the rent 18*] was for ever *to be paid in the currency of 1779; which is the construction contended for by the appellant in his answer to the bill. No person had an expectation that paper money would last for ever. It was not in the nature of things that it should. Nor is such a construction warranted by the expressions of the deed. The words are, "to have and to hold the said lot unto the said Abraham Faw, his heirs and assigns for ever, yielding and paying for the same, on the 5th day of August next ensuing, and yearly and every year, for ever, on the same day unto the said William Thornton Alexander, his heirs and assigns, the sum of twenty-six pounds, current money of Virginia." And the covenant of Faw is, that he will "yearly and every year, for ever, well and truly pay the aforesaid sum of twenty-six pounds, Virginia currency."

This can only mean money current at the times the rents shall become payable. It cannot be contended, that he could satisfy the terms of the lease by paying the rents since 1782 in paper money.

As this case is not within the spirit, so neither is it within the letter, of the second section of the act.

The words are, "all debts and contracts entered into or made in the current money of this state, or of the United States," "within the period aforesaid, now remaining due and unfulfilled, or which may become due at any future day or days, for the payment of any sum or sums of money," &c.

At the date of the deed this was neither a debt nor a contract, in the sense in which those terms are used in the act.

The whole clause must be taken together. The subsequent words explain the kind of debts and contracts intended.

The word debts means *debita in præsenti, solvenda in futuro;* such as debts due by installments. But in the present case there was no debt at the date of the deed. If Faw had become 19*] bankrupt, the rents not accrued *at the time of the bankruptcy could not be proved under the commission; and the certificate would be no bar to the recovery of the future rents. The reason is because there is no debt until after enjoyment. Each gale of rent is as a new and separate contract, and constitutes a new and separate debt.

The words "debts" and "contracts" are not used synonymously, but in contradistinction to each other; and the subsequent epithets are to be applied distributively *reddenda singula singulis.* Thus the words "now remaining due, or which may become due at any future day or days," are to be referred only to the word "debts;" and the expressions "unfulfilled," and "for the payment of any sum or sums of money," are only applicable to the word "contracts." The meaning, therefore, is, "debts now remaining due, or which may become due at any future day or days," and "contracts for the payment of any sum or sums of money, now remaining unfulfilled."

It is clear, then, that this was not a debt within the meaning of the act.

The word contract evidently means such a contract as might be fulfilled. This is implied by the words, "now remaining unfulfilled."

It must not only be a contract which might be fulfilled, but it must be then remaining unfulfilled. Now this is not a contract which can ever be fulfilled, strictly speaking; and if the rents had been paid up to the time of passing the act, it would have been fulfilled as far as it was possible ever to fulfil it. If the rents should be paid for a thousand years, it would still be as far from being fulfilled as it was the day of its date. But as the rents were not paid up to the time of passing the act. there was something for the act to operate upon, if it is to be considered as affecting the case at all. The rents then accrued constituted a debt "remaining due," and, therefore, perhaps, they were properly subject to the scale. But the future rents constituted no debt; and the contract was constantly renovating, and never could be discharged.

*The case, then, is not within the [*20 statute. But if it is, it is within the fifth section.

It has been urged that this section is for the benefit of debtors only. But surely the legislature of Virginia would not so violate the principles of justice, as to provide for the equity of debtors, without also providing for special cases in favor of creditors. The case of *Watson and Hartshorne v. Alexander*, 1 Wash. 340, is full in our favor upon this point. The judgment in that case was not reversed on the merits, but upon a supposed impropriety in the manner of bringing the special circumstances of the case before the court below. But here it is not contended that the facts did not come properly before the court.

It appears that the rent was high at that time, if payable in specie; but low, if payable in paper money.

The deposition of Wise, who purchased the lot for Sly, states, that he understood at the time that the rents would be payable in specie when paper should cease to circulate.

What was the appellant's own opinion, appears by his having received from Saunders 400*l.* in specie, for a breach of Saunder's covenant to extinguish the rent. If the rent is to be reduced to the sum of 1*l.* 3*s.* 7*d.* according to the appellant's idea, he will have received more than three hundred years' purchase.

But the parties in this case, made their contract with a full knowledge of the depreciation of paper money. It had already greatly depreciated, and was continuing rapidly to depreciate.

They knew they were forming a contract which would extend far beyond the possible existence of paper money. That temporary medium, therefore, could not have had much influence upon either of them. The chance of paying his rent, for some time, in a depreciated currency might have been some small temptation to the appellant to give a little higher rent, but it does not appear to have been a very high rent, even if payable in specie, provided specie had been as plenty as it was *before the [*21 existence of paper money. The small increase of the rent which the existence of paper money occasioned was compensated to the appellant by his right to pay it in a depreciated currency;

during the existence of that currency while the same increase of rent was a compensation to Alexander for his loss by the depreciation.

It was, therefore, a fair and equitable bargain, in which the subject of depreciation was completely and fairly settled by the parties themselves. This court, therefore, as a court of equity, has nothing more to do than to carry into effect the contract as it was understood by the parties at the time, by reducing to the scale the rents which accrued during the existence of paper money, and by compelling a payment of the residue in specie.

The intention of the parties constitutes the contract; especially in equity. If it was their intention (as seems to have been fully proved) that the rent should be paid in paper money during its existence, and afterwards in specie, then it was a contract to pay the rent in gold and silver after a certain period; which period has by subsequent events been proved to be the 1st of January, 1782. As to all the rents, therefore, which have since accrued, it was a contract for gold and silver, and, therefore, expressly within the exception of the 2d section of the act.

Upon these principles the decree of the court below is founded, and if the court is now to form an equitable adjustment of the contract, it cannot be formed on surer ground than the intentions of the parties themselves, deliberately entered into, with a full knowledge of all the circumstances, and without even an allegation of fraud, mistake, or accident.

In reply, it was observed that the nature of the consideration makes no difference. The case is not varied whether the consideration be a horse or land; or the use of a horse, or the use of land; or whether an annuity for ever be granted in consideration of 1,000*l.* paid in hand, or whether it be a perpetual rent.

22*] *If the deed did not create a debt, yet it created a contract. It contains a covenant on the part of Faw to pay every year 26*l.* Virginia currency. This is a contract obligatory upon him without enjoyment.

The intention of the parties has been resorted to. That intention can be learned only from the instrument itself. But if we do resort to extraneous evidence, it appears that current money was intended, and that paper money was most naturally within the contemplation of the parties, because there was little specie in circulation. The law was intended to carry into effect the intention of the parties.

It has been said that the consideration must be a past, and not an accruing consideration.

But here the consideration was past. The grantor had parted with his whole right and estate.

In an action of debt for rent upon a demise by deed, it is not necessary to aver occupation and enjoyment. The deed itself is the consideration.

February 14. MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the Court.

This suit was instituted to recover the rent in arrear under the deed, executed in August, 1779, a part of which rent had accrued during the circulation of paper money.

The circuit court decreed that the rents which became payable in the years 1780 and 1781 should be adjusted by the scale of depreciation, when they respectively became due, and that the rents accruing afterwards should be discharged in specie.

From this decree Faw appealed to this court, and it is alleged that the decree of the court below is erroneous, because,

1st. The contract of August, 1777, is within the 2d section of the act of the Virginia assembly, which has been cited. And, if so,

*2d. That it is not within the 5th section of that act. [*23

The descriptive words of the act of assembly are, "all debts and contracts entered into, or made, in the current money of this state, or of the United States," "now remaining due and unfulfilled, or which may become due, at any future day or days, for the payment of any sum or sums of money." These words, it is urged, comprehend in express terms the very contract now before the court. That contract is an engagement entered into within the time specified by the act to pay several sums of current money in future. To make the case still stronger, contracts for gold and silver coin, tobacco, or any other specific property, are expressly excepted out of the operation of the law. When those who introduced these exceptions were so very cautious as expressly to take a contract for tobacco, or other specific property, out of the operations of a law made solely for money contracts, there are additional inducements to believe that every possible contract not included within the exceptions, was designed to be comprehended in the general rule.

It is admitted in argument, by the counsel for the appellee, that the terms used in the first part of the section are such, that if they stood alone, they would include, in their letter, the case at bar; but it is contended, that there are subsequent words which limit those just quoted, so as to restrain their operation to contracts capable of being extinguished. These words are, that upon payment of what was the value of the debt or contract at the time it was entered into, "the debtors or contractors shall be for ever discharged of and from the said debts or contracts." These words, it is said, can only apply to temporary contracts, such as may be completely fulfilled, and from which the debtors or contractors may in the language of the law, "be forever discharged."

It will not be denied that there is much weight in this argument; but it does not appear to the court to be strictly correct. In searching for the literal construction of an act, it would seem to be generally true, that positive and explicit provisions, comprehending in terms a *whole class of cases, are not to be re- [*24 strained, by applying to those cases an implication drawn from subsequent words, unless that implication be very clear, necessary, and irresistible. In the present case, the implication does not appear to the court to be of that description. A contract for the payment of distinct sums of money, at different periods, is very much in the nature of distinct contracts. An action of debt lies for each sum as it becomes due, and when that sum is paid, the debtor or contractor is forever discharged from the contract to pay it. To understand in this sense the words of the act which are considered as restrictive, does not appear to the court to be such a vio-

lence to their natural import as to be inadmissible; and to understand them in this sense reconciles the different parts of the clause with each other.

But although the counsel for the appellee may not have established the literal construction for which they insist, yet so much weight is admitted to be in the argument, that if they succeed in showing the case to be out of the mischief intended to be guarded against, or out of the spirit of the law, the letter would not be deemed so unequivocal as absolutely to exclude the construction they contend for.

It is urged, that the mischief designed to be guarded against, is confined to temporary contracts, and that by the spirit of the law, and the construction it has received, the time when the consideration, on which the debt is founded, moved from the creditor, is the real date of contract.

But the court perceives no sufficient ground for saying that this case is taken out of the mischief or spirit of the law by either of the circumstances which have been relied on.

The only real reason for supposing that the law might not be designed to comprehend interminable contracts is, that as paper money must unavoidably cease to circulate during the continuance of the contract, the parties must have measured their agreement by a more permanent standard.

25*] *Very great respect is certainly due to this argument, but it cannot be denied that an agreement, which is to subsist for a very great length of time, as for a thousand years, would be entered into with precisely the same sentiments as an agreement to subsist for ever. The contracting parties would be as confident in the one case as in the other, that the agreement would subsist after the paper currency would cease to circulate. Yet an agreement for a thousand years would be within the very words and spirit of the law, which plainly comprehends engagements for different sums of money, to become due in future at different periods. To suppose a distinction to have been contemplated between two such cases, is to suppose a course of reasoning too unsubstantial, and too finely drawn for the regulation of human action. It seems to be the date, and not the duration of the contract, which was regarded by the legislature. The act is applied directly to the date of contract, and the motive for making it was, that contracts entered into during the circulation of paper money, ought in justice to be discharged, by a sum differing in intrinsic value, from the nominal sum mentioned in the contract, and that when the legislature removed the delusive standard, by which the value of the thing acquired had been measured, they ought to provide that justice should be done to the parties.

That the time when the consideration was received constitutes the date of contract, according to the intention of the act, seems not to be a correct opinion; nor, if correct, would it affect the present case.

If, for example, a contract had been entered into in 1779, to be executed in 1789, whereby a specific sum in current money was to be given for property then to be delivered, no doubt would be entertained but that the case would come within the law, although the thing sold would pass out of the vendor after the first of January, 1782; yet the contract to pay the money was entered into in 1779, and in the general legislative view of the subject, the value of the money at the date of the contract is supposed to have regulated the price of the article.

*If in the case of rents, this argument [*26 of the counsel for the appellees was correct, it would follow that rents accruing during the circulation of paper money, or leases made before the first of January, 1777, were within the operation of the act. If enjoyment is the consideration for which the rent becomes payable, and the date of the consideration is in the spirit of the act the date of contract, then rents accruing between the first of January, 1777, and the first of January, 1782, or leases made prior to the former period, would be payable according to the scale of depreciation, and rents accruing after the first of January, 1782, or leases made for a short term of years, when depreciation was actually at the rate of 500 for one, would be payable in specie at their nominal sum. These consequences follow inevitably, from the construction contended for, and yet it is believed, that no person would admit an exposition which he acknowledged to involve them.

The position, then, that the value of the money at the time when the consideration for which it was to be paid was received, is the standard by which the contract is to be measured, is not a correct one, and if correct, it would not apply to this case, because the real consideration is found in the contract itself, by which the right to enjoy the premises is conveyed from the grantor to the grantee. This right was defeated by subsequent events, but does not originate in those events.

This case cited from 1 Wash. 8, by no means conflicts with this opinion. In that case it was decided that where a written instrument discloses on its face any matter which proves that the contract itself was of a date anterior to the paper by which it is evidenced, as when a bond carries interest from a past day, the contract shall be considered as of a date antecedent to its execution, and the scale of that antecedent date shall be applied to it. The reason of this decision is, that the price of the article sold was measured in nominal money, according to its value at the date of the original contract, and not according to its value when the instrument of writing was executed.

*It is, then, the opinion of the Court, [*27 that the contract of the 5th of August, 1779, comes within the second section of the act "directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes."

It remains to inquire whether it is a case proper for the interposition of that equitable power which is conferred on the court by the fifth section of that act, and if so, in what manner, and to what extent, that power ought to be interposed.

It is contended by the counsel for the appellant that this case does not come within the fifth section of the act, because,

1st. That section is designed only for the benefit of debtors.

2d. No testimony out of a written contract can be admitted to explain it.

3d. If the testimony be admitted, it does not

prove one of those extraordinary cases which will be entitled to the benefits of that section.

1st. The fifth section is designed only for the benefit of debtors.

That the provisions of an act, for the regulation of contracts, should be designed uniformly to benefit one of the parties only, is at first view a proposition replete with so much injustice, that the person who would maintain it must certainly show, either that the words of the act will admit fairly of no other construction, or that legislative aid on one side only was requisite in order to do right between the parties.

The counsel for the appellants endeavor to maintain both these propositions, and if they succeed in either, the case is clearly with them.

In reasoning from the words of the law they say, that the two cases put are by way of ex-28*] ample, and as *they are both cases where the scale established by the act is to be departed from, for the benefit of the debtor, the general power afterwards given to the court ought to be considered as designed to furnish a remedy in other similar cases not occurring at the time to the legislature.

The words of the section are, "that where a suit shall be brought for the recovery of the debt, and it shall appear that the value thereof hath been tendered and refused; or where it shall appear that the nonpayment thereof hath been owing to the creditor; or where other circumstances arise, which, in the opinion of the court before whom the cause is brought to issue, would render a determination agreeable to the above table unjust; in either case it shall and may be lawful for the court to award such judgment as to them shall appear just and equitable."

The terms used in the third member of the sentence, are certainly very comprehensive, and their general natural import does not appear to be so restrained by their connection with other parts of the section, as necessarily to confine their operation to cases where debtors only can derive advantage from them.

The legislature was performing a very extraordinary act. It was interfering in the mass of contracts entered into between the first of January, 1777, and the first of January, 1782, and ascertaining the value of those contracts by a rule different from that which had been adopted by the parties themselves. Although the rule might in the general be a just one, yet that it would often produce excessive injury to one or other of the parties, must have been foreseen. It was, therefore, in some measure necessary to vest in the tribunals applying this rule a power to relax its rigor in such extraordinary cases. This sentiment might produce the fifth section, and if it did, the general terms used ought to be applied to the relief of the injured party, whether he was the creditor or the debtor.

The opinion that the creditor could not in the contemplation of the legislature be the in-29*] jured party, because *the scale of depreciation gave him the full value of his contract, does not seem to be perfectly correct. According to the law of the contract, all moneys accruing under it, which were not received during the currency of paper, would be payable in such other money as might be current at the time of payment. It is impossible to say by any general rule what influence the knowledge of this principle might have on the parties, in every case where the contract was continuing, and was to be fulfilled at future very distant periods. Unless the rule applying to such cases possessed some degree of flexibility, it is apparent that the one or the other of the parties would often be injured, by the interference of the legislature with their contract, and this injury would most generally be sustained by the creditor, in all cases like that at bar, because in all such cases the conviction that a more valuable medium than that circulating at the time would return during the continuance of the contract, must have had considerable influence on the parties in fixing the sum of money agreed to be paid.

There appears, therefore, nothing in the state of the parties to be affected by the fifth section of the act, which should prevent its application, either to creditors or debtors, as the real justice of the case may require.

But admitting the correctness of this opinion, it is contended that no circumstances can be given in evidence to explain a written contract, and, therefore it is said, that the judgment of the court in this case must be governed absolutely by the deed of August, 1779, unless other subsequent and independent events should control that deed.

The rule which forbids a deed to be contradicted, or explained by parol testimony, is a salutary one, and the court is not disposed to impair it. The application of that rule to this case, however, is not perceived. The testimony which brings this contract within the fifth section, neither contradicts nor explains the deed. It is not pretended that the deed was not executed on the consideration expressed on the face of it. But according *to the law [*30 which existed when the deed was executed, that consideration would be payable only in gold and silver coin, when gold and silver coin should become the only currency of the country. The law changing the nominal sum of money by which the debt should be discharged, and giving a general rule by which a different sum, from that agreed on by the parties, is to be paid and received, authorizes a departure from the rule where circumstances shall arise which render a determination agreeable to it unjust. The examination of these circumstances is not entered into for the purpose of contradicting or explaining the deed, but for the purpose of determining which of two rules given by the statute altering the law of the contract does really govern the case.

The argument that the exception, if it receives the construction which the court seems inclined to give it, would destroy the rule, must be founded on a supposition that in every case the circumstances would be looked into, and a slight injustice in the application of the scale of depreciation to the contract would be deemed a sufficient motive for departing from it. But this is not the opinion of the court, and it may very readily be perceived that the great mass of contracts made during the circulation of paper money, may be decided by a general scale estimating the value of those contracts, although there may be very strong features in some few cases, which distinguish them as of such peculiar character, that they are embraced by the clause which measures their value by the standard of justice.

But although the just construction of the

5th section of the law admits a creditor, who would be greatly injured by the application of the general rule to his case, to show circumstances which authorize a departure from that rule; it is contended that such circumstances have not been shown in the cause under consideration.

It is said that the case ought to be an extraordinary one; that the circumstances ought to be uncommon which would warrant a departure from the general principle established for the government of contracts generally.

31*] *This is true, and the court would certainly not feel itself at liberty to exercise on a common occasion a discretionary power, limited only by the opinion entertained of the naked justice of the case.

But this appears to the court to be an extraordinary case. The evidence goes a great way in proving that the parties to the contract believed that the sums becoming due under it, would at no distant period be payable in specie only. This testimony is the more to be credited, because it is not easy to conceive any other motive for disposing of the property on the terms on which it was parted with; and still more, because such was the operation of the existing law on the contract when it was entered into. Under this impression, an impression warranted by the law of the land, a very valuable property has been conveyed away for what would have been, under the then existing law, a full consideration, but which a subsequent act of the legislature has reduced certainly to a tenth, perhaps to a twentith, of the real value of the estate disposed of.

Such a case is, in the opinion of the court, an extraordinary case, which is completely entitled to the extraordinary relief furnished by the act which has occasioned the mischief.

In inquiring to what extent this relief ought to be afforded, or, in the words of the law, what "judgment will be just and equitable," the court can perceive no other guide by which its opinion ought, in this case, to be regulated, but the real value of the property at the time it was sold. The record does not furnish satisfactory evidence of this value. It is proved that a lot not superior to that which occasioned the present contest, rented, in the year 1774, for 13*l.* 5*s.* per annum, and that other lots, perhaps not equal to it, rented in 1784, for 25*l.* per annum. It is even proved that a small part of the very lots, about the value of which the inquiry is now to be made, rented in the year 1784, on a ground rent for ever, for 25*l.* 16*s.* per annum. These are very strong circumstances in support of the decree of the circuit court, fixing the rent at 26*l.* per annum, the 32*] *nominal sum mentioned in the lease. But a majority of the judges are of opinion that the value must be ascertained by a less erring standard.

Neither the value in 1774, nor in 1784, ought to regulate the rent. The value at the date of the contract must be the sum which in equity and justice the lessee ought to pay, and as this value is not ascertained by the testimony in the record, it ought to be found by a jury. In finding this value, however, the jury ought not to be governed by the particular difficulty of obtaining gold and silver coin at the time, but their conduct ought to be regulated by the real value of the property, if a solid equivalent for specie had been made receivable in lieu thereof. On these principles the court has directed the following decree:

This cause, which was abated by the death of the appellee, and was revived in the name of his administrator, came on to be heard on the transcript of the record, and was fully argued by counsel. On consideration whereof, the court is of opinion that there is error in the decree of the circuit court in this; that the rents reserved in the lease in the proceedings mentioned, bearing date the 5th day of August, in the year of our Lord one thousand seven hundred and seventy-nine, and which were in arrear and unpaid, were decreed to be paid at their value according to the scale of depreciation when the same became due; and that those rents which accrued after the first of January, 1782, are decreed to be paid according to the nominal sum mentioned in the lease; whereas, the annual rent reserved in the said lease ought to be reduced to such a sum in specie, as the property conveyed was, at the date of the contract, actually worth; to ascertain which, the evidence of the cause not being sufficient for that purpose, an issue ought to have been directed, according to the verdict, on which, if satisfactory to the court, the final decree ought to have been rendered.

This court is, therefore, of opinion, that the decree rendered in this cause in the circuit court for the county *of Alexandria ought to [*33 be reversed, and it is hereby reversed and annulled; and the court, proceeding to give such decree as the circuit court ought to have given, doth decree and order that an issue be directed between the parties, to be tried at the bar of the said circuit court, in order to ascertain what was the actual annual value in specie, or in any other money equivalent thereto, of the half-acre lot of ground which was conveyed, by the executors of John Alexander, deceased, to Abraham Faw, on the 5th day of August, 1779, and that in the account between the parties, in order to a final decree, the representatives of said Philip Marsteller be allowed a credit for the rent which has accrued, and which remains unpaid, estimating the said annual rent at such sum as the verdict of a jury, to be approved of by the said circuit court, shall ascertain the half-acre lot of ground before mentioned to have been fairly worth, at the date of the contract under which the same is claimed by the said Abraham Faw.

OGLE *v.* LEE.

If a question upon which the judges below differ in opinion be certified to this court, and here decided, the parties are not precluded from a writ of error on the final judgment, when the whole cause will be before the court.

THIS cause came up to this court, upon a question on which the opinions of the judges of the circuit court were opposed.

It was made a question, whether this court would consider the whole case, or only the question upon which the court below divided.

The Court were unanimously of opinion, that they could only consider the single question upon which the judges below divided in opin-

ion, but that the parties will not be precluded from bringing a writ of error upon the final judgment below; and the whole cause will then be before the court. A court may at any time reverse an interlocutory decree.

The case was afterwards settled by the parties.

PENNINGTON v. COXE.

Sugar refined but not sold and sent out of the manufactory, before the 1st of July, 1802, is not liable to any duty upon being sent out after that day.

THIS was a feigned issue, between Tench Coxe, a citizen of the state of Pennsylvania, and Edward Pennington, a citizen of the state of 34*] New York, to try the question, *whether sugar actually refined, but not sold and sent out of the manufactory, before the 1st of July, 1802, is liable to any duty to the United States, upon being sent out after that day.

This question arose upon the act of Congress, entitled "An act to repeal the internal taxes," passed April 6, 1802, vol. 6, p. 58.

The declaration was upon a wager, that the United States were entitled to collect the duty, and stated the following facts: That Pennington was a refiner of sugar, within the meaning of the several acts of Congress imposing a duty on refined sugars; that he had refined a quantity of sugar between the 31st of March and the 1st of July, 1802, which, if the act for repealing the internal taxes had not been made, would have been liable to a duty, exceeding in the whole, the sum of 2,500 dollars; that he did from day to day enter in a book or paper kept for that purpose, all the sugar refined by him as aforesaid, but that he did not, on the 1st of October, 1802, render any account of the sugar which he had so refined to any officer of the revenue, nor did he produce to any such officer (though required) the original book or paper whereon the entries from day to day were made as aforesaid, nor did he on the said 1st of October, nor at any time before or since, pay or secure any duties upon the said quantity of sugar so refined by him as aforesaid, during the period aforesaid; that the same was not sent out of the manufactory before the 1st of July, 1802, but that the whole had been since sent out, viz., on the 30th of September, 1802. To this declaration there was a general demurrer and joinder; and it was agreed that no advantage should be taken of want of form in the proceedings.

The judgment of the circuit court of the district of Pennsylvania was for the plaintiff below, and the defendant brought the writ of error.

The act imposing the duty was passed June 5th, 1794, vol. 8, p. 93, and is entitled, "An act laying certain duties upon snuff and refined sugars."

The 2d section enacts, that from and after the 30th of September, 1794, "there be levied, 35*] collected, and paid, *upon all sugar which shall be refined within the United States, a duty of two cents per pound."

The 3d section directs, "that the duties aforesaid shall be levied, collected and accounted for," by certain officers therein described.

The 5th section directs, that every refiner of sugar shall make true and exact entry and report in writing, at the office of inspection, of every house or building where such business shall be carried on, and every pan or boiler, together with the capacity of each; and shall also give bond in the sum of 5,000 dollars, with condition that he will enter in a book or paper, to be kept for that purpose, all sugar which he shall refine, and the quantities from day to day sent out of the building, where the same shall have been refined; and shall on the first day of January, April, July and October, in each year, render a just and true account of all the refined sugar which he shall have sent out, from the time of the last account rendered, producing and showing therewith the original book or paper, whereon the entries from day to day, to be made as aforesaid, have been made; "and he shall, at the time of rendering each account, pay or secure the duties which by this act ought to be paid upon the refined sugar in the said account mentioned."

By the 7th section, it is enacted, that every refiner of sugar shall, yearly, being thereunto required by an officer of inspection, make oath that the accounts which have been by him rendered of the quantities of refined sugar by him sent out of the building, have been just and true.

By the 10th section, it is enacted, "that all snuff and refined sugar, which shall have been manufactured, or made within the United States, in manner aforesaid, after the said 30th day of September next, whereof the duties aforesaid have not been duly paid or secured, according to the true intent and meaning of this act, shall, upon default being made in the paying or securing of the said duties, be forfeited, and shall and may be seized as forfeited, by any officer of the inspection or of the customs."

By the 11th section, the refiner has the option to pay, upon rendering his account, "the duties which shall *thereby appear to be due [*36 and payable," with a deduction of six per cent. for prompt payment, or to give bond payable in 9 months.

By the 11th section a drawback of the duties "hereby laid upon sugar refined within the United States" is allowed upon exportation to a foreign port.

But by the 16th section, such allowance is not to be made, unless the exporter shall make oath that the duties have been paid or secured.

The 20th section declares it shall be lawful to export refined sugar directly from the manufactory, free from duty.

The 1st section of the repealing act of April 6, 1802, enacts, "that from and after the 30th day of June next, the internal duties on stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, and stamped vellum, parchment and paper, shall be discontinued, and all acts and parts of acts relative thereto shall, from and after the said 30th day of June next, be repealed.

"Provided, that for the recovery, and receipt of such duties as shall have accrued, and on the day aforesaid remain outstanding, and for the payment of drawbacks, or allowances on the exportation of any of the said spirits, or sugars legally entitled thereto, and for the recovery and distribution of fines, penalties and forfei-

tures, and the remission thereof, which shall have been incurred before and on the said day, the provisions of the aforesaid acts shall remain in full force and virtue."

Ingersoll, for the plaintiff in error.

By the repealing act, no duties upon refined sugar are to be collected, but such as had accrued and remained outstanding, on the 30th of June, 1802. The sugars in question were refined before, but were not sent out until after that day; and the question is, whether the duties upon them had accrued on that day, and then remained outstanding. We contend that 37*] the duty is to be collected *only upon sugar sent out of the building in which it was refined; and to support this construction, we rely upon the general tenor of the act which imposed the duty. It is a rule of construction of statutes, that "every act, upon consideration of all the parts thereof together, is the best expositor of itself." 4 Inst. 325. And it is another sound rule, that words distributed into different sections, are to be considered as if all were in one section. By this rule the 5th section of the act of June 5th, 1794, is to be connected with the 2d. What is general in the 2d is thus restricted and qualified by the 5th. The 2d section enacts that the duty shall be levied, collected and paid, upon all sugar refined in the United States. If this section stood alone, it is admitted that it would be conclusive against the plaintiff in error. But it is limited by the 5th section not accidentally, but with a clear view to collection, and that it might not operate as a tax upon labor, but upon consumption. By this section two accounts are to be kept; one of the sugar refined, the other of the refined sugar sent out; but the duty is only upon that contained in the latter.

If the words of both sections were incorporated into one, (and they are to be construed as if they were,) it would read thus; upon all sugar refined within the United States, and sent out of the building, &c., there shall be levied, collected and paid, a duty of two cents per pound.

The account of sugar refined, but not sent out, was intended merely as a check. It was not to be delivered, but shown, to the officer, and its purpose was to enable him, by comparing the amount refined with that sent out, and what remained on hand, to estimate the correctness of the account of sugar sent out, upon which alone the duty was chargeable. It was clearly the intention of the legislature, that the duty should be paid upon sugar, only in such circumstances as would show that the tax would fall upon the consumer, and not on the manufacturer.

But it will be contended that there is a distinction between levying and collecting. That the duty is levied upon the whole, but is payable only on such as shall be sent out.

But for this distinction there is not even an intimation in the act of Congress.

*38] *It will be said on the part of the United States, that there is no section but the 2d which imposes the duty, and by that section it is imposed on all sugar refined.

But why impose a duty, which is not to be collected?

It is agreed, that the sending out is a prerequisite to the payment. What use can there be in imposing a duty, upon an article in circumstances which prevent its collection?

If the duty arises from the act of refining only, the 5th section might be expunged, and the law would remain the same. That section is of no use unless it operates upon the second.

The words "levied, collected and paid," in the 2d section, are commensurate, though not of the same meaning. The word "levied" applies to the act of the legislature in imposing the duty. "Collected," refers to the act of the officer. "Paid," to the act of the party. "Levied," means the same as imposed.

Each verb has the same subject. The same thing is to be levied, collected and paid. Nothing is levied but what is to be collected; nothing collected but what is to be paid; and nothing is to be paid but on the sugar sent out. Hence no duty is levied but upon sugar sent out.

There is no analogy between this duty and that upon goods imported. There the duties are payable on the landing of the goods, and are payable even if the goods are destroyed as soon as landed. In such a case a remission of the duties is matter of favor. But in the case of refined sugar it is not so. The legislature did not intend that the manufacturer should be the sufferer. The impost laws have no section restricting the general imposition.

The bond to be given for the duties on sugar is to be payable in nine months after the time of sending out, not of refining.

The bond given for impost is payable in 6 months after importation.

Hence, if any analogy exists, the argument derived from *it is in favor of the con- [*39 struction that the duty is not imposed until the sugar is sent out.

A duty not to be paid, is no duty.

Suppose the refining house should be burnt, and a quantity of refined sugar destroyed, no duty could be collected upon it. The relation of debtor and creditor had not arisen between the manufacturer and the United States. The duty had not accrued.

That it be sent out, is descriptive of the subject matter of the tax. It fixes a certain stage of the business of a manufacturer, at which the duty shall attach. It ascertains the quality and degree of refining, which otherwise might be the subject of much litigation. Sugar may not be fit to send into the market, and yet it may be strictly said to be refined.

The penalties and the duty must correspond. The duty of the manufacturer cannot exceed the penalty. The doctrine of relation will not extend to create a penalty or a forfeiture. The provisions of the old law are continued by the repealing law, only as to penalties and forfeitures, "which shall have been incurred before or on the 30th of June, 1802." As no penalty or forfeiture for non-payment of the duty could be incurred until after the sugar was sent out, and as the sugar was not sent out until after the 30th of June, it is evident no penalty or forfeiture, as to that sugar, could "have been incurred before or on that day." This shows that the provisions of the law to enforce the payment of duties on such sugar were not continued, and is a strong indi-

cation of the will of the legislature that none should be paid.

All the provisions in the act of 1794, subsequent to the 5th section, mention the subject of the duty as being sugar refined and sent out. Thus the oath mentioned in the 7th section is to the truth of the account of sugar sent out.

The drawback, the account to be rendered, the tax to be collected, and the bond for securing the duties, refer only to such sugar as shall have been sent out.

If there had been no express provision in the repealing act, and the duty had been repealed 40*] generally on the 30th *of June, no duty could have been due on sugars then refined but not sent out. The repealing law creates no obligation on the refiner to render an account of sugars refined before and sent out after the 30th of June. If the duty was levied upon all sugars refined before that day, and payable at any future indefinite time when they should be sent out, it would be necessary to keep an officer in pay as long as a single loaf remained in the building. All parts of the acts were to cease after the 30th of June, unless saved by the proviso; and that relates only to the recovery and receipt of all such duties as had then accrued and remained outstanding, and such penalties and forfeitures as had then been incurred.

The question then recurs, had these duties accrued, and were they remaining outstanding on the 30th of June? The word "accrued" must mean arisen, due; at least due at present, payable in future. But if they were due, the officer had a right to call for payment or security. It cannot be said to have accrued until it is to be paid or secured. But the words "remaining outstanding" are still stronger. "Shall have accrued and remain outstanding," that is, having before accrued, shall remain outstanding. These expressions imply that the duties had been fixed and their amount ascertained; that the relation of debtor and creditor had arisen, and that the duties remained unpaid either through negligence or indulgence.

The effect of the construction contended for on the part of the United States would be to throw the whole of these duties upon the refiner, for he could not make a difference in price between the sugars refined before, and those manufactured after the 30th of June. This effect would be in direct hostility to the general principle of the legislature which is apparent through the whole act, and which was to tax consumption and not labor.

The proviso in the repealing law either enacts or declares. It is evident that it does not enact any new regulations, but merely declares the continuance of former provisions. The remedy given by the former act was only by action, or forfeiture. But no action would lay, nor would any forfeiture be incurred, until after the sugars were sent out. It is a rule, that upon a new statute which prescribes a par-41*] ticular remedy, no remedy can be *taken but that prescribed by the statute. 2 Burr. 1157, *Stevens v. Evans.*

But it will be objected that the duties outstanding meant only those not bonded, because, when bonded, the debt is due by bond and not as a duty. But the law is not so; for a debt due by act of Congress is at least of equal dignity with a debt due by bond, and cannot be extinguished by it.

Mr. Ingersoll cited 3 Burr. 1341, *The Lead Company v. Richardson,* to show that an act imposing a duty is not to be extended to other subjects than those expressly described.

Lincoln, (Attorney General of the United States,) and Dallas, for the defendant in error.

The whole question turns on the operation of the repealing act. If the duty had accrued and remained outstanding on the 30th of June, it was unaffected by the repeal.

To show that the duty accrued on the act of refining the sugar, independent of the act of removing it, they relied, 1st. On the words and spirit of the act of 1794; and 2d. On the obvious meaning of other acts *in pari materia.*

1. The words and spirit of the act.

Every revenue system consists of three parts: 1. The subject of the tax. 2. The time of payment; and, 3. The mode of collection.

The act of 1794 discriminates between each of these, and the construction must not confound them.

1. The subject of the tax.

The title of the act is general, "duties on snuff and refined sugar, not on the quality sold or sent out, but on the sugar refined."

The 2d section is equally general, "upon all sugar which shall be refined within the United States."

*The 3d section directs by what officers [*42 the "duties aforesaid" shall be collected.

The 2d is the only section which imposes the duty, the 3d provides for its collection, and nothing is left for the object of the 5th but to ascertain the time of the payment.

The 10th section contemplates the duty as attaching on the act of refining, and subjects the sugar to forfeiture after removal, if the duty shall not have been duly paid or secured.

The subject then is refined sugar; and the process of refining being complete, the duty accrues.

Without further provision there could be no doubt that all sugar refined between the 30th of September, 1794, and the 1st of July, 1802, would be liable to duty.

Every subsequent provision respecting the time and manner of payment is consistent with this imposition of the duty. No express transfer is made of the duty from the act of refining to the act of removing; no substitution of the quantity removed for the quantity refined; no words restricting the general expression "all sugar refined within the United States." All the subsequent clauses respect the payment, not the imposition of the duty.

2. Time of payment.

The duty attaches to the act of refining, but the fund for payment is created by the act of sale. Hence the 5th section directs two accounts to be kept, one of the whole quantity refined, the other of such as shall have been removed; and that, at the time of rendering the latter, the refiner "shall pay or secure the duties, which by this act ought to be paid, upon the refined sugar in the said account mentioned." This provision evidently is intended only to ascertain the amount which shall then be payable. The duties payable by this act are on all the sugar refined; if on all, it ought in strictness to be upon every part; but the United

States say, we will accept a partial payment, in consideration that you have not yet sold the residue of the sugar. The quarterly account ascertains the amount of this partial payment; while the other regulations are intended 43*] *to enable the officer to ascertain the gross quantity refined.

The terms of payment show how and when the duty shall be paid, but do not affect the subject of the tax.

The legislature had power to give, or to refuse a credit; but the modification of the time or terms of payment does not create, and cannot discharge, the obligation to pay. It is but the common case of *debitum in præsenti, solvendum in futuro.*

By the 20th section, sugar may be exported directly from the manufactory "free from duty." This shows that the duty had attached, but was not to be exacted.

2. The mode of collection must conform to the primary and secondary objects of the law. These were, 1st. A revenue form all refined sugars; 2d. Accommodation in payment.

For the primary object, it takes measures to ascertain the gross quantity refined. For the secondary object, it takes measures to ascertain the quantity removed in each quarter. For the first, it obliges the manufacturer to enter and report his house, and implements, with all additions made thereto, under a penalty and forfeiture; and to give a bond of 5,000 dollars, to keep an account of all sugar refined which is to be quarterly produced to the collecting officer.

For the 2d it obliges him to keep, and render quarterly to the officer, a daily account of refined sugar removed, which is to be substantiated by an oath if required.

Thus all the provisions of the act harmonize with each other; but by an opposite construction, the duty is made incident to the time of payment, and not the time of payment incident to the duty. If what a man sells, and not what he refines, is the subject of the tax, the provision to ascertain the gross quantity refined is useless and vexatious.

It is true, that the two circumstances of refining and removing are necessary before pay- 44*] ment can be demanded, *or a forfeiture for non-payment incurred; but the obligation to pay is co-eval with the act of refining; the duty had then accrued, and must remain outstanding until the removal of the sugar. The two circumstances are distinct in words and in purpose; the one creates the duty, the other fixes the time of payment. To connect them is to amplify, not only the words, but the sense of the legislature; but to keep them separate preserves the intention of the law in consistency with its language.

Hypothetical arguments, extreme cases, and arguments *ab inconvenienti*, cannot alter the law. Such are the cases of the sugar being destroyed in the house; the necessity of keeping officers to collect the tax, and the sales of refined sugar, made in contemplation of their being free of duty, &c. If the sugar is destroyed before removal, it is no longer refined sugar; and the duty being attached to the thing itself, is destroyed with it. The argument drawn from the supposed intention of the legislature to tax consumption, and not labor, applies only to the collection, not to the imposition, of the duty. The act of sending out does not necessarily import sale. A manufacturer may remove the sugar to his own stores, separate from the manufactory, and would be liable to the duty. The legislature did not intend that a sale should precede the imposition of the tax.

There is a case in 1 Anst. 450, (558,) in which it was decided, that the duty had attached on the distillation of spirits, although the building and materials were destroyed before the process was complete.

The words and spirit of the act are thus reconciled, and they are in unison with the repealing act, which meant to put all the internal taxes upon the same footing up to the 20th of June. By the 3d section of the latter act, the owners of stills, of snuff mills, the banks, retailers of wine and spirits, and the owners of carriages, are to pay the taxes up to that day; and if sugar refiners are to be excepted, it seems to be an exception without any adequate reason. The objection which has been raised, that the duty upon sugars refined before and delivered after the 30th of June, 1802, would fall upon the refiners, cannot avail them, because they received the duty upon sugars refined after the 6th of June, 1794, and before *the 30th [*45 of September in that year, without being accountable for it.

2. The construction contended for, is supported by the obvious meaning of the words of other acts, *in pari materia.*

The analogy exists in the terms of imposing the duty; in the accommodation of credit, and in the security for collection.

In the following acts, imposing duties on imported articles, the words which create the imposition are, "levied, collected and paid," viz., August 10, 1790, § 1, vol. 1, p. 248. June 7, 1794, § 1, vol. 3. p. 108, and Jan. 29, 1795, vol. 3, p. 154.

In other acts the words are "laid, levied and collected," viz., March 3, 1797, § 1 & 3, vol. 3, p. 397. July 8, 1797, § 1, vol. 4, p. 35 and May 13, 1800, § 1, vol. 5, p. 201.

In all these acts, the imposition of the tax necessarily precedes the collection; hence we may infer, that when the legislature used the same words in the act of 1794, they intended that the tax should be laid before the time of collection, and that from the time of the imposition, until paid or secured, the duty should be considered as outstanding. An outstanding duty can mean nothing more than a duty laid, but not collected or secured. As to bonded duties, it was not necessary that the provisions of the act of 1794 should be continued in force, because a suit might have been maintained on the bond, notwithstanding the repeal; hence it is evident that by the expression "duties which shall have accrued and remain outstanding," the legislature could not mean bonded duties. What is the situation of the duties upon goods imported before bond given? They have attached upon the goods, and remain outstanding. A debt has accrued. The relation of debtor and creditor has arisen between the importer and the United States.

There is no difference between the case of the refiner of sugar and the distiller of spirits. In the latter, the act of distillation furnishes the subject of the tax; the removal *des- [*46

ignates the time of payment. Between the distillation and removal, the duty remains outstanding. Laws U. S. vol. 1, p. 301, 310, § 14 and 17. The inspector is to estimate the gross quantity, by which he is to regulate the penalty of the bond, but the condition is to pay in nine months the duties upon such part as shall be removed in three months from the date of the bond. Had not the duties accrued when the bond was given? And yet does not the payment in fact, and in amount, depend on the removal within three months?

In the case of sales at auction, Laws U. S. vol. 3, p. 122, the duty accrues at the time of sale, to be paid at the end of the quarter. So in the instance of the carriage tax, vol. 3, p. 327. Why, then, should it not attach on the sugar as soon as refined, when in all other cases, it attaches at a period antecedent to the time of payment?

In the act laying duties upon goods imported, vol. 1, p. 248, 253, § 6, the duties are said to accrue from the time specified for their commencement, not from the time when they were to be paid or secured.

Again, in the case of snuff, the terms and conditions are the same as in the case of sugar. By the first section the duty is laid on snuff manufactured for sale, not on snuff sold; and by the fourth section the account of the quantity manufactured is to be exhibited. By a subsequent act (vol. 3, p. 195,) the duty is transferred from the snuff to the mill. A license is to be granted, and a bond given for payment of the annual rate of the tax, in three installments. This act shows that the employment of the mill, and not the sale of the snuff was the object of the tax. The first section says that the former duty shall cease on the last day of March, and shall not thenceforth be collected, and the 16th section provides for the recovery of such duties as shall then have accrued. Yet the snuff then manufactured, although not sent out, in fact, paid the duty; and in law, what could be referred to but snuff manufactured and not removed? There could be no idea that the repeal of the duty applied to a bond given which had extinguished the duty.

Upon the whole, then, we find the repealing act perfectly correspondent to the words and spirit of the imposing act, and to analogous provisions *in pari materia.*

47*] *The refiner was bound to pay, or secure, before removal. But a bond was tantamount to a payment of the duty; it was a matter of option with the refiner. It released the sugar from a specific *lien*, or liability to forfeiture; and it changed the nature of the debt and the remedy. A discontinuance of the duty could not cancel the bond, nor render a provision to recover it necessary. The proviso, therefore, was not more calculated for a bond payment than for a cash payment. But it is consistent, operative and necessary, if we suppose the legislature contemplated the recovery and receipt of duties which had accrued when the sugar was refined, but which, according to pre-existing arrangements, must remain outstanding as duties, and which were not to be paid or secured until removal of the sugar.

The duty to be paid was upon all sugar refined. But the duty on refined sugar was not discontinued until after the 30th of June. The sugar in question was refined sugar before the 30th of June. To exempt it from duty, therefore, is to discontinue the duty before the day of the repeal.

There can be no question as to the remedy; for if the duty had accrued, all the pre-existing remedies were continued.

If, then, we consider the words and spirit of the imposing act, the general nature and operation of a revenue system, the analogy of provisions *in pari materia*, and the words and spirit of the repealing act, little doubt can remain that the legislature meant to impose the duty on the act of refining, and not the act of removing the sugar, and, therefore, that the duties upon the sugar in question had accrued and remained outstanding on the 30th of June, 1802.

Harper and Martin, in reply.

The question has been truly stated to be, at what time did the duties upon refined sugar accrue? To ascertain this, all the provisions of the imposing act are to be considered in one view. This is the general rule of construction of all written instruments, and results from the principle that such instruments are only the evidence of the will of the maker.

*General expressions may be restricted [*48 by other parts of the instrument, or by its general import.

It is true that the 2d section lays a duty upon all sugar which shall be refined within the United States, to be levied, collected and paid after the 30th of September, 1794. If no time is fixed for the commencement of an act, it operates from the time of passing. By the strict construction of this section, it applies as well to those sugars refined after the passing of the act, and before the 30th of September, as to those refined after that day. But it is evident from the subsequent provisions of the act, that such was not the intention of the legislature. The act, therefore, cannot be construed strictly; and resort must be had to the other parts to ascertain its meaning.

If the duty was to be levied upon all sugar refined, the legislature would have directed a bond to be given for the duties on all such. Why should an account be rendered to the officer of all the sugar sent out, and not of all refined?

The general system of the excise laws was to tax, not the means of living, but the consumption of the article.

In respect to the impost, the duties are not due while the goods are in the ship on the passage. The analogy is between goods landed, and refined sugar sent out. This is the decisive act which evidences that the sugar is for consumption.

The expressions "recovery and receipt," in the repealing law, are not applicable to an unascertained duty; the term in such a case would have been collection. In the revenue system this difference is taken.

There is no analogy to the other cases mentioned, because the legislature have used different expressions, and, therefore, it is reasonable to infer that they meant to enact different provisions.

Wherever they meant that the duty should be laid at the time of the manufacture, they have so expressly declared.

In the case from Anstruther, the duty was laid upon wash, *totidem verbis*, and, therefore, 49*] although the wash *was destroyed before the process of distillation was complete, yet the court decided that the duty had attached.

But here we contend that no duty is laid upon refined sugar not sent out. The only inference from the case is that the court judged from the general purview of the act; and that is what we contend ought to be done in our case.

It is an important consideration that the penalties and forfeitures apply only to the sugar sent out. Hence it may be strongly inferred that the duty was laid only on such.

The entry and report of the house, the number and capacity of the pans, boilers, &c., and the daily account of sugar refined, were only provisions enabling the officer to check the account of the quantity sent out.

It is said that every revenue system consists of three parts; the subject of the tax, the time of payment, and the mode of collection.

All these parts would be included in the 5th section, if the words "two cents per pound" had been introduced. It contains the subject of the tax, and provisions for the collection and payment.

As to the title, it is no part of the law, and is not to be considered in construing the act. But if it was, it is so general and indefinite, no argument can be derived from it.

The act ought to be construed favorably for the manufacturer.

Penal laws, and laws giving costs, are to be construed strictly.

Multitudes of cases are to be found where general words shall be construed in favor of him on whom a penalty is imposed, but never against him.

No argument can be drawn from the 14th section, because the drawback is allowed only upon sugars which have paid the duty, and no duty is to be paid but upon sugars sent out.

So in the 10th section the forfeiture is only 50*] of sugars on *which the duty has not been duly paid; but no duty is payable but upon sugar removed.

But it is said that the contrary construction harmonizes the system. If the duties are payable upon sugars refined but not removed, why not render an account of those refined as well as of those sent out? Why do none of the penalties apply to the former, but all to the latter?

As to the idea of *debitum in præsenti, solvendum in futuro;* if the sending out is a condition precedent, no debt accrues until the sugar has been sent out.

If I am bound to A. to pay a sum when A. shall return from Rome, it is not a debt until he has returned; and if he never returns, it is no debt.

In the case of impost, the duties accrue at the moment when they become payable. They must be paid or secured when application is made for a permit to land them. If they are destroyed before landing, or application for the permit, no duties have accrued, and none are to be paid.

With regard to distilled spirits, the bond is to pay the duty upon all such spirits as shall be removed during the next three months. If no spirits are removed during that time, nothing is due upon the bond.

The duty upon sales at auction does not accrue until the purchase money is paid. It is a part of the price.

The carriage tax accrues at the time of payment; and if not duly entered, and the duty paid, a penalty is incurred.

As to snuff, the construction of the 4th section of the act of June 6, 1794; ought to be the same as that of the 5th section respecting sugar. There has been no legislative construction, or judicial decision, that the duties upon snuff manufactured after the 3d of March, 1795, (the date of the repealing law as to snuff,) and before the 30th of March, (when the duty was to cease,) and not sent out until after the 30th of March, were payable. The gentlemen have said that those duties have been paid; the fact may be so, but that cannot alter the law.

*As the penalties and forfeitures re- [*51 specting sugars not then sent out, ceased on the 30th of June, the legislature must have meant to provide for the recovery and receipt of such duties only as could be collected without penalties and forfeitures. These could only be upon sugar removed before that day.

Feb. 22. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

In this case a single point is presented to the court. The plaintiff in error was a refiner of sugar, in the city of Philadelphia, and had a large quantity of refined sugars in his refinery on the 1st of July, 1802.

In April, 1802, Congress passed an act to repeal the internal taxes. The first section of the repealing law enacts "That from and after the 30th day of June next, the internal duties," &c.

To recover the duty on sugars refined before the 30th of June, and sent out afterwards, this action was brought. The single question is, whether the duty had then accrued, and was on that day outstanding? This is admitted on both sides; and the repealing law is to be construed, as if it had passed on the 30th of June, to take effect immediately, and the proviso had been expressed in words of the present tense, thus; "provided, that for the recovery and receipt of such duties as have now accrued, and now remain outstanding, the provisions of the aforesaid act shall remain in full force and virtue."

Had the duty accrued, and was it outstanding, in contemplation of the legislature, on sugars refined, but not sent out of the building in which the operation was performed?

The solution of this question depends on the construction of the act by which the duty was imposed.

This act passed in June, 1794, and is entitled "An act laying certain duties on snuff and refined sugars." The first section imposes a duty on snuff, which shall be manufactured after the 30th of September then next ensuing, and the second section is in these words: "And be it further enacted, that from and after the said 30th day of September next, there be levied, collected *and paid, upon all sugar which [*52 shall be refined within the United States, a duty of two cents per pound."

The fourth section of the act contains provisions respecting the duty on snuff, and the fifth section, after making several regulations requiring the refiner of sugars to report the building and utensils to be employed in the manu-

facture, and to give bond with condition that he shall keep books in which he shall enter daily the sugars refined, as well as those sent out, proceeds to enact, "that he shall, on the 1st day of January, April, July, and October, in each year, render a just and true account of all the refined sugar which he or she shall have sent out, or caused, or procured to be sent out, from the first time of his or her entry, and report aforesaid, until the day which shall first ensue, of the days above mentioned, for the rendering of such account, and thenceforth successively, from the time when such account ought to have been, and up to which it shall have been, last rendered, until the day next thereafter, of the days above mentioned, for the rendering of such account, producing and showing therewith the original book or paper, whereon the entries from day to day, to be made as aforesaid, have been made: and he or she shall, at the time of rendering each account, pay or secure the duties, which, by this act, ought to be paid upon the refined sugar in the said account mentioned."

Other sections of this act have been relied on by the counsel on both sides, and the phraseology of the law, in other acts said to be *in pari materia* has been brought into view. They have not been unnoticed by the court in forming the opinion now to be delivered; but as the case depends principally on the just construction of the sections which have been quoted, those sections only are stated for the present.

That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes 53*] *which have been uniformly acknowledged. If by the application of these rules it shall appear that the duty on refined sugars did "accrue, and was outstanding," before the article was sent out of the building, then the refiner is unquestionably liable to pay it, notwithstanding the repeal of the law by which it was imposed.

To support the proposition that the duty did accrue, the words of the second section of the act for imposing it have been relied on. These words are, "That from and after the 30th day of September next, there be levied, collected and paid, upon all sugar which shall be refined within the United States, a duty of two cents per pound." These words, it is said, contain an express charge upon all the sugars to be refined within the United States.

It is admitted by the counsel for the plaintiff in error, that such would be the operation of the section if unexplained, and not restrained by other parts of the law.

In order to determine the influence which other sections must necessarily have on this, it is proper to ascertain with precision the import of the words which have been stated.

"There shall be levied, collected and paid," &c. Each of these words implies a charge upon the article, and if either of them had been used singly, no doubt could have been entertained that the article would have been burdened with the tax. They present to the mind distinct ideas, and when used together seem to designate distinct actions required by the law.

It would not, perhaps, be assuming more than is warranted to say, that either of them exclusively imports the creation and imposition of the duty. The word "levy" is selected for this purpose; and yet, in the succeeding section, the term is again used with a reference to that now under consideration, and very plainly designates the duty of the officer, not the operation of the act. The words of the third section are, "that the duties aforesaid shall be levied, collected and accounted for by the same officers," &c. The meaning *of the term [*54 in this section is by no means equivocal, and there does not appear sufficient ground for saying that it was used by the legislature in the preceding section in a different sense. Unquestionably the requisition that a duty shall be levied, collected or paid implies the existence of that duty: it seems to be as clearly implied by the one term as by the other. But, however this may be, they act on the same subject, and at the same time. The object of each verb is precisely the same. "There shall be levied" —on what? On "all sugars to be refined within the United States." There shall be "collected and paid"—from, and on what? "all sugars to be refined within the United States." It has, then, been very correctly said, that these words, though not synonymous, are certainly, as they stand in the sentence, co-extensive in their operation. They reach and embrace the same article at the same time. If, then, the other parts of the act demonstrate that the words collected and paid, have not for their object all sugars to be refined, this section is necessarily restrained in its operation by those which follow and designate more particularly what is in the first instance expressed in general terms.

That such is the real effect of the law is acknowledged. It is admitted by the counsel for the defendant in error, that the duties are not to be collected and paid on all sugars to be refined, but on all sugars to be refined and sent out of the building. It follows, then, that the general terms of the second section were intended by the legislature to be understood in like manner, as if their intent had been expressly qualified, by adding the words "according to the regulations hereinafter prescribed;" or other words of similar import.

But admitting this view of the case to be correct, the great difficulty remains to be solved. It is contended by the defendant in error, that the fifth section neither imposes a duty, nor restrains to a more limited object the duty which was before imposed, and that its only effect is to prescribe the time of payment; that the duty on the article, taking the two sections together, constitutes a present debt to be paid in future.

On the other hand, the plaintiff in error insists that *the general terms of the [*55 second section are defined and restricted by the fifth, as well with respect to the object of the tax as to the time of its collection and payment.

The Court has felt great difficulty on this point. It is one on which the most correct minds may form opposite opinions, without exciting surprise. After the most attentive examination of the laws, and the arguments of counsel, a judgment has at length been formed,

differing from that rendered in the circuit court.

The object of the act imposing the duty being revenue, and not to discourage manufactures, it is reasonable to suppose that the attention of the legislature would be devoted to the article in that state in which it was designed to be productive of revenue. There could be no motive for imposing a duty never to be collected, or for imposing it on the article in that condition, in which it might remain forever, without yielding a cent to the treasury. The duty not being progressive, but complete in the instant of its commencement, being one entire thing, no purpose was to be effected by charging it on an object from which it was not afterwards to be drawn.

If, therefore, we find the whole attention of the legislature directed to the article in one state; if we find it productive only in one state; there is no reason for supposing, unless the words require that construction, that the duty was imposed upon it in a different state.

All those provisions of the act, which are calculated to bring the money arising from this tax into the treasury, or to create any liability in the person who is to pay it, apply exclusively to sugars sent out of the building.

Of those sugars only is an account to be rendered: on those only are the duties to be paid or secured. It can scarcely be imagined that the legislature, if imposing a duty on all sugars refined, should entirely neglect to take any means whatever to secure the collection of that duty, and should postpone those means until a subsequent event should happen, which might never occur.

56*] *It is argued by the counsel for the defendant in error, that the happening of this event was certain, and that it was unnecessary for the legislature to perform any act which might occasion it, because the interest of the refiner was a sure pledge for his sending out the sugars he had refined.

This is true; but the argument is not less strong when urged, to prove that the legislature might rely on this interest to produce the state of things which would create the charge. If this interest was relied upon for the fact on which a duty should become payable, it might well be relied upon to produce the fact on which the article should be chargeable with the duty; and it is unquestionably in the common course of legislative proceedings on the subject of revenue, to obtain security for the payment of duties, at the first convenient time after they shall have accrued.

If, as is contended for the defendant in error, the act of refining the sugar creates a debt to be paid when sent out of the building, then the refiner becomes immediately the debtor of the government, and his situation by sending out the sugar, is changed in no other respect whatever, than that the debt before created does by that fact become payable. The position to be proved is that A., the refiner of sugars, becomes the debtor of the United States to the full amount of the sugars refined, which debt does not accrue, but only becomes payable on the fact of their being sent out of the building.

Let this proposition be examined.

If A. becomes the debtor by the mere act of refining, then he remains the debtor until he shall be legally discharged. Suppose him to part with his manufactory and his capital stock, there being at the time of transfer a quantity of refined sugars in the building, which pass with it to the purchaser. If, by the act of refining, A. became the debtor of the government, which debt became payable whenever the sugars should be sent out of the building, then A. would remain the debtor notwithstanding his sale, and would be liable for *those duties, [*57 if the purchaser should send them out without rendering any account of them, or securing their payment.

Yet this construction would be admitted to conflict with the obvious meaning of the law. Not only the person who sends out the sugars is to account and pay for them, but if he fails to do so, the consequences of his failure fall entirely on himself. The sugar is forfeited, and if lost to the purchaser, his recourse could only be against the person from whom he purchased.

But let it be supposed that A. sends out his sugars, and parts with his building, before the day on which the account is to be rendered, and the duties paid or secured. Who then would be the debtor of the government? Who in that case would be liable for the duties that had thus accrued? It is believed that only one answer could be given to this question. The person who sent out the sugars would unquestionably be liable for the duties on them, and if they should be seized for the non-payment of them, the purchaser would have recourse to him for compensation.

If these positions be correct, it would seem to be a plain and necessary deduction from them, that the fact of sending out the sugars, not the fact of refining them, created the debt, and that the person sending them out became the debtor.

It has been argued that the provision of the 5th section, which requires a daily entry to be made on the books, of the quantity of sugars refined, evidences an intention in the legislature, to impose a tax on the article immediately. But this argument did not appear to be much relied on, and it is too apparent that the regulations of the 5th section were designed to furnish the means of detecting any fraud which might be attempted, in the account of sugars sent out of the building, to require that the court should employ any time in demonstrating the correctness of that construction.

The argument drawn from the 3d section, which uses the expression "the duties aforesaid" does not *appear to operate more [*58 in favor of the construction contended for by the counsel for the defendant in error. The section is employed not in designating the tax to be collected, but the person to collect it, and the words have the same import, as if instead of "the duties aforesaid," the language had been changed, and the words "the duties imposed by this act" had been used.

The sections respecting drawbacks have been relied on by both plaintiff and defendant, as completely supporting his own construction of the act, but the court can perceive nothing in those sections in any degree affecting the case.

It has been stated by both parties, that all the revenue acts of the United States may be considered as *in pari materia*, as forming one connected system, and therefore to be compared

together, when any one of them is to be construed.

In pursuance of this doctrine they have been resorted to by the defendant in error, to show that the terms used in the 2d section of the act under consideration are such as in all those acts import the imposition of a duty.

This is not questioned. It is not denied that a tax is imposed, nor would this have been denied if two of the three words used in the act had been omitted. It is the general phraseology of laws enacted for the purpose of raising money; but to reason by way of analogy, from the acts quoted to that under consideration, it would be necessary to show that these general terms had been construed to be more extensive than the particular regulations, which follow for the purpose of carrying them into execution. It is not recollected that this has been attempted.

It has been argued that the duty on spirits of the home manufactory, is laid on their distillation, not on their removal, and that the legislature must, therefore, be presumed also to have imposed the duty on sugars, on the act of refining them, and not on the act of removal.

59*] *But the force of this argument is not admitted. Those political motives which induce the legislature to select objects of revenue, and to tax them under particular circumstances, are not for judicial consideration. Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded. It is the duty of the court to discover the intention of the legislature, and to respect that intention. Where the provisions of two acts are so unlike each other, that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say that the one act exhibits a legislative mind materially variant in the particulars where the difference exists from what is exhibited by the other.

Every regulation of the act imposing a duty on spirits distilled within the United States, respects exclusively the time of distillation, and they are all essentially variant from the regulations of the act imposing a duty on snuff and refined sugars.

The duty on spirits is to be paid or secured previous to their removal. That on sugars is not to be paid or secured until after their removal.

The credit for the duties on distilled spirits is allowed from the date of a bond, to be quarter annually given for all the spirits distilled whether removed or not, so that the credit is as near as possible from the date of distillation.

The credit for the duties on refined sugars is allowed from the date of a bond quarter annually given for all the sugars removed from the building, so that the credit is as near as possible from the date of the removal.

Spirits, having a duty imposed on them at the time of distillation, are liable to seizure and confiscation if removed without paying or securing the duty.

60*] *Sugars not being liable for the duty till removed are not seizable nor confiscable unless the refiner, after removal, shall have failed to pay or secure the duties which became payable at a given day after their removal.

With respect to country stills, the tax is laid on the capacity of the still, and is to be paid without regard to the quantity distilled, but if this tax should become oppressive, it may be discharged by paying the duty on the quantity actually distilled. In this case no respect whatever is paid to the removal of the spirits. Their distillation alone attracts the attention of the legislature.

With respect to all refined sugars no duty can ever be demanded, unless the demand be predicated on the fact of removal.

Spirits being chargeable with the duty when distilled cannot be removed without a permit.

Sugars being only chargeable when sent out, may be removed at the will of the refiner.

It is going very far indeed to argue a sameness of intention from these dissimilar regulations. The court thinks it much more correct to say that the intention of the legislature with respect to these different objects was entirely different, and that in the case of spirits the duty was imposed on the distillation, while in the case of sugars the duty was imposed on the removal.

It is not improbable that the difference in the progress made in the two pursuits, and the greater degree of forbearance required by the one than by the other; or that the difference in the facility with which frauds might be practiced in the two cases, might occasion this apparent difference in the time of imposing the duty on the article. But this, it is repeated, is a legislative, not a judicial inquiry; and if the difference exists it must be respected, whatever may be the motives which produced it.

Some arguments have been drawn from the repealing law which have too much weight to be unnoticed.

*It has been said that the provisions in- [*61 tended as a guard, to prevent frauds in the collection of duties on sugars sent out of the building, are dispensed with so far as respects sugars refined before the 30th of June, but sent out after that day, and from thence it is argued that the legislature could not have supposed sugars under such circumstances to be liable to a duty. The weight of this argument, if supported by the fact, is so apparent that the counsel for the defendant in error controverts the fact itself, and not the inference drawn from that fact, if it be correctly stated.

It is and must be admitted, that the first part of the first section of the repealing law does away any forfeiture which was to be produced by the future operation of the act repealed. If, therefore, such forfeiture is retained, it must be by virtue of the saving in the subsequent part of the section. That saving clause is in these words, "Provided," &c. It is contended that the forfeiture of sugars sent out after the 30th of June, 1802, and refined before that period, is preserved by this proviso.

But this construction is deemed totally and clearly inadmissible. The forfeiture of the thing is not the recovery and receipt of a duty, but a punishment for the non-payment of it, and is never to be protected by a proviso extending only to remedies given for the recovery of the duty itself. To render this point still more clear, the proviso in express terms com-

prises fines, penalties and forfeitures incurred before the 30th of June. It is impossible to suppose they would not have deemed it equally necessary to provide expressly for the preservation of those which might afterwards be incurred, if it was contemplated that the state of things introduced by the act admitted of such subsequent forfeitures.

The force of this argument, therefore, remains undiminished.

It has very properly been observed at the bar, that it was most apparently the object of the legislature, through their whole system of im- 62*] posts, duties and excises, *to tax expense and not industry, and that, in the particular case of the duty now in question, this intent is manifested with peculiar plainness. The refiner of sugars never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building in which they have been refined. In most other cases it has been deemed sufficient to secure this object by a credit, which will allow time for the sale of the article, after which the duty must be paid whether the article be sold or not. But in the case of refined sugars, the refiner never can be liable for the duty, but on a fact which is considered, and properly considered, as evidencing a sale, after which a credit for the collection of the duty is still allowed him. With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed on expense, and never on labor. If this proposition be true, it furnishes an additional argument in favor of that construction which is believed to be correct.

If the duty is payable on sugars refined before the 30th of June, 1802, whenever they may be sent out, that duty will fall on the refiner himself, because sugars refined before the 30th of June, must come into the market at the same price with those refined afterwards, and cannot sell, in consideration of the duty with which they are burdened, at a higher price than sugars admitted not to be chargeable with that duty. So far as this effect would be produced by the repealing law, it would occasion an oppression which the enacting law has manifested a particular solicitude to avoid.

This effect, it is said, is produced in the case of those distilled spirits which are subjected to a duty on the quantity distilled or removed, and, therefore, the refiner of sugars ought to be considered as receiving the same measure.

But it has already been shown that a difference is made in the first creation of the tax between the distiller and the refiner; and the same difference may be perceived throughout. 63*] But if they were viewed with *precisely the same degree of favor, yet there is a difference between relinquishing a right which was complete, when the law under which it accrued ceased to operate, and one depending on a fact afterwards to happen.

The argument which controverts the proposition, that the legislature designed in no instance to subject the refiner of sugars to the tax on the article till a sale should take place, is founded on the circumstance, that the refiner may be himself a retailer, and may remove his sugars from the building to his retail store, and thus become liable for the tax before the sale.

But the fallacy of this argument is immediately detected. A person acting in two distinct characters must in many respects be considered as two distinct persons. The refiner, who is, in a different place, the retailer of sugars, must be considered as selling them from the manufactory, when he sends them out of it to his retail store. The law contemplates the fact exactly in the same manner, and must give to it the same effect, as if they had been sent to the retail store of a different person, and considers them as sold.

It has also been contended, that the proviso in the act would be unnecessary, and absolutely inoperative, unless it be construed to apply to the duties on the sugars remaining in the building on the 30th of June. Those duties which were bonded, cannot, it is said, be the object of the proviso, because they, in contemplation of law, are not outstanding; they are paid by the bond given by the debtor, and there remains only the duty on sugars not sent out, which is outstanding, and is to be preserved by this part of the act.

It requires but a very slight attention to the subject, to perceive that this argument is not entitled to the weight which has been attributed to it.

The act imposing the duty, does in terms speak of its being bonded in contradistinction to its being paid. The duty is either to be paid, or secured by bond. To say, then, that a duty secured by bond was not outstanding in contemplation of the legislature, but was paid, would be to violate the very words of the act.

*In addition to this circumstance, it [*64 ought to be observed, that the repeal takes effect at the close of the 30th of June, and the law has no existence on the 1st of July. Yet the duties on sugars sent out during the last quarter are to be secured or paid on the 1st of July. All admit that there was no disposition to relinquish these duties. Of consequence, if the proviso could be necessary in any possible construction of the law, it was necessary in this case.

After the most attentive consideration of the acts of Congress and the arguments of counsel, the Court is of opinion, that the duties on refined sugars remaining in the building on the 1st of July, 1802, had not then accrued, and were not then outstanding. The judgment of the circuit court, which was in favor of the plaintiff below, must, therefore, be reversed, and judgment rendered for the plaintiff in error.

ALEXANDER MURRAY, Esq.,
v.
SCHOONER CHARMING BETSY.

An American vessel sold in a Danish island, to a person who was born in the United States, but who had bona fide become a burgher of that island, and sailing from thence to a French island, in June, 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure under the non-intercourse law of 27th of February, 1800.

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.

The report of the assessor appointed by the court of admiralty to assess the damages ought to state the principles on which it is founded, and not a gross sum without explanation.

An American citizen residing in a foreign country may acquire the commercial privileges attached to his domicile; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance.

Quære, whether a citizen of the United States can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is rescued from punishment for a crime against the United States?

What degree of arming constitutes an armed vessel?

THE facts of this case are thus stated by the district judge in his decree.

"The libel in this cause, is founded on the act entitled 'An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof;" (vol. 5, c. 10, p. 15, passed February 27, 1810,) and states that the schooner sailed from Baltimore, after the passing of that act, owned, hired or employed, by persons resident within the United States, or by citizens thereof resident elsewhere, bound to Guadaloupe, and was taken on the high seas, on the 1st of June, 1800, by the libellant, then commander of the public armed ship the Constellation, in pursuance of instructions given to the libellant, by the President of the United States, there being reason to suspect her to be engaged in a traffic, or commerce contrary to the said act, &c.

"The claim and answer, replication and rejoinder, are referred to for a further statement 65*] of the proceedings *in this case, on all which I ground my decree."

"On a careful attention to the exhibits and testimony in this cause, and after hearing of counsel, I am of opinion, that the following facts are either acknowledged in the proceedings, or satisfactorily proved.

"That on or about the 10th of April, 1800, the schooner, now called the Charming Betsy, but then called the Jane, sailed from Baltimore, in the district of Maryland, an American bottom, duly registered according to law, belonging to citizens of, and resident in, the United States, and regularly documented with American papers; that she was laden with a cargo belonging to citizens of the United States; that her destination was first to St. Bartholomew's, where the captain had orders to effect a sale of both vessel and cargo; but if a sale of the schooner could not be effected at St. Bartholomew's, which was to be considered the "primary object" of the voyage, the captain was to proceed to St. Thomas's, with the vessel and such part of the flour as should be unsold, where he was to accomplish the sale. That although a sale of the cargo, consisting chiefly of flour, was effected at St. Bartholomew's, yet the vessel could not there be advantageously disposed of, and the captain proceeded, according to his instructions, to St. Thomas's, where a bona fide sale was accomplished, by Captain James Phillips, on behalf of the American owners, for a valuable consideration, to a certain Jared Shattuck, a resident merchant in the island of St. Thomas's.

That although it is granted that Jared Shattuck was born in Connecticut, before the American revolution, yet he had removed long before any differences with France, in his early youth, to the island of St. Thomas, where he served his apprenticeship, intermarried, opened a house of trade, owned sundry vessels, and, as it is said, lands; which none but Danish subjects were competent to hold and possess. About the year 1796, he became a Danish burgher, invested with the privileges of a Danish subject, and owing allegiance to His Danish Majesty. The evidence on *this head is sufficient to [*66 satisfy me of these facts; though some of them might be more fully proved. It does not appear that Jared Shattuck ever returned to the United States to resume citizenship, but constantly resided, and had his domicile, both before and at the time of the purchase of the schooner Jane, at St. Thomas's. That although the schooner was armed and furnished with ammunition, on her sailing from Baltimore, and the cannon, arms and stores were sold to Jared Shattuck, by a contract separate from that of the vessel, she was chiefly dismantled of these articles at St. Thomas's, a small part of the ammunition, and a trifling part of the small arms excepted. That the name of the said schooner was at St. Thomas's changed to that of the Charming Betsy, and she was documented with Danish papers, as the property of Jared Shattuck. That so being the bona fide property of Jared Shattuck, she took in a cargo belonging to him, and no other, as appears by the papers found on board, and delivered to this court.

"That she sailed, with the said cargo, from St. Thomas's on or about the 25th day of June, 1800, commanded by a certain Thomas Wright, a Danish burgher, and navigated according to the laws of Denmark, for aught that appears to the contrary, bound to the island of Guadaloupe.

"That on or about the first of July last, 1800, she was captured on her passage to Guadaloupe, by a French privateer, and a prizemaster and seven or eight hands put on board; the Danish crew (except Captain Wright, an old man and two boys) being taken off by the French privateer. That on the 3d of the same July, she was boarded and taken possession of by some of the officers and crew of the Constellation, under the orders of Captain Murray, and sent into the port of St. Pierres, in Martinique, where she arrived on the 5th of the same month of July. I do not state the contents of a paper called a *proces verbal*, which, however, will appear among the exhibits, because, in my opinion, it contains statements, either contrary to the real facts, or illusory; and calculated to serve the purposes of the French *captors. [*67 Nor do I detail the number of cutlasses, a musket and a small quantity of ammunition, found on board when the schooner was boarded by Captain Murray's orders. The Danish papers were on board, and, except the *proces verbal* formed by the French captors, no other ship's papers. The instructions to Captain Murray from the President of the United States com-

prehend the case of a vessel found in the possession of French captors, but then it should seem that it must be a vessel belonging to citizens of the United States. It does not appear that Captain Murray had any knowledge of Jared Shattuck being a native of Connecticut, or of any of the United States, until he was informed by Captain Wright at Martinique.

"It is unnecessary to go into any disquisition about the instructions to the commanders of public armed ships, whether they were directory to Captain Murray in the case in question; and if so, whether they were, or not, strictly conformable to law does not finally justify an act which on investigation turns out to be illegal, either as it respects the municipal laws of our country or the laws of nations. Captain Murray's respectable character, both as an officer and a citizen, forbids any idea of his intention to do a wanton act of violence towards either a citizen of the United States, or a subject of another nation. He, no doubt, thought it his duty to send the vessel in question to the United States for adjudication. He had also reasons prevailing with him, to sell Jared Shattuck's cargo in Martinique. His sending the schooner to Martinique was evidently proper, and serviceable to the owner, as she had not a sufficient number of the crew on board to navigate her. But the further proceeding turns out, in my opinion, wrong. Whatever probable cause might appear to Captain Murray to justify his conduct, or excite suspicion at the time, he runs the risk of, and is amenable for, consequences.

"On a full consideration of the facts and circumstances of this case, I am of opinion, that the schooner Jane, being the same in the libel 68*] mentioned, did *not sail from the United States with an intent to violate the act, for a breach whereof the libel is filed. That she did not belong, when she sailed from St. Thomas for Guadaloupe, to a citizen of the United States, but to a Danish subject. Jared Shattuck either never was a citizen of the United States under our present national arrangement, or, if he should at any time have been so considered, he had lawfully expatriated himself, and became a subject of a friendly nation. No fraudulent intent appears in his case, either of eluding the laws of the United States in carrying on a covered trade by such expatriation, or that he became a Danish burgher for any purposes which are considered as exceptions to the general rule which seems established on the subject of the right of expatriation. That, being a Danish burgher and subject, he had a lawful right to trade to the island of Guadaloupe, any law of the United States notwithstanding, in a vessel bona fide purchased, either from citizens of the United States, or any other vessel documented and adopted by the Danish laws. I do not rely more than it deserves, on the circumstance of Jared Shattuck's burghership, of which the best evidence, to wit, the brief, or an authenticated copy, has not been produced. I know well that this brief alone, unaccompanied by the strong ingredients in his case, might be fallacious. I take the whole combination to satisfy me of his being bona fide a Danish adopted subject; and altogether, it amounts, in my mind, to proof of expatriation. The Captain (Wright) produces his Danish burgher's brief. He is a native of Scotland. But even the British case of *Pollard v. Bell*, 8 T. R. 435, to which I have been referred, shows that, with all the inflexibility evidenced in the British code, on the point of expatriation, a vessel was held to be Danish property, if documented according to the Danish laws, though the captain, who had obtained a Danish burgher's brief, was a Scotchman. It shows, too, that, in the opinion of the British judges, (who agree, on this point, with the general current of opinions of civilians and writers on general law,) the municipal laws or ordinances of a country do not control the laws of nations. The British courts have gone great lengths to modify their ancient *feudal law of allegiance, so as to moderate its rigor, and adapt it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural born subject cannot throw off his allegiance to the king, but is always amenable for criminal acts against it, yet for commercial purposes he may acquire the rights of a citizen of another country. Com. Rep. 677, 689. I cite British authorities because they have been peculiarly tenacious on this subject. Naturalization in this country may sometimes be a mere cover; so may, and, no doubt, frequently are, burghers' briefs. But the case of Shattuck is accompanied with so many corroborating circumstances, added to his brief, as to render it if not incontrovertibly certain, at least an unfortunate case on which to rest a dispute as to the general subject of expatriation. I am not disposed to treat lightly the attachment a citizen of the United States ought to bear to his country. There are circumstances in which a citizen ought not to expatriate himself. He never should be considered as having changed his allegiance, if mere temporary objects, fraudulent designs, or incomplete change of domicile, appear in proof. If there are any such in Shattuck's case, they do not appear, and, therefore, I must take it for granted that they do not exist. That, therefore, the ultimate destruction of his voyage, and sale of his cargo, are illegal. [*69

"The vessel must be restored, and the amount of sales of the cargo paid to the claimant, or his lawful agent, together with costs, and such damages as shall be assessed by the clerk of this court, who is hereby directed to inquire into and report the amount thereof. And for this purpose the clerk is directed to associate with himself two intelligent merchants of this district, and duly inquire what damage Jared Shattuck, the owner of the schooner Charming Betsy and her cargo, hath sustained by reason of the premises. Should it be the opinion of the clerk, and the assessors associated with him, that the officers and crew of the Constellation benefited the owner of the Charming Betsy, by the rescue from the French captors, they *should allow, in the adjustment, reasonable compensation for this service. [*70

(Signed) "RICHARD PETERS.
"28th April, 1801."

On the 15th of May following, upon the report of the clerk and assessors, a final decree was entered for 20,594 dollars and 16 cents damages, with costs.

From this decree the libellant appealed to the circuit court, who adjudged, "that the decree

of the district court be affirmed so far as it directs restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to the account exhibited by Captain Murray's agent, being one of the exhibits in this cause; and that the said decree be reversed for the residue, each party to pay his own costs, and one moiety of the custody and wharfage bills for keeping the vessel until restitution to the claimant."

From this decree both parties appealed to the Supreme Court.

The cause was argued at last term, by Martin, Key, and Mason, for the claimant.

No counsel was present for the libellant.

For the claimant it was contended, that the sale of the schooner to Shattuck was bona fide, and that he was a Danish subject. That although she was in possession of French mariners, she was not an armed French vessel within the acts of Congress, which authorized the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared.

That the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations. That the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing to do with 71*] *the law of nations; it could give no right to search a neutral. That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.

As to the position that the sale was bona fide the counsel for the claimant relied on the evidence, which came up with the transcript of the record, which was very strong and satisfactory. Upon the question whether Shattuck was a Danish subject or a citizen of the United States, it was said, that although he was born in Connecticut, yet there was no evidence that he had ever resided in the United States, since their separation from Great Britain. But it appears by the testimony that he resided in St. Thomas's during his minority, and served his apprenticeship there. That he had married into a family in that island; had resided there ever since the year 1789; had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years been the owner of vessels and lands. Even if by birth he had been a citizen of the United States, he had a right to expatriate himself. He had at least the whole time of his minority in which to make his election of what country he would become a citizen. Every citizen of the United States has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a bona fide and honest intention, at a proper time, and in a public manner. While we are inviting all the people of the earth to become citizens of the United States, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may indeed show the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, &c. But such circumstances do not appear in the present case. Shattuck was fairly and bona fide, domiciliated at St. Thomas's before our disputes arose with France. The act of Congress, "further to suspend," &c. cannot, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June, 1798, vol. 4, p. 129, and expired with the end of the next session of Congress. The next act, "further to suspend," *&c. was [*72 passed on the 9th of February, 1799, vol. 4, p. 244, and expired on the 3d of March, 1800.

The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of February, 1800, vol. 5, p. 15. All the acts are confined in their operations to persons resident within the United States, or under their protection.

She was not such an armed French vessel as comes within the description of those acts of Congress, which authorized the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of other arms arises from the deposition of one M'Farlan. But he did not go on board of her till some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize money if the vessel should be condemned; and although a release from him to Captain Murray appears among the papers, yet that release was not made until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession by nine Frenchmen did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of the Amelia. (See 1 Cranch, 1, *Talbot v. Seeman.*) The *proces verbal* is no evidence of any fact but its own existence. If she had arms they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in Martinique.

It being, then, a neutral unarmed vessel, Captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided, that the vessel was not liable to capture. The only question is, whether the claimant is entitled to damages? Captain Murray has libelled her upon the non-intercourse act. He does not state that he seized her because she was a French armed vessel, although he *states her to be armed at the time of [*73 capture. It has also been decided by both the courts that she is Danish property. If an American vessel had been illegally captured by Captain Murray, he would have been liable for damages; *a fortiori* in the case of a foreign vessel, where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, probable cause is not a justification, unless it be made so by municipal law. As in the case of hue and cry, he who raises it is liable if it be false.

If the sheriff has a writ against A., and B. is shown to him as the person, and he arrests B.

instead of A., he is liable to an action of trespass at the suit of B. 1 Buls. 149, *Wale v. Hill.* So if he replevies wrong goods, or takes the goods of one upon a *fi. fa.* against another. In these cases it is no justification to the officer that he was informed, or believed, he was right. He must in all cases seize at his peril. So it is with all other officers, such as those of the revenue, &c.; probable cause is not sufficient to justify, unless the law makes it a justification. If the information is at common law for the thing seized, and the seizure is found to have been illegally made, the injured party must bring his action of trespass, but by the course of the admiralty, the captor, being in court, is liable to a decree against him for damages. 2 Rob. 202. (*The Fabius.*) The case of *Wale v. Hill*, in 1 Buls. 149, shows that where a crime has not been committed, there probable cause can be no justification. But where a crime has been committed, the party arresting cannot justify by the suspcion of others; it must be upon his own suspicion.

In the case of *Papillon v. Buckner*, Hardr. 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In 1 Dall. 182, *Purviance v. Angus*, it was held that an error in judgment would not excuse an illegal capture; and in *Leglise v. Champante*, 2 74*] *Str. 820, it is adjudged that probable cause of seizure will not justify the officer.[1]

In 3 Anster. 896, is a case of seizure of hides where no provision was made in the law that probably cause should be a justification. This case cites 7 T. R. 53, *Pickering v. Truste.* For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so without such a provision? In these cases the injury by improper seizures can be but small compared with those which might arise under the non-intercourse law. Great Britain has never made probable cause an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations while in your territorial jurisdiction. But as soon as she gets to sea, you have lost your remedy. You cannot seize her on the high seas. Even in Great Britain, if a vessel gets out of the jurisdiction of one court of admiralty, she cannot be seized in another. It is admitted that a law may be passed authorizing such a seizure, but then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the Danish islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the United States; and this Court will consider what cause of complaint it would furnish to the Danish nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of Congress was more to prevent our vessels falling into the hands of the French, than to make it a war measure by starving the French islands.

*Even if a Danish vessel should carry [*75 American papers and American colors, it would be no justification. In a state of peace we have no right to say they shall not use them if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages.

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See Marriott's Rep. and in the same book, p. 184, in the case of *The Vanderlee*, liberal damages were given.

In the revenue laws of the United States, vol. 4, p. 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been, made in the non-intercourse law. The powers given were so liable to abuse, that the commander ought to act at his peril.

The *Chief Justice* mentioned the case of the Sally, Captain Joy, in 2 Rob. 185, (Amer. edit.) where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued at this term, by Dallas, for the libellant, and Martin and Key, for the claimant.

Dallas, as a preliminary remark, observed, that the judge of the district court had referred to the clerk and his associates to ascertain whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, or by the nature of his office. Although they had not reported upon this point, yet he submitted it to the Court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That Jared Shattuck was a citizen of the United States, at the time of capture and recapture; and, therefore, *the vessel was [*76 subject to seizure and condemnation, under the act of Congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the French, and therefore, if not liable to condemnation under the act of Congress, Captain Murray was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet Captain Murray had probable cause to seize and bring her in, and, therefore, he ought not to be decreed to pay damages.

1. The vessel was liable to seizure and condemnation under the non-intercourse act, Shattuck being a citizen of the United States at the time of recapture.

1.—The *Chief Justice* observed, that this case was overruled two years afterwards, in a case cited in a note to Gwilliim's edition of Bac. Abr. *The case cited in a note is from 12 Vin. 173, tit. Evidence, P. b, 6, in which it is said "that Lord Ch. Baron Bury, Montague and Page, against Price, held that where an officer had made a seizure, and there was an information upon it, &c. which went in favor of the party who afterwards brings trespass, the showing these proceedings was sufficient to excuse the officer; it was competent to make out a probable cause for his doing the act. Mich. 6 Geo."

*The case of *Leglise v. Champante* was in 2 Geo. II. That cited in the note to Bac. Abr. referred to by the Ch. J. was in 6 Geo. 1. The mistake arises from the note in Gwilliim's edition not mentioning the date of the case cited from Viner.

Captain Murray's authority to capture the Charming Betsy, depends upon the municipal laws of the United States, expounded by his instructions, and the law of nations.

Before the non-intercourse act, measures had been taken by Congress to prevent and repel the injuries to our commerce which were daily perpetrated by French cruisers.

By the act of 28th May, 1798, vol. 4, p. 120, authority was given to capture "armed vessels sailing under authority, or pretence of authority, from the republic of France," &c. and to retake any captured American vessel.

The act of 28th June, 1798, vol. 4, p. 153, regulates the proceedings against such vessels when captured, ascertains the rate of salvage for vessels recaptured, and provides for the confinement of prisoners, &c.

The act of July 9, 1798, vol. 4, p. 163, authorizes the capture of armed French vessels anywhere upon the high seas, and provides for the granting commissions to private armed vessels, &c.

The right to retake an armed, or unarmed neutral vessel in the hands of the French, is nowhere expressly given; but is an incident 77*] growing out of the state of war; *and is implied in several acts of Congress. This was decided in the case of *Talbot v. Seeman*, in this court at August term, 1801.[1]

The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed June 13, 1798, vol. 4, p. 129. A similar act was passed Feb. 9, 1799, vol. 4, p. 244.

The act upon which the present libel is founded was passed Feb. 27, 1800, vol. 5, p. 15.

These are not to be considered as mere municipal laws for the regulation of our own commerce, but as a part of the war measures which it was found necessary at that time to adopt. It was *quoad hoc* tantamount to a declaration of war.

Happily there is not, and has not been, in the practice of our government, an established form of declaring war.

Congress have the power, and may by one general act, or by a variety of acts, place the nation in a state of war. As far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply.

By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir William Scott might be cited.

As to the present case, France was to be considered as our enemy. The non-intercourse act of 1800 prohibits all commercial intercourse "between any person or persons resident within the United States, or under their protection, and any person or persons resident within the territories of the French republic, or any of the dependencies thereof." And declares that "any ship or vessel, owned, hired, or employed, in whole, or in part, by any person or persons resident within the United States, or any citi- 78*] zen or *citizens thereof resident elsewhere," &c. "shall be forfeited, and may be seized and condemned."

A citizen of the United States, resident "elsewhere," must mean a citizen resident in a neutral country. If Shattuck was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an American vessel; it is sufficient if owned by a citizen of the United States. Registering is only necessary to give the vessel the privileges of an American bottom. Nor is it necessary that she should have been built in the United States.

By the 8th section of the act of 27th Feb. 1800, vol. 5, p. 20, reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion, and that suspicion applies both to the character of the vessel, and to the nature of the voyage.

Although the act of Congress mentions only vessels of the United States, still, from the nature of the case, the right to seize and send in must extend to apparent as well as real American vessels.

Such is the cotemporaneous exposition given by the instructions of the executive.[2]

The words of these instructions are: "You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or *cargoes really American, but cov- [*79 ered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe, though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable:

1. That a vessel captured by the French sails under French authority; and if armed, is, *quoad hoc*, a French armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the United States.

2. The right to recapture an unarmed neutral is an incident of the war, and implied in the regulations of Congress.

3. The non-intercourse law justifies the seizure of apparent, as well as of real American vessels.

Nor does this doctrine militate with the law of nations. A war in fact existed between the United States and France. An army was raised, navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were

1.—*Ante*, vol. 1, p. 33.

2.—Upon Mr. Dallas's offering to read the instructions,

CHASE, *J.*, said he was always against reading the instructions of the executive; because, if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

MARSHALL, *Ch. J.*, I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. They may be read.

CHASE, *J.*, I can only say I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the vessels of war of France upon the high seas.

So far as the war was allowed, the laws of war attached.

That it was a public war, was decided in the case of *Baas v. Tingey*, in this court, Feb. term, 1800.

No authorities are necessary to show that a state of war may exist without a public declaration. And the right to search follows the state of war. Vattel, b. 3, c. 7, s. 114. 1 Rob. 304. (*The Maria.*) 8 Term Rep. 234. *Garrels v. Kensington.* Whether the vessel was American or Danish, she was taken out of the hands of our enemy.

80*] *The law of nations in war gives not only the right to search a neutral, but a right to recapture from the enemy. On this point the case of *Talbot v. Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a partial as to a general war.

Captain Murray's authority, then, was derived not only from our municipal law, and his instructions, but from the law of nations. If he has pursued his authority in an honest and reasonable manner, although he may not be entitled to reward, yet he cannot deserve punishment.

It remains to consider whether the vessel was, in fact, liable to seizure and condemnation.

What were the general facts to create suspicion at the time?

1. The vessel was originally American. The transfer was recent and since the non-intercourse law. The voyage was to a dependency of the French Republic, and therefore prohibited, if she was really an American vessel.

2. The owner was an American by birth. The captain was a Scotchman. The crew were not Danes, but chiefly Americans, who came from Baltimore.

3. The *proces verbal* calls her an American vessel; which was corroborated by the declarations of some of the crew.

4. The practice of the inhabitants of the Danish islands to cover American property in such voyages.

What was there, then, to dispel the cloud of suspicion, raised by these circumstances?

1. The declarations of Wright, the captain, whose testimony was interested, inconsistent with itself, and contradicted by others.

2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were,

81*] *1. The sea-letter or pass from the Governor General of the Danish islands, who did not reside at St. Thomas's, but at St. Croix. It states only by way of recital that the vessel was the property of Jared Shattuck, a burgher and inhabitant of St. Thomas's. It does not state that he was naturalized or a subject of Denmark.

2. The muster-roll, which states the names and number of the captain and crew, who were ten besides the captain, viz., Wm. Wright, captain, David Weems, John Robinson, Jacob Davidson, John Lampey, John Nicholas, Frederick Jansey, George Williamson, William George, Prudentio, a Corsican, and David Johnson, a Norwegian. There is but one foreign name in the whole. Wright, in his deposition, says that three were Americans, one a Norwegian, and the rest were Danes, Dutch and Spaniards.

The muster-roll was not an oath, but was the mere declaration of the owner.

3. The invoice, which only says that Shattuck was the owner of the cargo.

4. The bill of lading, which says that he was the shipper.

5. The certificate of the oath of property of the cargo, states only by way of recital, that Shattuck, a burgher, inhabitant and subject, &c. was the owner of the cargo, but says nothing of the property in the vessel.

By comparing this certificate with the oath itself, it appears that the word "subject" has been inserted by the officer, and was not in the original oath.

6. Shattuck's instructions to Captain Wright.

7. The bill of sale by Phillips, the agent of the American owners, to Shattuck; but his authority to make the sale was not on board. To show what little credit such documents are entitled to, he cited the opinion of Sir. W. Scott, in the case of *The Vigilantia*, 1 Rob. 6, 7, 8, Amer. ed., and in the case of *The Odin*, 1 Rob. 208, 211.

The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His *burgher's brief [*82 was not on board, nor did it appear even by his own oath that Shattuck was a burgher. And no document is yet produced in which he undertakes to swear that he is a Danish subject.

Such documents could not remove a reasonable suspicion founded upon such strong facts.

There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since to remove the suspicion, and to prove Shattuck to be a Danish subject?

All the original facts remain, and the case rests on Shattuck's expatriation, whence arise two inquiries.

1. As to the right, in point of law, to expatriate.

2. As to the exercise of the right, in fact.

1. As to the right of expatriation.

He was a native of Connecticut, and, for aught that appears in the record, remained here until the year 1789, when we first hear of him in the Island of St. Thomas's. This was after the revolution, and, therefore, there can be no question as to election, at least there is no proof of his election to become a subject of Denmark.

If the account of the case of Isaac Williams (1 Tuck. Bl. part 1, App. p. 436,)[1] is correct, it

1.—The state of the case, and the opinion of Ch. J. Ellsworth, as extracted by Judge Tucker from "The National Magazine," No. 3, p. 254, are as follows:

On the trial of Isaac Williams, in the District (qu. Circuit) Court of Connecticut, Feb. 27, 1797, for accepting a commission under the French republic, and under the authority thereof committing acts of hostility against Great Britain, the defendant alleged, and offered to prove, that he had expatriated himself from the United States and become a French citizen before the commencement of the war between France and England. This produced a question as to the right of expatriation, when Judge Ellsworth, then Chief Justice of the United States, is said to have delivered an opinion to the following effect.

"The common law of this country remains the

83*] was *the opinion of Ch. J. Ellsworth, that a citizen of the United States could not expatriate himself. That learned judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution.

But in the case of *Janson v. Talbot*, 3 Dall. 133, this court inclined to the opinion that the right exists, but the difficulty was, that the law had not pointed out the mode of election and of proof.

It must be admitted that the right does exist, but its exercise must be accompanied by three circumstances.

1. Fitness in point of time.
2. Fairness of intent.

84*] *3. Publicity of the act.

But the right of expatriation has certain characteristics, which distinguish it from a locomotive right, or a right to change the domicile.

By expatriation the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native.

But by a mere removal to another country for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of domicile determines his character, enemy, or neutral, as to trade. But with respect to his own country, the change of place alone does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. 1 Rob. 165. (*The Hoop*,) 1 Term Rep. 84, *Gist v. Mason*, and particularly 8 Term Rep. 548, *Potts v. Bell*, where this principle is advanced by Doct. Nicholl, the king's advocate, in p. 555, admitted by Doct. Swabey, in p. 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of Congress.

In France the character of French citizen remains until a naturalization in a foreign country. In the United States we require an oath of abjuration, before we admit a person to be naturalized.

If he was naturalized, he has done an act disclaiming the protection of the United States, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he in fact exercised the right of expatriation? And is it proved by legal evidence?

His birth is prima facie evidence that he is a citizen *of the United States and throws [*85 the burden of proof upon him. No law has been shown by which he could be a naturalized subject of Denmark, nor has he himself ever pretended to be more than a burgher of St. Thomas's. What is the character of burgher, and what is the nature of a burgher's brief?

It is said that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary to enable a man to be a captain of a Danish vessel.

It is a mere license to trade; a permit to bear the flag of Denmark; like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. 1 Rob. 133, The Argo. 8 Term Rep. 434, *Pollard v. Bell*. These cases show with what facility a man may become a burgher; that it is a mere matter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this burgher's brief. He went from Connecticut, a lad, an apprentice or clerk in 1788 or 1789. He was not seen in business there until 1795 or 1796. In going in 1789, he had no motive to expatriate himself, as there was then no war. We find him first trading in 1796, after the war, and the law of Denmark forbids a naturalization in time of war.

At what time, then, did he become a burgher? If he ever did become such in fact, and it was in time, he can prove it by the record. Wright's burgher's brief is produced, and shows that they are matters of record. The brief itself, then, or a copy from the record duly authenticated, is the best evidence of the fact, and is in the power of the party to produce.

Why is it withheld, and other ex parte evidence picked up there, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade at St. Thomas's, owned ships and land, married,

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same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of a civil community are bound to each other by compact; the other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful to its defense. It necessarily results that the member cannot dissolve the compact without the consent or default of the community. There has been no consent, no default. Express consent is not claimed; but it is argued that the consent of the community is implied, by its policy, its condition, and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration; but our policy is different, for our country is but scarcely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country, because we are in a state of peace. But though we were in peace, the war had commenced in Europe; we wished to have nothing to do with the war, but the war would have something to do with us. It has been difficult for us to keep out of the war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities.

"The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any, and at all times, renounce his own, and join himself to a foreign country.

"Consent has been argued from the acts of our government permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own; but this implies no consent of the government that our own should also expatriate themselves. It is, therefore, my opinion, that these facts, which the prisoner offers to prove in his defense, are totally irrelevant," &c. The prisoner was accordingly found guilty, fined and imprisoned.

and resided there. By the depositions they prove that a man is not by law permitted to do these things without being a burgher; and hence they infer his burghership.

86*] *These facts are equivocal in themselves, and not well proved.

Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir W. Scott, in the cases before cited. A case happened in this country, 2 Dall. 370, *United States v. Gallato*, where a person having taken the oath of allegiance to Pennsylvania, agreeably to the naturalization act of that state, obtained a certificate from a magistrate, confirmed by the attestation of the supreme executive of the state, that he was a citizen of the United States. But upon a trial in the circuit court of Pennsylvania, it was adjudged that he was not a citizen. Captain Barney also went to France, became a citizen, took command of a French ship of war, returned to this country, and is now certified to be a citizen of the United States. So in the case of the information against the ship John and Alice, Captain Whitesides, he was generally supposed to be a citizen of the United States.

On the trial, evidence of his citizenship was called for, when it appeared that his father brought him into this country in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized and the vessel was condemned. These instances show the danger of crediting such custom house certificates.

All these certificates in the present case do not form the best evidence, because better is still in the possession of the party, and he ought to produce it.

The general and fundamental rules of evidence are the same in courts of admiralty as in courts of common law. If they appear to relax, it is only in that stage of the business where they are obliged to act upon suspicion.

In the present case the opinion of merchants only is taken as to the laws of Denmark. No judicial character, not even a lawyer, was applied to. Certificates of merchants are no evidence of the law. 1 Rob. 58, (*The Santa Cruz.*)

The evidence offered is both *ex parte* and *ex post facto*. Fraud is not to be presumed, but 87*] why was not the burgher's *brief produced, as well as the other papers, such as the oath of property, &c. when it was certainly the most important paper in the case?

The only reason which can be given is, that it did not exist. It was a case like that of Captain Whitesides, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole, then, we have a right to conclude that Jared Shattuck was not a Danish subject; or that if he was the fact is not proved, and, therefore, he remains a citizen of the United States, in the words of the act of Congress, "residing elsewhere."

The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the French courts of admiralty, and therefore Captain Murray is entitled to salvage.

This depends, 1. On the right to retake; 2. On the degree of danger; and, 3. The service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the non-intercourse law, as well as on the ground of her being a vessel sailing under French authority, and so armed as to be able to annoy unarmed American vessels. He had also a right to bring her in for salvage, if a service was rendered.

If his right to retake depends upon the suspicion of illicit trade, or upon her being a French armed vessel, he could take her only into a port of the United States.

The point of illicit trade has already been discussed. That the vessel was sailing under French authority is certain; the only question is, whether she was capable of annoying our commerce.

She had port-holes, a musket, powder and balls, and *eight Frenchmen, who, prob- [*88 ably, as is usual, had each a cutlass. Vessels have been captured without a single musket. Three or four cutlasses are often found sufficient.

The vessel was sufficiently armed to justify Captain Murray, under his instructions, in bringing her in.

If, then, the taking was lawful, has she been saved from such danger as to entitle Captain Murray to salvage?

There is evidence that Captain Wright requested Captain Murray to take the vessel to prevent her falling into the hands of the English. He consented to be carried into Martinique. He protested only against the privateer, not against Captain Murray. His letter to Captain Murray does not complain of the recapture, but of the detention. The taking was an act of humanity, for if Captain Murray had taken out the Frenchmen, and left the vessel with only Captain Wright and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the French courts of admiralty.

The case of *Talbot v. Seeman* has confirmed the principle adopted by Sir W. Scott, in the case of *The war Onskan*, 2 Rob. 246, that the departure of France from the general principles of the law of nations, varied the rule that salvage is not due for the recapture of a neutral out of the hands of her friend; and that the general conduct of France was such as to render the recapture of a neutral out of her hands an essential service which would entitle the recaptors to salvage. If she had been carried into a French port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The Danish papers would have been considered only as a cover for American property. The danger is shown by the apprehensions of Captain Wright and his crew; by the declarations of the privateer; by the *proces verbal;* and by the actual imprisonment of the crew.

*But independence of the general mis- [*89 conduct of France, there are several French ordinances under which she might have been condemned. The case of *Pollard v. Bell*, 8 Cranch 2.

Term Rep. 444, shows that such ordinances may justify the condemnation. The case of *Bernardi v. Motteaux*, Doug. 575, shows that the French courts actually do proceed to condemnation upon them, as in the case of throwing over papers, &c. So in the case of *Mayne v. Walter*, Park on Insurance, 414, (363) the condemnation was because the vessel had an English supercargo on board.

By the ordinances of France, Code des prises, vol. 1, p. 306, § 9, "all foreign vessels shall be good prize in which there shall be a supercargo, commissary or chief officer of an enemy's country; or the crew of which shall be composed of one-third sailors of an enemy's state; or which shall not have on board the *roles d'equipage* certified by the public officers of the neutral places from whence the vessels shall have sailed."

And by another ordinance, 1 Code des prises, 303, § 6. "No regard is to be paid to the passports granted by neutral or allied powers to the owners or masters of vessels, subject of the enemy, if they have not been naturalized, or if they shall have not transferred their domicile to the states of the said powers three months before the 1st of September in the present year; nor shall the said owners and masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of there continuing their commerce;" and by the next article, "vessels, enemy built, or which shall have been owned by an enemy, shall not be reputed neutral or allied, if there are not found on board authentic documents, executed before public officers who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorized." 90*] *In violation of these ordinances, the chief officer, Captain Wright, was a Scot, an enemy to France; for although he had a burgher's brief, yet it did not appear that he had resided three months before he obtained it; and we have before seen that a previous residence was not necessary by the laws of Denmark to entitle him to a burgher's brief for the purpose of being master of a vessel. In the next place, the whole number of the crew with the captain, being eleven, and three of the crew being Americans and the captain a Scot, more than one-third of the crew were enemies of France. The muster roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between France and the United States. And there was no authority on board from the American owners to Phillips, the agent who made the sale, in violation of the regulation of 17th February, 1794, art. 4, 2 Code des prises, p. 14, which declares "the vessel to be good prize, if being enemy built, or belonged originally to the enemy, the neutral, the allied, or the French proprietor, shall not be able to show, by authentic documents found on board, that he had acquired his right to her before the declaration of war." See also 2 Valin, 249, s. 9, 251, s. 12 and 244.

What chance of escape had this vessel, under all these ordinances which the French courts were bound to enforce? The case of *Pollard v. Bell*, 8 Term Rep. 434, is precisely in point. The vessel in that case was Danish, and had all the papers usually carried by Danish vessels. But she was condemned in the highest court of appeal in France, because the captain was a Scot who had obtained a Danish burgher's brief subsequent to the hostilities.

Has there, then, been no service rendered?

It is no objection to the claim of salvage that it is not made in the libel. Salvage is a condemnation of part of the things saved. The prayer for condemnation of the whole includes the part. It may be made by petition, or even *ore tenus*.

The means used for saving need not be used with that sole view. *Talbot v. Seeman.*

*As to the quantum of salvage, he re- [*91 ferred to the opinion of Sir W. Scott, in the case of *The Sarah*, 1 Rob. 263.

III. But if the Charming Betsy is not liable to condemnation under the non-intercourse law, and if Captain Murray is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases probable cause is always a justification. The grounds of suspicion in the present instance have been already mentioned; and when to these are added the circumstances that it was at Captain Wright's request, that Captain Murray took possession of the vessel; that he consented to be carried into Martinique; that if he had taken out the Frenchman and left the vessel in the midst of the ocean with only Captain Wright and his boy, they would have been left to destruction; that part of the cargo was damaged, part rifled, and all perishable; and that Captain Murray offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 Rob. 110, it is, by Sir W. Scott, taken as a principle that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shown that the captors conducted themselves otherwise than with fair intentions.

In the present case there is no pretence that Captain Murray did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contra.

1. The schooner Charming Betsy and her cargo were neutral property, and not liable to capture under the non-intercourse law.

2. When recaptured she was not an armed French vessel capable of annoying our commerce, and, therefore, not liable under the acts of Congress authorizing the capture of such vessels.

*3. She was not in imminent danger [*92 when recaptured, and, therefore, Captain Murray is not entitled to salvage.

4. Under all the circumstances of the case he acted illegally, and is liable for damages, which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended,

1. That Jared Shattuck never was an American citizen.

2. That if he was, he had expatriated himself, and had become a Danish subject.

3. That if not a Danish subject, yet he was not a citizen of the United States.

The evidence is, that he was born in Connecticut, but before the declaration of independence, and was, therefore, a natural born subject of Great Britain. He was in trade for himself in St Thomas's in 1794. This he could not do until he was 21 years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at St. Thomas's in the year 1788 or 1789. There is no evidence of his being in the United States since the declaration of independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence that his parents were citizens of the United States. Being a natural born subject of Great Britain, he could not become a citizen of the United States unless he was here at the time of the revolution, or his parents were citizens, or unless he became naturalized according to law.

It is incumbent upon Captain Murray to prove him to be a citizen of the United States. It is sufficient for us to show that he was born a subject of Great Britain. They must show how he became a citizen. This is a highly penal law, and every thing must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the United States, he had expatriated himself.

93*] *That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded.

Some of the states of the union have expressly recognized the right, and even prescribed the form of expatriation. But where the form is not prescribed, nothing more is necessary than that it be accompanied with fairness of intention, fitness of time, and publicity of election.

In the present instance, all these circumstances concur.

No time could have been more fit than the year 1788 or 1789, when all Europe and America were in a state of profound peace. His country had then no claim to his service.

The fairness of intention is evidenced by its having been carried into effect by an actual bona fide residence of 10 or 11 years; by serving an apprenticeship; by actual domiciliation; by marriage; by becoming a burgher; by acquiring lands, and by owning ships.

The publicity of election is witnessed by the same acts, and by taking the oath of allegiance to Denmark.

The United States have prescribed no form of expatriation. All that he could do to render the act public and notorious has been done.

It is said a man cannot cease to be a citizen of one state until he has become a citizen or subject of another. But a man may become a citizen of the world; an alien to all the governments on earth.[1] It is in evidence that by the laws of Denmark, a man cannot become a subject and carry on trade, without being naturalized; that an oath of allegiance and an actual domicile are necessary to naturalization; but that a domicile is not necessary to *become a burgher for the purpose of navigating a Danish vessel. [*94

In the two cases cited from 1 Rob. 133, *The Argo*, and 8 Term Rep. 434, *Polard v. Bell*, the question was only as to the national character of the master of the vessel, not of the owner; and, therefore, they do not apply to the present case.

The burgher's brief of Captain Wright is dated 19th May, 1794, and certifies that he had taken the oath of fidelity to His Danish Majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove Shattuck to be a Danish subject, yet they do not prove him to be a citizen of the United States, and if he is not a citizen of the United States, it is immaterial of what country he is a subject.

By the law of nature and nations a man may, by a bona fide domicile, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scott v. Schwartz*, Comyns' Rep. 677, it was decided that residence in, and sailing from, Russia, gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act; and in the case of *The Harmony*, 2 Rob. 264, Sir W. Scott condemned the goods of an American citizen, because, by a residence in France for four years, he had acquired a domicile in that country which had given his property the character of the goods of an enemy. In the case of *Wilson v. Marryatt*, 8 Term Rep. 31, it was adjudged that a natural born British subject might acquire the character of a citizen of the United States for commercial purposes.

II. The Charming Betsy was not a French armed vessel, capable of annoying our commerce, and, therefore, not liable to capture or condemnation, by virtue of the limited war which existed between the United States and France.

In supporting this proposition it is not intended to interfere *with the decision of [*95 court in the case of *Talbot v. Seeman*. There is a great difference between the force of the Amelia, in that case, and that of the Charming Betsy. The Amelia had eight cannon, was manned by twelve Frenchmen, and had been in possession of the French ten days, and must be admitted to have been such an armed French vessel as came within the meaning of the acts of Congress.

But in the present case, the vessel was built at Baltimore, and owned by citizens of the United States. When she sailed from Baltimore she had four cannon, a number of muskets, &c., which Shattuck was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss.

The captain swears that at the time of recapture she had only one musket, a few balls, and twelve ounces of powder; and although M'Farlan deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the recapture.

1.—*Ch. J.* There can be no doubt of that.

Dalas said he had been misunderstood. He only said that the act of becoming a citizen of another state was the most public act of expatriation, and the best evidence of the fact.

If arms were on board, they ought to have been brought in with the vessel. This is particularly required by the act of Congress. No arms are mentioned in the account of sales. It is to be presumed, as none were brought in, that none were on board. The captain expressly swears that the French put no force or arms on board when they took her.

She could not, therefore, be such an armed vessel as was intended by the acts of Congress.

III. She was not in imminent danger when recaptured, and therefore the recaptors are not entitled to salvage.

It is a general principle that the recapture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot v. Seeman*, nor that of Sir W. Scott, in the case of the *War Onskan*. Those cases were exceptions to the general rule, because the conduct of France was in violation of the law 96*] *of nations, and because neutral vessels had no chance of escaping the rapacity of the French prize courts. This system of depredation upon neutral commerce continued during the years 1798 and 1799. The Amelia was recaptured by Captain Talbot in September, 1799, while the arret of 18th of January, 1798, so injurious to neutral commerce, and the violences of the prize courts, were in full operation.

The Charming Betsy was recaptured by Captain Murray on the 3d of July, 1800. During this interval great events had occurred in France.

On the 9th of November, 1799, Bonaparte was placed at the head of the government, and a new order of things commenced.

On the 24th of December, 1799, the arret of the council of five hundred of 18th January, 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden in whole or in part with the productions of England or her possessions, was repealed, and by a new decree the ordinance of 1778 was re-established. The government adopted a more enlightened and liberal policy towards neutrals.

On the 26th of March, 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated Portalis, author of the Civil Code.

On the 29th of May, 1800, their principles were tested in the case of the Pigou, an American ship belonging to Philadelphia. This case was a public declaration to all the world that they began to entertain a proper respect for the law of nations, and from this time the rule of salvage, as established in the case of the *War Onskan*, ceased.

The Pigou had been condemned in an inferior tribunal.

On an appeal to the council of prizes, Portalis, with a degree of liberality and correctness which would confer honor upon any court in the world, declared that *"excepting the [*97 case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes, come to the examination of a fact of neutrality." And in discussing the question, as to the necessity of a *role d'equipage*, he says, "I will begin with the principle that all questions about neutrality are what are called in law, questions bona fide, in which due regard is to be had to facts, and weigh them properly without adhering to trifling appearances." "But it would be a gross error in believing that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

"Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

"We must speak to the point; and in these matters as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say with the law, that mere omissions or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*" "The main point in every case is, that the judge may be satisfied that the property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of October, 1744; by which article the act of throwing over papers is made a substantive ground of condemnation. But it was decided that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which the Pigou was condemned in the inferior tribunal, were, that she was armed for war, without any commission or authority from the United States, and that there was on board no *role d'equipage* attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores.

*Upon the first point it was decided in [*98 the council of prizes that she was not armed for war, but for lawful defence; and on the second that a *role d'equipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.[1]

1.—There is so much reason, justice and good sense appearing through a bad translation of, probably, not a very accurate account of this case, that it is with pleasure transcribed as it has been published in this country from the London public prints.

Opinion of Portalis. After having read the opinion of commissioners of the government, left in writing on the table, which is as follows:

It appears that a judgment of the tribunal of commerce at L'Orient, had granted Captain Green the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at L'Orient against that judgment, the tribunal of the department of Morbihan declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of Morbihan were, that the vessel was armed for war without any commission or authorization from the American government; and that there was on board no *role d'equipage* attested by the public officers of the port of his departure.

The captured claim the nullity of the prize, and that the vessel be reinstated in the situation she was in when captured, and that she delivered up as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize, excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.

In this case was the tribunal of Morbihan authorised to determine that the ship Pigou was in such circumstances as to be prevented from being acknowledged and respected as neutral?

99*] *In another case, (The Statira,) which was decided very shortly after that of the 100*] Pigou, by the same council *of prizes, two questions arose, 1st. Whether the Statira, being an American vessel captured by a British 101*] ship and *recaptured by a French privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and 2d. Whether her cargo was ground of condemnation?

On the first point it was held, that the mere capture does not, before condemnation, vest the property in the captor, so as to make it transferable to the recaptor, and therefore no ground of confiscation.

On the 2d there were two inquiries: 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband?

It is said the vessel was armed for war, and without any authorization from her government; that she mounted 10 guns of different rates, and that muskets and warlike stores have been found in her.

The captured reply, that the vessel being bound to India, was armed for her own defense, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part. I think it is not for having arms on board only, that a vessel can be said to be armed for war. The warlike armament is merely of an offensive nature; it is deemed so when there is no other end than attacking, or at least when everything shows that attack is the main point of the armament; then a vessel is reputed inimical or pirate if she has no commission or papers which may remove the suspicion. But defense is of natural right, and every means of defense is lawful in voyages at sea, as in every other dangerous occurrence of life.

A vessel consisting but of a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defense. The pretense of armament for war, in mv opinion, cannot be founded.

I am now to discuss the second argument against the captors on the want of a *role d'equipage* attested by the public officers of the place of her departure.

To support the validity of the prize, they allege the regulations of the 21st October, 1774, of the 26th of July, 1778, and the decree of the directory of the 12th Ventose, 5th year, which require a *role d'equipage.*

The captured, on their part, claim the execution of the treaty of commerce between France and the United States of America, of the 6th February, 1778; they contend that general regulations could not derogate from a special treaty, and that the directory cou'd not infringe the treaty by an arbitrary decree.

It is a fact that the regulations of 1774 and 1778 and the decree of the directory require a *role d'equipage* asserted by the public officers of the place of departure. It is also a fact that the *role d'equipage* is not mentioned in the treaty of the 6th February, as one of the papers requisite to establish neutrality, but I believe I am not under the necessity of discussing whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle that all questions about neutrality, are what are called in law, questions *bona fide,* in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances.

Neutrality is to be proved; for this reason, the regulation of marine of 1681, article 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter-parties, bills of lading, or invoices, shall be considered as good prize.

From the same motives, the regulations of 1774 and 1778 put the commanders of neutral vessels under obligation of proving at sea their property being neutral, by passports, bills of lading, invoices, and vessels' papers.

The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *role d'equipage* in due form.

But it would be a gross error to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

We must speak to the point, and in these matters as well as on those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say with the law, that mere omissions, or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways; and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*

Therefore, the regulation of the 26th July, 1778, art. 2, after having stated that the masters of neutral vessels shall prove at sea their property being neutral by passports, bills of lading, invoices, and other vessel-papers, adds, one of which at least shall establish the property being neutral, or shall contain an exact description of it.

It is not then necessary in every case to prove the property neutral by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient, according to the circumstances, that one of these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances.

The main point in every case is, that the judge may be satisfied that the property is neutral or not.

We have a precedent of what I assert in art. 6 of the regulation of the 21st October, 1774; by that article every vessel belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit.

Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778.

On the 13th November, 1779, the King wrote to the admiral that he left entirely to him and to the commissioners of the council of prizes to apply the rigidity of the decree, and of the regulation of the 26th July, or to moderate their clauses as peculiar circumstances would require it in their opinion.

A judgment of the council of the 27th December, in the said year, rendered between Pierre Brandebourg, master of the Swedish ship Fortune, and M. de la Rogredourden, captain of the King's xebec the Fox, liberated the said vessel notwithstanding some papers had been thrown overboard. It was determined that to ground an adjudication of the vessel on the papers's being thrown overboard, they ought to be of such nature as to prove the property enemy's, and that the captain ought to have had a concern in throwing his papers overboard; which was not the case with the Swedish captain.

In this case without discussing whether American captains are obliged or not to exhibit a *role d'equipage,* attested by the public officers of the place of their departure, I observe that this role is supplied by the passport, and that the captured alleged the impossibility for them to have their *role d'equipage* attested by public officers in Philadelphia, since the intercourse was forbidden, under pain of death, with Philadelphia, where a most tremendous epidemic was raging; I must add, that the passport, the invoice, and all the vessel's papers, establish evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus the invalidity of the capture is obvious; whence it follows that every thing which has been taken from them ought to be restored, in kind, or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not in every case the sequel of the invalidity of the capture.

Suspicious proceedings of the captured may occasion the mistake of the captors. But when the injustice on the part of the captors cannot be excused, the captured have a right to damages and interest.

Let us apply these phinciples to the cause. Could the captors entertain any grounded suspicions

As to the first, the commissary, (Portalis) reviews the laws upon this subject prior to the arrêt of the council of 500, of the 29th of Ni-
102*] vose, year 6, (January 18, 1798,) *the severity of which he condemns; but as the Statira was captured while it was in force, the captor was entitled to have the capture tried by it. He observes that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part, by which, he says, ought to be understood, a great part, according to the judicial maxim *parum pro nihilo habetur.* Upon this principle he is of opinion, that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest.

The question of contraband related to 40 barrels of pitch, part of the cargo of the Statira. He observed that pitch was not made contraband by the treaty of 1778, but as France was by that treaty entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the United States and Great Britain, pitch was among the enumerated articles of contraband, it necessarily became such in regard to France.

He however decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th (quære 29th) Nivose. And the ship was restored.[1]

*These cases are read to show that [*103

against the captain of the ship Pigou? was not the neutrality of the ship proved by her being an American built ship, by her flag, by her destination, by the crew being composed of Americans, by her cargo consisting of American goods, without any contraband articles, by the name and the character of Captain Green, very well known by services he rendered to the French nation, by the register, the passport, the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors at the first summons, the officers and crew made faithful declarations; they answered plainly in their examination; no pretense whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances, I am of opinion, that a more absolute and full replevy be granted to Captain Green of the American ship Pigou and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain Green, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship Pigou and her cargo is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo to Captain John Green; as to the damages and interest claimed by Captain Green, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

Done at Paris, on the 9th Prairial, 8th year of the republic.

Present,

CITIZEN PRESIDENTS.

REDON,	NIOU CANTE,
MOREAU,	MONTIGNY,
MONPLACID,	BARENNES,
DUSAUB,	PAREVAL,
GRANDMAISON,	TOURNACHER.

1.—The following account of the case of The Statira is extracted from London papers of June 1800.

We stated to our readers some time ago the principles upon which the new council of prizes at Paris proceeded with respect to neutral vessels, and we gave the decision at length upon the American ship Pigou, which was ordered to be restored with costs. That decision showed that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of The Statira.

The Statira, Captain Seaward, an American ship, had been captured by an English vessel, and recaptured by the French privateer the Hazard.

The first point which the commissary considers is, the effect which the Statira having been in the possession of the English ought to have.

He observes, that if the vessel captured and recovered had been French, and recaptured by a national vessel, there would have been nothing due to the recaptor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been recaptured by a privateer, the French regulation gives the property of the vessel to the recaptor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right that it should.

In the next place, he considers the case of a neutral recaptured from the enemy. If really neutral he says the vessel must be released. The ground of this higher degree of favor for a neutral he states to be, that the French vessel must have been lost in the country. But it is not certain that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the recaptor. The commissary considers the property not vested in the captor till sentence of condemnation.

We believe this is much milder and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra mania* transfers the property to the captor. This was held in the late well known case of the Spanish prize, captured by the French, and recaptured by the English. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

Having proved that the Statira was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation.

Upon this point he considers two questions: 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband?

He then reviews all the laws upon this head. He shows that till the decree of the 29th Nivose, (year 6.) January 18, 1798, the regulation states, "His Majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from, or bound to, the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states laden with contraband commodities for the enemy, they may be stopped, and the said commodities shall be seized and confiscated, but the vessels and the residue of their cargo shall be restored, unless the said contraband commodities constituted three fourths of the value of the cargo, in which case the ship and cargo shall be wholly confiscated. His Majesty, however, reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof."

The law of the 29th Nivose (year 6) overturned all this system, and enacted, "That the state of ships, in regard to their being neutral or hostile, should be determined by their cargo; that accordingly every vessel found at sea, laden in whole or in part with commodities coming from England or its possessions, should be declared good prize, who ever might be owners of their articles and commodities."

France had abstained from those violations of
104*] the law of nations, which had *caused the rule in the case of the *War Onskan;* and to bring the present case within the principles established by the court in the case of *Talbot v. Seeman.*

105*] *The general conduct of France having been changed, it is to be presumed she would have been released with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. France was at war with Great Britain; partial hostilities existed with the United States. The non-intercourse law prevented our vessels from trading with France or her dependencies; and the French West Indies could only be supplied from the Danish islands. It is not to be believed, therefore, that they would, by condemning this vessel, (coming to them with those very supplies which they wanted,) embarrass a trade so necessary to their very existence.

But independent of the general misconduct of France towards neutrals, the captors rely upon three points arising under French ordinances.

1. That the *role d'equipage,* wants the place of nativity of the crew. But, according to the opinion of Portalis, this is not a fatal defect, nor is it, of itself, a sufficient ground for condemnation.

106*] *2. That more than one-third of the crew were enemies of France. The word *matelot,* in the ordinance of 1778, means a sailor, in contradistinction to the captain or master. Exclude the captain, and there were only 10 persons on board, and only three of those are pretended to be enemies; so that one third were not enemies within the meaning of the ordinance.

But these three pretended enemies were Americans. The hostilities which existed between France and the United States amounted at most to a partial, limited war, according to the decision of this court in the case of *Baas v. Tingey.* It was only a war against French armed force found on the high seas.

It did not authorize private hostilities between the citizens of the two countries. Individuals are only enemies to each other in a general war. The war extended only to those objects pointed out in the acts of Congress; as to everything else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc.* The individuals of the two nations were always neutral to each other. A citizen of the United States could only be considered as an enemy of France while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression) the complement of the war. A citizen of the United States, peaceably navigating a neutral vessel, could not be burdened with the character of enemy.

3. The captain was a Scot by birth.

The ordinance cited from 1 Code des prises, 303, s. 6, in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, or must have transferred his domicile to the neutral country three months before the first of September in that year. Naturalization is not necessary if there be such a transfer of the domicile; and the domicile is not necessary if the party be naturalized.

But the authority of Portalis shows that these decrees are not to be considered as laws but *sub modo.*

*They are only regulations made at [*107 particular times, for particular purposes.

If the same evidence had been produced at Guadaloupe which has been brought here, (and the same would have been more easily obtained there,) there can be no doubt the vessel would have been restored.

It is in evidence that other vessels of Mr. Shattuck had been released.

No salvage can be allowed unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain Murray acted illegally, and is liable for damages; which have been properly assessed.

His subsequent conduct rendered the transaction tortious *ab initio.* If he was justified in rescuing the vessel from the hands of the

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The severity of this regulation the commissary condemns, but as the Statira was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part. By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur.* Upon this principle, then, he is of opinion that a ship ought not to be subject to confiscation even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as aught to excite a presumption of fraud against all the rest. What that part should be is not capable of definition; but should be left to the enlightened equity and sound discretion of the judge. The Statira had on board sixty barrels of turpentine, and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans they were not enumerated as contraband.

But the commissary shows that the Americans by the treaty were bound to admit the French to all the advantages of the most favorite nations; that having, in a subsequent treaty with England, made pitch contraband, with respect to the latter, necessarily it became contraband with regard to France.

The learned commissary, however, thinks, that even upon the principle of the law of the 24th Nivose, the quantity of pitch was too small to justify confiscation.

In the next place the captor alleged that 2,911 pieces of Campeachy wood, part of the cargo of the Statira, was the produce of English possessions.

This point, however, had not been regularly ascertained, as the report on the subject was made without the captured being called as a party.

The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo. The point came under the consideration of the court on the appeal of the captor, who wanted to get both ship and cargo.

The commissary, therefore, saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured.

Judgment was pronounced accordingly.

The piratical decree of the 29th Nivose, (year 6,) mentioned above with so much severity by Portalis, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the French are to treat neutrals in regard to contraband in the same way in which they are treated by us; they will not allow the Americans to carry into England a commodity which the English would seize as contraband going into the courts of France.

French, his subsequent detention of the vessel, and the sale of the cargo at Martinique by his own agent, without condemnation, were unauthorized acts in violation of the rights of neutrality.

The libel says nothing of the cargo. It is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law he was bound to bring the vessel and cargo into a port of the United States for adjudication, and had no authority to sell the cargo before condemnation. As to the pretense of her being an armed French vessel, he ought to have sent the arms into port with the vessel as the only evidence of their existence.

The commander of the French privateer, in his commission to the prize-master, calls her the Danish schooner Charming Betsy, William Wright, master.

There was no evidence to impeach the credence due to the papers found on board of her, 108*] and which at that *time had every appearance of fairness, and which have since been incontestably proved to be genuine.

The facts stated in the *proces verbal* are, that she had no log-book; that the mate declared himself to be an American; that the flag and pendant were American; that the Danish flag had been made during the chase, which was confirmed by the two boys, and that she had no pass from the French consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer entirely destroys the credit of the *proces verbal*, and at best it would be only the declaration of interested plunderers.

But it is said that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations.

In revenue laws, probable cause is no justification, unless it is made so by the laws themselves.

This is not a war measure. If the United States were at war it was unnecessary, because the act of trading with an enemy, is itself a ground of condemnation. This law was passed because the United States were not at war, and wished to avoid it, by showing their power over the French colonies in the West Indies. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes must take at his peril. The law only gives authority to seize vessels of the United States. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain Murray; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfor- 109*] tunate *owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. The damages have been properly assessed in the district court. If damages are to be given they ought not to be less than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation it will be found that the damages assessed do not exceed the amount of these.[1]

Dallas. It is said that Mr. Shattuck never was a citizen of the United States.

What is averred and admitted need not be proved.

Mr. Soderstrom, in his rejoinder, expressly admits that he was once a citizen of the United States by alleging that he had transferred his allegiance from the government of the United States to His Danish Majesty.

Mr. Shattuck's burgher's brief is at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April, 1797. It may here be remarked that some of the witnesses have testified that he became a burgher in 1795. This shows how little reliance ought to be placed upon their testimony. If, then, Mr. Shattuck did expatriate himself, it was not until April, 1797. It has been conceded that a man cannot expatriate himself unless it be done in a fit time, with fairness of intention, and publicity of act.

As to the fitness of the time. What was the situation of this country and France in the year 1797?

In 1795 the British treaty had excited the jealousy of France. In 1796 she passed several edicts highly injurious to our commerce. Mr. Pinckney had been sent as an envoy extraordinary, and was refused. France had gone on in a long course of injury and insult, which at *length roused the spirit of the nation. [*110 On the 14th of June, 1797, the act of Congress was passed, prohibiting the exportation of arms; on the 23d, the act for the defense of the ports and harbors of the United States; on the 24th the act for raising 80,000 militia; on the 1st of July, the act providing a naval armament; on the 13th of June, 1798, the first non-intercourse bill was passed, and on the 7th of July, the treaties with France were annulled.

These facts show that the time when Mr. Shattuck chose to expatriate himself, was a time of approaching hostilities, and when every thing indicated war.

As to the fairness of his intention. The same facts show what that intention was. It was to carry on that trade which every thing tended to show would soon become criminal by the laws of war, and from the exercise of which the other citizens of the United States were about to be interdicted.

The act of Congress points to this very case. It was to prevent transactions of this nature, that the word "elsewhere" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious, because it would have discovered the time of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew.

Domicile in a neutral country gives a man

1.—MARSHALL, *Ch. J.* What would have been the law as to probable cause, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would probable cause excuse, in such a case, if it should turn out that she was a neutral?

only the rights of trade; it will not justify him in a violation of the laws of his country.

If, then, Mr. Shattuck could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the United States. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the United States have done in the act of Congress respecting the slave trade, and in the non-intercourse law.

The question, whether the vessel was capable of annoying our commerce, depends upon mat-
111*] ter of fact, of which *the court will judge. The number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction, and by the usage in such cases. Some arms were necessary to prevent Captain Wright and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory.

The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadaloupe might have been completely equipped. Upon the principles of the case of *Talbot v. Seeman*, Captain Murray was bound to guard against this, and he would have been culpable if he had suffered her to escape.

But it is said that she was not in danger of condemnation by the French, because France had ceased from her violation of the laws of nations, because she had repealed the obnoxious arret of 18th January, 1798, and because one third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned.

The vessel was transferred from an enemy to a neutral during the heat of hostilities. This alone was a sufficient ground of condemnation under the ordinance already cited from 1 Code des prises, 304, art. 7. In the case of *Talbot v. Seeman*, the ground of salvage was, that the vessel was liable to condemnation under a French arret. And that the courts of France were bound to carry the arret into effect.

The conduct of Captain Murray was not illegal. He was bound by law, as well as by his instructions, to take the vessel out of the hands of the French. It was with the consent, if not at the request, of Captain Wright; and it was in itself an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable; if it had been brought to the United States it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of American produce) as at Martinique. The sale was fair, and the proceeds brought to the United States to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found even at common law.

112*] *If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages; the principles upon which they are assessed do not appear from the report of the assessors, but the probability is, that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give speculative or vindicative damages.[1]

Martin, in reply.

1. As to the national character of Shattuck.

He was born before the revolution; probably in 1773 or 1774; at least 21 years before April 10th, 1797, which will bring it before the declaration of independence.

In *Duane's Case*, it was decided that even if it had been proved that he was born in New York, yet his birth being before the revolution, and having been carried to Ireland during his minority, he was an alien.

The rejoinder of Mr. Soderstrom does not admit the fact, that Shattuck was a citizen of the United States; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that the said Jared Shattuck, at the several times and periods above mentioned, and long before, and in the intermediate times which elapsed between the said several times or periods, had been, then was, ever since hath been, and now is, a subject of His Majesty the King of Denmark, owing allegiance to His *said Majesty, and to no other prince, [*113 potentate, state or sovereignty whatever; and that he the said Jared Shattuck had, long before his said purchase of the said schooner, duly expatriated himself from the dominions of the United States, to those of His said Majesty; and transferred his allegiance and subjection from the said United States and their government, to His said Majesty and his government." The whole purport of which is, that if he was ever a citizen of the United States he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. Shattuck, as the rejoinder is by Mr. Soderstrom in character of consul of Denmark, and as the representative of the nation.

If he was born before the revolution, he never owed natural allegiance to the United States; and if he remained here after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the United States, he would have been guilty of a treason; but that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. Foster's Cr. Law, 183, 185.

That he acted with a fair and honest intention is proved by his bona fide residence and domicile for 10 or 11 years. 2 Brown's Civil and Admiralty Law, 328.

The navigation act of Great Britain is a municipal law, and yet a bona fide domicile and

1. In answer to an inquiry by the Chief Justice for authorities to support the position that probable cause is always a justification in maritime cases, Mr. Dallas referred generally to Brown's Civil and Admiralty Law, and to the decisions of Sir Wm. Scott.

residence of foreigners were held sufficient to bring the persons within its provisions. Comyn's Rep. 677, *Scott, qui tam, v. Schwartz.*[1]

114*] *But a stronger case than that is found in 1 Bos. & Pull. 430, *Marryatt v. Wilson,* in the exchequer chamber, on a writ of error from the king's bench.

In that case a natural born British subject, naturalized in the United States since the peace, was adjudged to be a citizen of the United States within the treaty and navigation acts of Great Britain, so as to carry on a direct trade from England to the British East Indies.

The opinion of Eyre, Ch. J., beginning in p. 439, is very strong in our favor.

There is no probability that the vessel would have been condemned at Guadaloupe. Mr. Shattuck, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is, that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded, but for the able negotiations of Lord Nelson at Copenhagen.

In Park on Insurance, 363, it is said: "If the ground of decision appear to be, not on the want of neutrality, but upon a foreign ordinance manifestly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty so as to discharge the insurer." And in support of this position he cites the case of *Mayne v. Walter.*

There is no ordinance of France, which, upon the principles established in the case of the Pigou, would have been a sufficient ground of condemnation.

115*] *The circumstances required by those ordinances are only evidence of neutrality, which is always a question of bona fide. A condemnation upon either of these ordinances alone would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by Portalis.

The French have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of France. Hence it appears that they would not have considered an American vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an afterthought. It was not necessary to bring her to the United States to obtain salvage. Salvage is a question of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain Murray's intentions were undoubtedly correct and honorable, and we do not wish vindictive damages; but Mr. Shattuck will be a loser, even if he gains his cause, and recovers the damages already assessed.

Probable cause cannot justify the taking and bringing in a neutral; but it may prevent vindictive damages.

February 22. MARSHALL, *Ch. J.*, delivered the opinion of the Court. The Charming Betsy was an American built vessel, belonging to citizens of the United States, and sailed from Baltimore, under the name of the Jane, on the 10th of April, 1800, with a cargo of flour for St. Bartholomew's; she was sent out for the purpose of being sold. The cargo was disposed of at St. Bartholomew's, but finding it impossible to sell the vessel at that place, the captain proceeded with her to the island of St. Thomas, where she was disposed of to Jared Shattuck, who changed her name to that of the Charming Betsy, *and having put on board her a cargo [*116 consisting of American produce, cleared her out as a Danish vessel for the island of Guadaloupe.

On her voyage she was captured by a French privateer, and eight hands were put on board her for the purpose of taking her into Guadaloupe as a prize. She was afterwards recaptured by Captain Murray, commander of the Constellation frigate, and carried into Martinique. It appears that the captain of the Charming Betsy was willing to be taken into that island; but when there, he claimed to have his vessel and cargo restored, as being the property of Jared Shattuck, a Danish burgher.

Jared Shattuck, was born in the United States, but had removed to the island of St. Thomas while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a Danish subject; had married a wife and acquired real property in the island, and also taken the oath of allegiance to the crown of Denmark in 1797.

Considering him as an American citizen who was violating the law prohibiting all intercourse between the United States and France or its dependencies, or the sale of the vessel as a mere cover to evade that law, Captain Murray sold the cargo of the Charming Betsy, which consisted of American produce, in Martinique, and brought the vessel into the port of Philadelphia, where she was libelled under what is termed the non-intercourse law. The vessel and cargo were claimed by the Consul of Denmark as being the bona fide property of a Danish subject.

This cause came on to be heard before the

1.—The case of *Scott v. Schwartz* was an information against the Russian ship, The Constant, because the master and three-fourths of the mariners were not of that country or place, according to the statute of 12 Car. II, c. 18, s. 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733 was admitted, and ever since continued, a burgher of Riga; and had been a resident there when not engaged in foreign voyages, and traded from thence 9 years before the seizure. There were only 11 mariners on board, of whom 4 were born in Russia, Morgan, a fifth, was born in Ireland, and there bound apprentice to the master. and as such went with him to Riga, and for three or four years before the seizure, served on board the same ship and sailed therein from Riga, on this and former voyages. The other 6 were born out of the dominions of Russia, but Stephen Hanson, one of them, had resided at Riga 8 years next before the seizure. Hans Yasper 5 years. Rein Steingrave 4 years, and Derrick Andrews, the cook, 7 years, and these 4, during those years, had sailed from Riga in that and other vessels.

It was adjudged that these people were of that country or place, within the meaning of the statute, and the vessel properly manned and navigated.

judge for the district of Pennsylvania, who declared the seizure to be illegal, and that the vessel ought to be restored and the proceeds of the cargo paid to the claimant or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage Jared Shattuck had sustained by reason of the premises. If they should be of opin-
117*] ion that the *officers and crew of the Constellation had conferred any benefit on the owners of the Charming Betsy by rescuing her out of the hands of the French captors they were, in the adjustment, to allow reasonable compensation for the service.

In pursuance of this order the clerk associated with himself two merchants, and reported that having examined the proofs and vouchers exhibited in the cause, they were of opinion that the owner of the vessel and cargo had sustained damage to the amount of 20,594 dollars and 16 cents, from which is to be deducted the sum of 4,363 dollars and 86 cents, the amount of moneys paid into court arising from sales of the cargo, and the further sum of 1,300 dollars, being the residue of the proceeds of the said sales remaining to be brought into court, 5,663 dollars and 86 cents. This estimate is exclusive of the value of the vessel, which was fixed at 3,000 dollars.

To this report an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at 14,930 dollars and 30 cents.

No exceptions having been taken to this report, it was confirmed, and, by the final sentence of the Court, Captain Murray was ordered to pay the amount thereof.

From this decree an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, and reversed for the residue.

From this decree each party has appealed to this court.

It is contended on the part of the captors in substance,

1st. That the vessel Charming Betsy and cargo are confiscable under the laws of the United States. If not so,

2d. That the captors are entitled to salvage. If this is against them,

3d. That they ought to be excused from
118*] damages, *because there was probable cause for seizing the vessel and bringing her into port.

1st. Is the Charming Betsy subject to seizure and condemnation for having violated a law of the United States?

The libel claims this forfeiture under the act passed in February, 1800, further to suspend the commercial intercourse between the United States and France and the dependencies thereof.

That act declares "that all commercial intercourse," &c. It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication.

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with France or her dependencies is to be prohibited, names any person or persons resident within the United States, or under their protection. Commerce carried on by persons within this description is declared to be illicit.

From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed, wholly or in part, by any person residing within the United States, or by any citizen thereof residing elsewhere, which shall perform certain *acts recited in the law, becomes liable [*119 to forfeiture. It seems to the court to be a correct construction of these words to say, that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed. The cases of forfeiture are, 1st. A vessel of the description mentioned, which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the French republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act.

The second class of cases are those where vessels shall be sold, bartered, intrusted, or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose for which it was made. If it was intended that any American vessels sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the French republic, or any of its dependencies.

In these cases too, the vessels must be within the description of the act at the time the fact producing the forfeiture was committed.

The Jane having been completely transferred in the island of St. Thomas by a bona fide sale to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry whether the purchaser was within the description of the act.

Jared Shattuck having been born within the United *States, and not being proved to [*120

have expatriated himself according to any form prescribed by law, is said to remain a citizen entitled to the benefit, and subject to the disabilities imposed upon American citizens; and therefore, to come expressly within the description of the act which comprehends American citizens residing elsewhere.

Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can devest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition. But his situation is completely changed, where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance, and, consequently, takes him out of the description of the act.

It is, therefore, the opinion of the Court, that 121*] the *Charming Betsy, with her cargo, being at the time of her recapture the bona fide property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island.

The vessel not being liable to confiscation, the Court is brought to the second question, which is,

2d. Are the recaptors entitled to salvage?

In the case of the Amelia[1] it was decided, on mature consideration, that a neutral armed vessel in possession of the French, might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well founded reasons for the opinion that she was in imminent hazard of being condemned as a prize, the recaptors would be entitled to salvage. The Court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of the Amelia. One of these circumstances is, that the vessel should be in a condition to annoy American commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder, and a few balls. The testimony respecting the cutlasses is not considered as showing that they were in the vessel at the time of her recapture. The capacity of this vessel for offense appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the Court, that the Charming Betsy was in such imminent hazard of being condemned as to entitle the recaptors to salvage.

*It remains to inquire whether there [*122 was in this case such probable cause for sending in the Charming Betsy for adjudication as will justify Captain Murray for having broken up her voyage, and excuse him from the damages sustained thereby.

To effect this there must have been substantial reason for believing her to have been at the time wholly or in part an American vessel, within the description of the act; or hired, or employed by Americans; or sold, bartered, or trusted for the purpose of carrying on trade to some port or place belonging to the French Republic.

The circumstances relied upon are, principally,

1st. The *proces verbal* of the French captors.

2d. That she was an American built vessel.

3d. That the sale was recent.

4th. That the captain was a Scotchman, and the muster-roll showed that the crew were not Danes.

5th. The general practice in the Danish islands of covering neutral property.

1st. The *proces verbal* contains an assertion that the mate declared that he was an American, and that their flag had been American, and had been changed, during the cruise, to Danish, which declaration was confirmed by several of the crew.

If the mate had really been an American, the vessel would not on that account have been liable to forfeiture, nor would that fact have furnished any conclusive testimony of the character of the vessel. The *proces verbal*, however, ought for several reasons to have been suspected. The general conduct of the French West India cruisers, and the very circumstance of declaring that the Danish colors were made during the chase, were sufficient to destroy the credibility of the *proces verbal*. Captain Murray ought not to have believed that an American vessel trading to a French port in the assumed character of a Danish bottom, would have been without Danish colors.

*That she was an American vessel, [*123 and that the sale was recent, cannot be admitted to furnish just cause of suspicion, unless the sale of American built vessels had been an illegal or an unusual act.

That the captain was a Scotchman, and that

1.—*Ante*, vol. 1, p. 1.

the names of the crew were not generally Danish, are circumstances of small import, when it is recollected that a very great proportion of the inhabitants of St. Thomas's are British and Americans.

The practice of covering American property in the islands might and would justify Captain Murray in giving to other causes of suspicion more weight than they would otherwise be entitled to, but cannot be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion taken together ought not to have been deemed sufficient to counterbalance the evidences of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the captain, uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance existed which ought to have discredited them. That a certified copy of Shattuck's oath, as a Danish subject, was not on board, is immaterial, because, being apparently on all the papers a burgher, and it being unknown that he was born in the United States, the question, whether he had ceased to be a citizen of the United States, could not present itself.

Nor was it material that the power given by the owners of the vessel to their captain to sell her in the West Indies, was not exhibited. It certainly was not necessary to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board, and by other testimony.

Although there does not appear to have been such cause to suspect the Charming Betsy and her cargo to have been American, as would justify Captain Murray in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to 124*] *produce a conviction that he acted upon correct motives, from a sense of duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the French Republic; and such too as might well have induced him to trust to very light suspicions respecting the real character of a vessel appearing to belong to one of the neutral islands. A public officer intrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the Court to relieve him from such when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed, where, from the nature of the proceedings, the whole case appears upon the record, unless those proceedings are such as to show on what the decree has been founded, and to support that decree.

In the case at bar damages are assessed as they would be by the verdict of the jury, without any specification of items which can show how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of if it was even probable from the testimony contained in the record that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given. It is true Captain Murray ought to have excepted to this report. His not having done so, however, does not cure an error apparent upon it, and the omission to show how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the Court would in any case disapprove of this mode of proceeding, yet in order to save the parties the costs of further prosecuting this business in the circuit *court, the error which has been stated [*125 might have been passed over, had it not appeared probable that the sum, for which the decree of the district court was rendered, is really greater than it ought to have been according to the principles by which the claim should be adjusted.

This Court, therefore, is not satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

Decree of the Court.

This cause came on to be heard on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed, as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by Captain Murray's agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner. to damages for the seizure and detention of his vessel was rejected, be reversed.

And the Court proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order, and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at 20,594 dollars and 16 cents, and by which the libellant was directed to pay that sum, be reversed and annulled. And this Court, does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the United States for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including *the insurance actu- [*126 ally paid, and such expenses as were necessarily

sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court, and in the circuit court. All which is ordered and decreed accordingly.

A true copy,
E. B. CALDWELL,
Clerk Sup. Court U. S.

Capt. Murray was reimbursed his damages, interest and charges out of the treasury of the United States, by an act of Congress, January 31, 1805.

CAPRON v. VAN NOORDEN.

A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort.

A party may take advantage of an error in his favor, if it be an error of the court.

The courts of the United States have not jurisdiction unless the record shows that the parties are citizens of different states, or that one is an alien, &c.

ERROR to the circuit court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, Van Noorden, upon which judgment was rendered.

The writ of error was sued out by Capron, the plaintiff below, who assigned for error, among other things, first, "that the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said George Capron, or the said Hadrianus Van Noorden, was an alien at the time of the commencement of said suit, or at any other time, or that one of the said parties was at that or any other time, a citizen of the state of North Carolina where the suit was brought, and the other a citizen of another state; or that they the said George and Hadrianus were, for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being sued there."

127*] *And, secondly, "that by the record aforesaid it manifestly appeareth that the said circuit court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof or given judgment therein, but ought to have dismissed the same, whereas the said court hath proceeded to final judgment therein."

Harper, for the plaintiff in error, stated the only question to be whether the plaintiff had a right to assign for error the want of jurisdiction in that court to which he had chosen to resort.

It is true, as a general rule, that a man cannot reverse a judgment for error in process or delay, unless he can show that the error was to his disadvantage; but it is also a rule, that he may reverse a judgment for an error of the Cranch 2. court, even though it be for his advantage. As if a verdict be found for the debt, damages, and costs, and the judgment be only for the debt and damages, the defendant may assign for error that the judgment was not also for costs, although the error is for his advantage.

Here it was the duty of the court to see that they had jurisdiction, for the consent of parties could not give it.

It is therefore an error of the court, and the plaintiff has a right to take advantage of it. 2 Bac. Abr. *tit. Error.* (K. 4.) 8 Co. 59, a. *Beecher's Case.* 1 Roll. Abr. 759. Moor, 692. 1 Lev. 289, *Bernard v. Bernard.*

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed.

HEAD & AMORY
v.
THE PROVIDENCE INSURANCE COMPANY.

If the insured make a proposition to the underwriters to cancel the policy, which proposition is rejected; if the underwriters afterwards assent to the proposition, but before information of such assent reaches the insured, they have notice of the loss of the vessel insured, such proposition and assent do not in law amount to an agreement to cancel the policy.

A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of law, and derives all its powers from the act of incorporation.

THIS was an action on the case brought by the plaintiffs in error, upon two policies of insurance, in the circuit court of the first circuit, holden at Providence, in the district of Rhode Island,[1] in which action judgment was rendered at April term, 1802, for the plaintiffs in error, upon one of the policies only, viz., that upon the vessel.

*The declaration consisted of four [*128 counts.

1. A special count upon a policy dated September 12, 1799, by which the defendants in error insured the plaintiffs "ten thousand dollars on merchandise on board the Spanish brig Nueva Empressa, at and from Malaga to Vera Cruz, and at and from thence to her port of discharge in Spain; the property being shipped in the name of Spaniards, and the assured not appearing as owners in any of the papers," "beginning the adventure upon the said merchandise at Malaga as aforesaid, and to continue during the voyage aforesaid, and until said vessel shall be arrived and moored at anchor twenty-four hours in safety."

2. A special count on another policy dated April 5, 1800, on the vessel, at and from Cuba, to her port of discharge in Spain, by which the defendants insured the plaintiffs the sum of six thousand dollars.

3. A count for money had and received.

4. A count for money paid, laid out, and expended.

1.—Under the act of congress of February, 13, by which sixteen circuit judges were appointed.

The defendants pleaded the general issue, and the defense set up at the trial was, that the first policy (viz. on the merchandise) was discharged by a subsequent agreement between the plaintiffs and defendants.

The jury returned the following verdict: "We find on the first count of the plaintiffs' declaration, that the defendants did not promise in manner and form as set forth in the declaration. On the second count we find the defendants did promise in manner and form as set forth in the declaration, and assess damages for the plaintiffs in the sum of fifteen hundred and forty-two dollars and five cents, being the sum due on said policy after deducting the amount of the premium notes due on both said policies with cost."

A bill of exceptions was taken by the plaintiffs at the trial, which stated that they gave in evidence a copy of the act of incorporation of 129*] the said company, and the *two policies of insurance, which were admitted by the defendants' counsel to have been duly executed in behalf of the company. That the defendants' counsel "further agreed and confessed before the said court and jury, that the plaintiffs had interest in the said vessel, called the Nueva Empressa, and the cargo on board the same, to the full amount of the sums assured aforesaid in said policies; and that the same were captured in and upon the prosecution of the voyage mentioned in said policy, on the first day of August, 1800, and afterwards on the 30th day of said month of August, were condemned by the court of vice-admiralty at St. John's, Newfoundland, as prize of war to the officers and crew of the British ship of war called the Pluto, who captured the same as aforesaid, whereby the property insured as aforesaid was utterly lost to the plaintiffs. Whereupon the said defendants, by their counsel, did contend and insist before the said court and jury, that the force, effect and obligation of said policy on said cargo, was settled and discharged by a subsequent agreement, which they alleged to have been made between the plaintiffs and the said Providence Insurance Company, and thereupon read and gave in evidence to the jury on the trial aforesaid, a certain letter from the said Head & Amory to Nicholas Brown and Thomas P. Ives, merchants, doing business under the firm of Brown & Ives, bearing date the 21st of August, 1800, which letter was admitted by the plaintiffs," and is as follows.

Boston, August 21, 1800.

MESSRS. BROWN & IVES,

Gentlemen:

We have your favor under the 18th inst. The brig Nueva Empressa is still detained at the Havanna; having expected a convoy, and the place being closely watched by British cruisers, the master has thought it prudent for all concerned not to proceed to sea; we have no direct advices from him, but we learn by an American master from thence, that the vessel is very much eaten by the worms, and was so 130*] leaky that *great repairs must be made and, perhaps, it will be necessary to reship the effects in some other Spanish bottom. We are about making the attempt to have the voyage terminated at Havanna, which can only be done by the consent of the officers of the Spanish government there, and that gained by a considerable *douceur*, but before we make this attempt, we wish to know at what rate we can settle with the underwriters on the merchandise; and if we can make it for our interest, and permission as aforesaid can be obtained, we would terminate the adventure at the Havanna. Some of the concerned have made an agreement with their underwriters in this town to return twenty-five per cent, and finish the risk on the above conditions, the hazard of her getting safe to Spain, free from capture, being very great; we wish a conditional permission from our underwriters to end the voyage, if we can effect it, and the rate of premium they will in such case return. We are, &c.

HEAD & AMORY.

The bill of exceptions then states that the defendants' counsel further offered and gave in evidence to the jury the following papers.

1. A letter from Brown & Ives to the plaintiffs, dated August 26th, 1800, in which they say, "Your letter to us on the subject of that vessel (*The Nueva Empressa*) was laid before the Insurance Company, and the secretary says, "If Messrs. Head & Amory are disposed to make a settlement and cancel the policies, the directors will agree to return 25 per cent., but they are not disposed to make any conditional agreement."

2. A letter from the plaintiffs to Brown & Ives, dated Boston, August 28, 1800, as follows: "We have your favor under the 26th instant. We note the answer to The Providence Insurance Company to our proposal; we are sorry they will not accede to our proposition for making the agreement conditional. On reflection we conclude to accept their offer and cancel our policy, they giving up our note on our paying one half the *amount of the same, and [*131 the risk to cease at the Havanna."

3. A letter from Brown & Ives to the plaintiffs, dated Providence, September 2d, 1800, which says, "Your letter to us saying that you would settle the policy on the Spanish brig, on a return of 25 per cent. was shown to the company, and we have received the following note.

Providence Insurance Office, Sept. 1, 1800.

Gentlemen,

"The Providence Insurance Company will agree to settle both of the policies upon the Spanish brig Nueva Empressa, &c. at the Havanna, and to return 25 per cent. upon the first, and 31, 83 1-3 per cent. on the last, but they decline making a partial settlement of one without the other. The premium note for the first policy, say 5,002 dollars and 75 cents, will fall due at bank 12th instant.

"Yours, &c.

"JOHN MASON, Pres't.

"*Messrs. Brown & Ives,*

"You will please to give us your instruction. The other company will settle at the same rate, say retain 1 1-2 per cent."

4. A letter from the plaintiffs to Brown & Ives, dated Boston, Sept. 3d, 1800, as follows: "We have your favor under the 2d instant, handing us a copy of a note received from the President of the Providence Insurance Company. When we consented to their proposition of settling the policy by paying 25 per cent. it was not because it was most agreeable to us. We wish to make it conditional, as has been

done in this town; and we had a right to suppose when we consented to their terms, the business was settled. If we can succeed with 132*] the Spanish government, the policies *on vessel and freight will be withdrawn of course at the usual custom; but we do not think it right to make one the condition of the other. If we make this settlement, we shall make every effort by money and interest to have the adventure terminate at the Havanna, and the sooner we know the better. By the last accounts the vessel was very much eaten by the worms, and wanted very great repairs. This, we hope, will induce them to grant us the permission. The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium."

5. A letter from Brown & Ives to the plaintiffs, dated Providence, September 9th, 1800, as follows: "Gentlemen, your letter of the 3d instant was laid before the directors of the Providence Insurance Company, and they have returned the following note:

"September 6th, 1800.

"As there appears to have been a misunderstanding in the business as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head & Amory's proposition (viz.) to settle the policy on the merchandise, at 25 per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head & Amory will please to forward the policy and have it canceled immediately. Premium note due 12–15 September.

"You will please to govern yourself accordingly, and we will attend to your wishes."

6. A letter from the plaintiff's clerk to Brown & Ives, dated Boston, Sept. 12th, 1800, viz.: "Gentlemen, this is to acknowledge the receipt of your favor of the 9th instant, containing the note from the directors of the Providence Insurance Company. Mr. Head is absent on a journey, he will return on Tuesday or Wednesday next, when your letter will be delivered him."

7. A letter from the plaintiffs to Brown & Ives, dated Boston, Sept. 17th, 1800, as follows: "Gentlemen, we have this day seen your 133*] letter of the 9th instant containing *the propositions of the Insurance Company to cancel the policy on merchandise on board the brig Nueva Empressa at 25 per cent. Previous to our seeing this letter, intelligence had arrived of the capture of this vessel, and of course it prevents any further negotiation on that subject. This circumstance you may suppose was quite unexpected by us, but unfortunately there is direct proof of it; a Spaniard being now in town who came from Newfoundland, and saw the brig there, being perfectly acquainted with Captain Zevallos, and he knows the vessel and cargo were condemned, and the master has gone to Lisbon.

"As the office is now in our debt, we presume they will not desire us to pay the note for the premium, but deduct it when the loss is paid. You will of course mention this loss to the office. The news reached town a day or two before the return of our I. Head. We are," &c.

8. The note or letter of the defendants referred to in Brown & Ives's letter of 26th of August, 1800, signed by William H. Mason, secretary of the company.

9. The note or letter of the defendants referred to in Brown & Ives's of Sept. 2d, signed by John Mason, president of the company, and dated Sept. 1, 1800.

10. The note or letter of the defendants of the 6th Sept. 1800, referred to in Brown & Ives's letter of 9th Sept. 1800, not signed but written in the handwriting of the secretary of said company, and by him delivered at the counting house of Brown & Ives as the answer of the board of directors of said company; all of which notes or letters of the defendants were handed to Brown & Ives by the secretary of the company, and were answers to the letters of the plaintiffs.

The bill of exceptions also states, that it was proved by the testimony of Mr. Brown, of the house of Brown & Ives, that he delivered the plaintiffs' letter of the 3d of Sept. 1800, to the secretary of said company at their office on the 4th of Sept. That the board of directors did not meet of course until the meeting of the 6th, when the said note bears date. That the following day (that *is the 7th) was Sun- [*134 day. That Brown went from Providence into the country in the afternoon of the 6th, and continued absent from Providence until 10 o'clock in the forenoon of Monday the 8th; when he returned and received the same note of the 6th, which had been left at the counting house as before mentioned, and that he forwarded the same to the plaintiffs on the next post day, as is stated in Brown & Ives's letter of Sept. 9th, and that it went in the mail, and came in due course to the hands of the plaintiff's clerk, at their usual place of doing business on the 10th or 11th of Sept.

It further states that Richard Jackson, Jun. of Providence, president of another marine insurance company, was also sworn as a witness and testified "that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing, was in all respects as binding on the parties as the thing done, according to the usage and practice among underwriters.

The bill of exceptions then proceeded as follows: "The above correspondence was offered by the defendants as evidence of a proposal on the part of the plaintiffs acceded to by the defendants, and it was contended by the defendants' counsel that the effect of the said correspondence, accompanied with the testimony of the said Nicholas Brown, and of the said Richard Jackson, jun. as aforesaid, was a good defence against the plaintiffs' claim on the policy on the cargo. And the said plaintiffs did, by their counsel, object to the admittance of said papers purporting to be notes or letters from the said Providence Insurance Company as evidence of any proposal or agreement on their part; more especially to the said note of the 6th of Sept., 1800; by reason that the said Providence Insurance Company could not make any agreement but by an instrument made and signed by the president of said company, or some other person specially appointed to sign the same according to the provisions of the act aforesaid. Also that no evidence was given of

any record or entry in the books or papers of the said Providence Insurance Company relative to the said supposed agreement.

135*] *The counsel for the plaintiffs did also contend and insist before the said court and jury, that the said Head & Amory were not bound, or obliged, by the letters signed by them as aforesaid, to discharge the said policy on the said cargo, and that the same policy, notwithstanding the letters aforesaid, was in full force and effect.

"But the said court, notwithstanding all the objections aforesaid, did admit and allow the said notes and letters from the said Brown & Ives, and the said Providence Insurance Company, in manner aforesaid, to be given in evidence to the said jury on the trial aforesaid.

"And the said honorable John Lowell, chief judge of said court, who alone addressed the jury in the said cause, did then and there declare and deliver, as the opinion of the court, to the jury aforesaid, that the said correspondence of the parties contained in the letters and notes aforesaid, according to the usage of merchants and underwriters, did import an agreement on the part of the plaintiffs to settle and discharge the said policy on the cargo on the terms proposed and acceded to in said correspondence; and that, in the opinion of the court, nothing remained to be done, after the said note of the 6th of September, 1800, to discharge the said policy, but that the same ought to be considered as settled and terminated in consequence of the plaintiffs' proposal, and the subsequent agreement thereto on the part of the defendants, as contained in said correspondence.

"The said chief judge further stated to the jury, that if they concurred with the court in this opinion, above expressed, on the legal effect of said correspondence, and other evidence adduced as aforesaid, they ought to find for the defendants on the first count in the plaintiffs' declaration, and for the plaintiffs on the second count for the damages therein demanded, deducting the premium notes. But if the jury were of opinion that anything further remained to be done after the said note of the 6th of Sept. to close and complete the contract proposed on the part of the plaintiffs for canceling 136*] *said policy, then they ought to find for the plaintiffs on the first and second counts in said declaration.

"The reduction of the said premium note by the jury was done by consent of parties.

"And the said jury then and there gave their verdict for the plaintiffs only on the second count in said declaration, and assessed the defendants in damages fifteen hundred and forty-two dollars and five cents, the said jury, by the consent of parties, first deducting from the damages on the said second count, and which were not disputed, the amount of the premium notes, and which deduction was made by consent of the parties; and as to the said first count on the said policy upon the said cargo, the jury found that the defendant's did not promise; all which was in consequence of the evidence admitted as aforesaid, against the objections of the plaintiffs, and from the direction given to the jury by the honorable court aforesaid." Whereupon the plaintiffs excepted to the said evidence, and to the opinion and direction of the court given as aforesaid.[1]

The case was now argued by J. Q. Adams, of Massachusetts, and Mason, attorney for the District of Columbia, on behalf of the plaintiffs in error; and by Hunter, of Rhode Island, and Martin, attorney general of Maryland, for the defendants.

Adams, for the plaintiffs in error.

The errors assigned are,

*1. That judgment was given for the [*137 defendants, on the first count, when it ought to have been given for the plaintiffs.

2. That the evidence referred to in the bill of exceptions ought not to have been admitted.

3. That the court ought to have directed the jury that the evidence proved no contract of the plaintiffs to discharge the first policy.

4. That if the evidence did prove a contract, it should have been given, not in this, but another action.

5. That the judgment and proceedings were altogether erroneous.

The first and last of these assignments of error, being of a general nature, will be noticed only so far as to submit to the court a question arising from the face of the proceedings, and which cannot come within the purview of the three intermediate and specific assignments.

The declaration consists of four counts; two upon the policies; the third for money had and received; the fourth for money paid, laid out and expended.

There is but one issue (the general issue) joined upon the four counts. The verdict finds for the defendants upon the first count; for the plaintiffs upon the second, and says nothing of the two others.

A part of the issue only is, therefore, found by the verdict.

We shall not make this a subject of argument, but merely read one or two authorities in point. Trials per pais, 3. "If upon an issue all the matter be not fully inquired, a *venire facias de novo* shall issue." In the same book, p. 287. "A verdict that finds part of the issue, and finding nothing for the rest, is insufficient for the whole, because they have not tried the whole issue wherewith they are charged." 1 Inst. 227. a.

*The 2d error assigned is, that the [*138 evidence referred to in the bill of exceptions ought not to have been admitted.

The grounds upon which we support this allegation depend in some degree upon the state of the cause when this evidence was offered.

It appears from this bill of exceptions that the plaintiffs had then substantially proved their demand upon both the policies. The contract, the interest, the loss, were all proved, and the claim of the plaintiffs was in the same condition upon both.

The evidence of the defendants excepted to

1.—The circuit court was holden by Lowell, Chief Judge, and Bourne, Assistant Judge. The bill of exceptions was dated April 7th, 1802, and was sealed only by Judge Bourne, who annexed to it the following certificate:

I, Benjamin Bourne, one of the aforenamed justices, do hereby certify, that the exceptions contained in the foregoing bill were made at the trial of the said cause, and then substantially reduced to writing. And after the form was settled as aforesaid, and agreed to by the honorable John Lowell, chief judge of the said court, but before he put his seal thereto, he died.

Witness my hand and seal this 30th June, A. D. 1802. BENJ. BOURNE, Judge of the Circuit Court. (Seal.)

was produced to prove a subsequent agreement of the parties to discharge the obligation of the policy upon the cargo.

This evidence ought not to have been admitted.

1. Because it was all evidence of a supposed parol agreement.

2. Because part of it was given as proof of the acts of a corporation.

3. Because another part was testimony to a point of law.

The whole mass of this evidence consisting, 1st. Of letters from the plaintiffs to Messrs. Brown & Ives; 2d. Of notes purporting to be acts of the defendants; 3d. Of the testimony of Mr. Brown; and, 4th. Of that of Richard Jackson, president of another Insurance Company in Providence, was combined together to prove one point; a contract of the plaintiffs to discharge the contested policy. If, therefore, any part of it was improper, the whole was so.

1. Parol evidence.

It is not denied that there are cases in which evidence of a parol agreement may be admitted to discharge the obligations of a written contract; but as this is a deviation from a very 139*] general and important principle of *law, it has never been done but where it was necessary to prevent fraud on the part of the party claiming the benefit of the written contract, and where the parol agreement has been executed. There is no instance where an executory parol contract, or mere mutual promises, have been allowed to discharge the obligation of a written executed contract.

2. Acts of the corporation.

By the rules of the common law the acts of a corporation can be proved only by instruments under their seal. By the charter and constitution of the Providence Insurance Company, they are authorized to make policies and other instruments under the signature of their president, countersigned by their secretary. In the evidence excepted against, there are three letters or notes which were admitted as proofs of the company's acts, neither of which is authenticated either by their seal, which alone could make them valid at common law, or by the double signature of the president and secretary, as required by the charter and constitution of the company. One of them is signed by the president alone; one by the secretary alone, and the third is not signed at all.

The reasons upon which these rules are founded, appear in 1 Bl. Com. 475. 6 Viner. 268, 287, 288. Kyd on Corporations, 1, 449, 450, 259, 268.

3. As to Richard Jackson's testimony.

This was the most exceptionable testimony admitted, because it was evidently to a point of law, and not to fact. Usage is in its nature matter of fact. But whether the fact of usage be binding is in its nature a point of law. This testimony seems to have been the hinge upon which the whole cause turned; and it is the more important as it was the ground upon which the court below adopted it as law. It is all abstract proposition; large and liberal indeed; but altogether principle, without reference to any fact. Among underwriters, says he, promise is in all respects as binding as performance. 1 Bl. Com. 75, 76.

140*] *The third assignment of error is, that the court should have directed the jury that the evidence proved no contract of the plaintiffs.

As this point embraces most essentially the merits of the controversy, it is proper to examine the particular nature of the transaction.

What was the ultimate object of the parties?

On the part of the plaintiffs it was to cancel the policy, on certain conditions.

On the part of the defendants the intention was different in every one of their notes; but still the ultimate object of cancelling was contained in all. From the tenor of the whole correspondence there is no evidence of an intention by either of the parties to make a contract for canceling the policies. On both sides it was meant to consummate the thing, and not to make a new bargain for discharging that which existed.

In the first letter of the plaintiffs there is, indeed, an inquiry whether the defendants would make a conditional contract, to depend upon the contingency of their obtaining leave from the Spanish government at the Havanna to terminate the adventure there; where they supposed the vessel still to be. But this was explicitly denied by the defendants; and this denial itself serves strongly to show that they were determined not to leave the business in the unsettled state of a new contract; but either to adhere to that which existed, or to finish the business in the usual and obvious way, by canceling the instrument in which it was contained.

The whole transaction, therefore, must be considered in the light of a negotiation; mere communications between the parties which could be consummated on one side only by canceling the policy; and on the other by giving up the premium notes.

A circumstance which further corroborates this view of the thing is, that neither of the parties ever indicated a time for finishing the business. Had it been in the *contem- [*141 plation of either to make a bargain for discharging the existing obligations between them, this would naturally have been one of the most important points to be settled. For until they had agreed upon the time when their new reciprocal obligations should commence, what would have been their situation? The policy was in the hands of the plaintiffs; the note was in possession of the defendants; and both were negotiable instruments. It is expressly laid down in the books that mutual promises must be made at the same time. Until the new bargain was completed the defendants were bound by the risks of the policy; and it would have been very material to both parties to fix the moment when their obligation to these risks should cease.

Let us go further and inquire, if these papers can be construed into a mutual engagement, when they became so.

The first letter of the plaintiffs contained only an inquiry, and manifested a desire to settle conditionally one of the policies.

The note of the defendants in answer contained in the letter of Brown & Ives of 26th August, refuses to make a conditional settlement; but offers to cancel the policies, retaining 25 per cent. of the premium upon both.

Let it here be remarked, that although the defendants made this offer, supposing it bottomed on the intimations of the plaintiffs'

first letter, yet it was founded upon a gross mistake of the insurance company, not only as to those intimations, but as to the state of the two policies at that time. They have in their third note expressly declared that their intention and expectation in the first was to cancel both the policies; and on the same terms.

The first policy was for 10,000 dollars on the cargo of the vessel, on a double voyage, from Malaga to Vera Cruz, and from thence back to Spain; at a premium of 50 per cent. The outward voyage insured by this instrument had been safely performed. The return voyage had commenced; and in its progress the vessel had 142*] been *driven into the Havanna, where the plaintiffs supposed she still remained.

The second policy was for 6,000 dollars on the vessel, made after the plaintiffs knew she was at the Havanna. It was for a single voyage, at and from the Havanna to Europe, and the premium was at 33⅓ per cent.

On the first policy the outward voyage was completed, and the homeward voyage had commenced. No apportionment of the premium was possible. The plaintiffs could not cancel the contract but with the consent of the defendants; and the terms upon which they naturally and reasonably wished to settle were to give the defendants one-half of the amount of the premium as a compensation for the risk they had incurred.

On the second policy the risk had barely commenced, as they supposed. Their intention was, if they could obtain permission from the government at the Havanna, to break up the voyage, and terminate the adventure there. Had they done so they might have withdrawn the policy and obtained a restoration of the whole premium, with the customary deduction of half per cent.

For this they did not want the consent of the defendants; it was their right so to do.

This circumstance is important in two points of view.

First. It laid the foundation of the mistake of the plaintiffs in their answer to this offer of the defendants; and of all the subsequent mistakes and differences between the parties.

It is impossible to suppose that the defendants meant to trifle with the plaintiffs. They intended to make a serious offer; and the fairest construction is, that they made it without attending to the subject matter; without looking into their own records to see the different situation of the two policies; and without adverting to the plaintiffs' letter, which expressly limited the negotiation to the policy on the cargo.

143*] *In the second place, it furnishes a violent presumption that the defendants had at the time no idea that they were engaged in the serious and deliberate employment of making a contract; a contract, too, which they now contend must dissolve an instrument so serious in its nature, so forcible in its operations, so various in its details, so precise and specific in all its conditions, and so minute and discriminative in the effect of all its stipulations, as a policy of insurance. An individual underwriter, when he pledges himself by his signature to indemnify a merchant for the numerous and deplorable calamities to which navigation is liable, must feel himself bound by all the ties of duty to himself and his fellow creatures, to act with caution, and with a knowledge of the right he acquires, and of the duty he incurs. A corporation, by their essential character and constitution, are under obligations of a still higher nature to do nothing inconsiderately. They are a deliberative body. The members who act in their behalf, bind not only themselves but their associates. They are responsible not only to themselves and their families, but to the public, to the legislature under whose sanction their proceedings are regulated, and to their country, which is interested in the accuracy of their transactions. Is it, then, possible to suppose that such a body should have conceived themselves performing solemnly one of the acts for which they were intrusted with all the powers and attributes of a corporation, when they accomplished it with such utter ignorance of the whole subject upon which they were engaged; with such gross negligence as in the eye of the law is equivalent to fraud? For the honor of the defendants we hope not.

But the present inquiry is, at what time this supposed solemn contract to discharge a perfect claim to indemnity took place; and certainly, if the defendants did consider themselves as contracting, this, at least, is not the time when the obligation of the parties took effect. The real offer to settle both policies on the same terms was certainly such as the defendants ought not to have made; and such as the plaintiffs could not accept. Indeed its absurdity furnishes a full apology for the mistake of the plaintiffs which appears in their reply of the 28th of August, and in which they manifest their acceptance of what *they supposed the offer to [*144 be. That is, to settle one policy; the policy on the merchandise. But in accepting it the plaintiffs add conditions, and there is no evidence that these conditions were ever assented to by the defendants. It is clear, therefore, that no agreement binding upon the parties can be found at the date of this letter of the plaintiffs. Here was a mere mistake.

This mistake on the part of the plaintiffs was very natural. They either did not perceive the *s*, at the end of the word policy, in the answer of the defendants communicated in the letter of Brown & Ives; or if they did, they might well suppose it was an error in the copy, especially as that is not the usual orthography of the plural of the word policy. They might have taken it for a comma, or a careless stroke of the pen, but could not suppose that it contained the whole substance of the defendant's offer.

Hitherto, then, there is nothing like a contract. There was nothing but mistake on both sides.

The next of these papers is the second letter signed by the president of the Insurance Company, dated September 1, directed to Brown & Ives, and inclosed by them in their letter to the plaintiffs of 2d September.

This makes a proposal entirely new. That the company will agree to settle both the policies at the Havanna, and return 25 per cent. on the first, and 31, 83 1-3 per cent, on the last, but they decline making a partial settlement of one without the other. This note, as well as the former, evidently shows that the company had no idea of having agreed to anything. In both they say they will agree, necessarily implying a

farther act on their part to complete the settlement, even if their offers had been accepted.

We come now to the plaintiffs' letter of September 3, which, in the opinion of the learned and lamented judge who tried the cause, contained a proposal to the defendants, which, by their acceptance on the 6th, became a complete contract between the parties, and by the custom of merchants and underwriters, sufficient of itself to dissolve the policy. With the utmost deference for his opinion, and the highest respect for his memory, we apprehend there was 145*] *error both in regard to his idea of this letter, and of the operation of the laws of insurance in this particular. In the first part of this letter, it is true, the expressions imply a strong degree of disappointment on the part of the plaintiffs at finding the directors had receded from what the plaintiffs had supposed was their first offer. But in the second part they explicitly decline the last offer of the company. They say that if they can succeed with the Spanish government, the policies on vessel and freight will of course be withdrawn at the usual custom. But they will not make one the condition of the other. And in the next sentence, they most unequivocally show that they had abandoned all idea of holding the defendants to their supposed offer, and were only desirous of having it made in reality. "If we make this settlement," "the sooner we know the better." "The terms we acceded to were very favorable to the company." Each of these expressions indicates that they considered the former transactions as given up; and that they had no idea of binding themselves to a settlement, before they could know whether the defendants would agree to make one.

Let us now consider the force and effect of the unsigned note of the 6th of September. The opinion of the court below, as expressed in the bill of exceptions is, that after this note nothing remained to be done; but that the policy was settled and discharged.

What says the note?

It begins by acknowledging that there had been a misunderstanding in the business, as respected the first propositions of the company, and by admitting that this misunderstanding was justly imputable to them; for it makes that the inducement upon which the directors express their willingness to accede to the plaintiffs' propositions. It does not say the directors have acceded, nor even that they do accede, but they are willing to accede. And to what proposition? To settle the policy on the merchandise at 25 per cent. Nothing is said about when or where the risk should cease; nor about taking up the note on the payment of one-half. Is this the language proper for the final completion of a solemn bargain? They were willing to accede to a proposition; they go on to specify 146*] that proposition, *and in specifying it they leave out half the particulars, especially that important one which the proposition contained, the cessation of the risk.

It may be said this is scrutinizing with hypercritical nicety the expressions of a loose note, the terms of which were not so accurately weighed; and which was not drawn up by a special pleader. But it may be asked, is it just, rational, or proper, that such unguarded immature notes as this should, by the solemn sanction of law, be adjudged to be of a force and obligation paramount to that of a policy of insurance; an instrument, in the printed parts of which, there is scarcely the cross of a *t*, or the dot of an *i*, but has had its comment and its adjudication. Lord Mansfield has observed that the merchants seldom introduce a written clause into a policy, but it ends in a lawsuit. And we are now told by Mr. Jackson that a succession of blunders, under the name of an assent of parties, is to overthrow the whole force and effect of an important instrument, which has gone through the crucible of three hundred years' experience.

The parties never could intend that these inconsiderate, shapeless approximations to a settlement, should of themselves operate as a final settlement.

At the close of this note it is said, "Messrs. Head & Amory will please to send the policy immediately to be canceled," and after it, "premium note due 12-15 September." If nothing remained to be done, why were the directors so anxious to have the policy sent immediately to be settled? Why were they so accurate and precise in noting both the day and the day of grace when the note would become due? Why, but because they were sensible, that the most important part of the business still remained to be done? Why, but because they were conscious that the plaintiffs still had their option, either to send the policy to be canceled, or to pay the note at its day of payment. Loose as these notes are; hasty and inartificial as their language is, some meaning must be given to their contents; and when we see the defendants so solicitous to have the policy canceled, and so punctilious to mark the days of payment for the note, we can give their words no possible construction, importing on their part that the policy was settled; that nothing remained to be done.

*We are still seeking for the time [*147 when this supposed contract of dissolution took effect. By all the laws in the world but those of Mr. Jackson, mutual promises are considerations of each other.

Both parties must be bound to the performance of their respective promises. One promise cannot be binding and the other remain invalid. To find this time we have sought in vain through the whole correspondence of the parties. It is equally vain to seek it in the opinion of the court, which is, that nothing remained to be done after the said note of the 6th September, 1800. Here also is a want of precision in conveying the idea of time, and it is a defect which lies in the nature of the thing. The words "after the said note of the 6th of September," are not a designation of time. Had the court said after the signing of the note, (and as we conceive, all the promises of the company ought by their charter to be signed,) the time would have been fixed at the date of the signature. But this they could not say; the note is unsigned. Had the court said, after the writing of the note; then the engagement of the company would have been contracted, not by the note of the directors, but by the hand-writing of the clerk. Had the court said after the delivery of this note, the question would recur, delivery to whom? And to whom could it be but to the plaintiffs? This would

doubtless have altered the state of the question; for if the reciprocal engagements were binding only from the time of delivery, or notice of this note, then they were dissolved by an external event before they were formed. The whole superstructure had crumbled to atoms. For the plaintiffs had received information of the loss of the vessel and cargo. I say dissolved before they were formed; and the absurdity of the expression is only the genuine mirror of the impossibility of the thing.

The meaning of the court must have been, that the note of the directors on the 6th of September, constituted the assent of the company, as they considered the plaintiffs' letter of the 3d September as proof of their assent. The plaintiffs, then, must be considered as having made their promise on the 3d, when they wrote their letter; and the correspondent promise of the defendants as having been made on the 6th by the note of the directors. If so, the plaintiffs were bound from the 3d, and the defendants from the 6th, of September.

148*] *The promises were not made at the same time; both parties were not equally bound; for one was bound three days sooner than the other. Will it be said that the offer and the acceptance must be considered as one transaction, because it was impossible it should be completed at once, the parties residing more than forty miles distant from each other? This is an additional proof that the consummation of the thing, the canceling of the policy, and the taking up of the note, was, and alone could be, the intent of the parties, and until that was effected the original instruments must, in the nature of things, retain all their validity.

Consider how unequal the situation of the parties was if the plaintiffs were bound on the 3d and the defendants only on the 6th. From the moment the plaintiffs became obligated by the new engagement, the risk of the policy was transferred from the defendants to them; yet their obligation to pay the whole premium note had not ceased; nor could it cease until the defendants had decided whether they would accept or reject the offer. On the other hand, the defendants, from the 3d of September, must have been *de facto* released from all the risks of the policy, and at the same time entitled to recover the whole of the premium note from the plaintiffs. During all this interval, the plaintiffs must have been at once liable to all the risks of the policy, and to the payment of the whole premium, while the defendants were discharged from the risk and entitled to the premium. Is there any measure of equal justice, or common equity, which can sanction such a state of things as this?

But this is not all. From the moment when the plaintiffs sent their letter of the 3d September to the post office, their promise was out of their power. According to this system of justice, they had no longer the right or the power to retract from this offer. Their word and their property were pledged; yet the defendants retained the right of adhering to the policy and the premium, or of dissolving them on the terms of the ofter. The plaintiffs were entirely at their mercy. The policy, it is true, remained in their hands uncanceled, but it had lost all its force and effect. The unsigned note of the secretary, like the ghost of paper money in M'Fingal, had turned it back to rags again. But this was unknown to the *plaintiffs; and before they knew it they had received information of the loss, and had acquired a perfect right to indemnity. [*149

Hitherto the argument has proceeded upon the supposition that the plaintiffs' letter did really contain a certain proposal, and the unsigned note an acceptance of that proposal. It has been endeavored to prove that, even admitting this, they did not constitute an agreement sufficient to dissolve the policy. The necessity of fixing a time when the mutual engagements of the parties could take effect must be obvious. The necessity of notice to both parties, that the new engagement had superseded that of the policy, must be equally clear. But neither the time nor the notice can be found, until after the perfect right to the indemnity secured by the policy was vested in the plaintiffs.

Let us now consider the subject in another point of view. One of the principal reasons which must always give a contract, written and signed with deliberate solemnity, a more powerful sanction than a verbal agreement is its superior certainty. There is no instrument reduced to a greater degree of certainty than a policy of insurance. It is a general maxim of law, as well as an obvious dictate of reason, that every contract requires the same power to effect its dissolution as to effect its creation. The whole system of law founded upon the statute of frauds is built upon a principle that a contract in writing, and signed by the party contracting the engagement, is more forcible and binding in its nature, than an engagement verbally made, or agreed to, without being reduced to that form. The circuit court seems to have been of opinion that this supposed agreement of the parties was something more than a parol agreement; and indeed it did pass whatever it was, in the form of letters and notes. But if certainty is one of the characters of a written contract, this was far from possessing that requisite.

A written agreement, in contemplation of law, as well as in the common understanding of mankind, must be a paper containing the whole meaning of the parties, and signed by them, or at least by one of them. When the contract is altogether executory, containing merely promise for promise, it seems equally to require the signature *of both. A policy of insurance, [*150 for instance, is signed only by one of the parties, but that is because its existence depends upon performance by the other. It commences only by the payment of the premium. It is difficult to conceive how a contract which must be picked out piecemeal from nine or ten letters and notes, and spliced by the verbal testimony of two witnesses in open court, can be considered as a written agreement.

If, however, these papers could be grappled and dovetailed into an agreement, as between individuals, we ask whether this can be done when one of the parties is a corporation aggregate? By the principles of the common law, the promises of a corporation can be authenticated only by a record, or by their seal. By the charter of the Providence Insurance Company, the signature of their president and secretary are necessary to give validity to their policies, and

other instruments. The act of the company, which constituted, as we are told, their assent to the propositions of the plaintiffs, was done at a weekly meeting of the directors. Yet of this act (in their own view higher in its nature than the act of making a policy) no record was made; no instruments delivered to the plaintiffs, or ever drawn up, excepting this note of the secretary, unsigned, undirected, and not even indicative of the subject to which it relates, otherwise than in the general terms of "the business."

If the intelligence received by the plaintiffs on the 14th of September had been, not that the vessel was lost, but that she had arrived safe in Spain, would the defendants have been contented with half the premium? They must now say so to support their present ground; but they would then have discovered that while the policy remained uncanceled, and the premium note in their hands, something did remain to be done. They would have called upon the plaintiffs for payment of the whole note, and if payment had been refused, would have sued them. What defense could the present plaintiffs have had against their action? Could they have produced all this mass of evidence on their side? Would not the company then have said, we never meant to consider these as the final transactions, and you knew it; we never entered so much as a minute of them on our records; we never did an act to authenticate them as all our acts must be authenticated; we considered **151*]** *ourselves bound until the policy should be canceled. You knew we could not be bound by a written agreement, unless signed and countersigned as our charter requires, and you shall not produce in evidence, to discharge the debt you justly owe us, these notes, which we purposely made irregular, to prevent your supposing they could dissolve the force of a previous contract. Surely the court would have admitted the weight of these objections.

They would not have suffered such shapeless nothings as these notes, to be shown as the formal release of a corporation. The defendants might have added that the notes themselves did not fully meet the propositions of the plaintiffs. It is true, they agreed to settle the policy at 25 per cent. but they had not promised to deliver up the note. The plaintiffs, therefore, could not have produced those papers to prove the promise of the defendants, and of course there was no consideration for the bargain; and the defendants would have said it was little less than fraud, if the plaintiffs, after the arrival of their vessel had attempted by such means to evade the payment of half the premium note. The subject has been presented in this light to enforce the objection against these papers, as evidence of the acts of a corporation. In point of equity, the case is infinitely stronger on the side of the plaintiffs than it would have been on the side of the defendants. If it was an agreement at all, the defendants were not bound by it until three days later than the plaintiffs, and when the company bound themselves, it was with the full knowledge that the plaintiffs were bound too. The defendants did not remain from the 3d to the 17th of September without knowing whether the agreement was made or not.

It has thus been endeavored to prove that this transaction was not, and could not possibly be, an agreement between the parties, of force and effect, to dissolve the obligations of the policy.

1. Because the object of the negotiation was to act, and not to promise; to cancel, and not to make an agreement for canceling.

2. Because the business was transacted much too loosely on both sides, and especially on that of the company, to show any intention to make a bargain, paramount in force to the policy.

*3. Because it is impossible to fix any [***152** one time, or even any one day, upon which the agreement became binding on both parties.

4. Because if understood as an agreement, its operation was altogether unequal upon the two parties; all the benefit being on one side, and all the burden on the other.

5. Because in point of form, it could not be an agreement; one of the parties being a corporation; and no authentication of its assent being given.

In opposition to all this, what is said? That in agreements about insurance, the assent of the parties to the doing of a thing, is in all respects as binding as the thing done.

As we apprehend the fallacy, upon which the defendants prevailed in this cause before the circuit court, lies in this opinion of Mr. Jackson, we shall examine it with some attention, and hope to show that, in its only possible application to this cause, it is a great mistake; that in the most punctilious court of honor it would not be true; and that, instead of according with the usage and practice of underwriters, it is in direct opposition to the whole system of insurance law.

In the first place, the assent of the parties to the doing of a thing must be founded upon a certain state of things and relations between the parties at the time when the assent is given. If before the thing is done, that state of things is totally changed by external events, the basis of the agreement has failed, and the assent of parties cannot bind them as much as the thing done.

I write to Mr. Jackson, "Sir, your word is as good as your deed; so is mine. I have a ship at Newport that I wish to sell for ten thousand dollars, will you buy it? If so, I will execute the bill of sale, and you shall pay me the money." Mr. Jackson answers me, "I will buy your ship on the terms you propose." After Mr. Jackson has written this letter, and before I receive it, my ship is burnt. Is there any court of honor which will say, because his word is as good as his deed, that he is bound to take my bill of sale of a ship which no longer *ex- [***153** ists, when he gave me his word to take my bill of sale of a ship which did exist? Is there any court of equity which would decree that I should make the conveyance, and that he should pay me the money? Examine to this point 5 Viner, 509, 505, 514, 517, 526.

Let us now apply the principle to cases of insurance. Mr. Jackson's testimony is, that this assent of parties to the doing of a thing is as binding as the thing done, in effecting insurance, as much as in discharging a policy.

Let us suppose that this whole negotiation between the parties had been, not to cancel, but to make a policy.

The plaintiffs' first letter to Brown & Ives

would have said, we want insurance for 10,000 dollars done on the brig at and from the Havanna to Spain. The same risk has been insured here at 25 per cent.; what can you do it for at the Providence Insurance Company? They say, "we will insure on the brig and cargo at 25 per cent. but not conditionally. The plaintiffs mistake this for an offer to insure on the brig alone, and write "we accept this offer, and will send a premium note in due time." On receiving this, the defendants find there has been a mistake. They make a new offer to insure the brig at 25 per cent. and the cargo at another premium. The plaintiffs, on receiving this, say, "we thought the matter settled; we have insured on the cargo elsewhere; we say again we want insurance on the brig. If we make this insurance we shall order the brig to sail at once, and the sooner we know the better. This is exactly their letter of the 3d September, only supposing it was a policy to be made, and not a policy to be discharged.

On the 6th of September, the directors say, "as there appears to have been a misunderstanding we are willing to make insurance on the brig alone at 25 per cent. though we meant, and expected, to insure both brig and cargo. Messrs. H. and A. will please to send their premium note immediately and we will have the policy made."

Now put the case on both sides. Before the 154*] plaintiffs *receive this note they have had information that their vessel, which they supposed at the Havanna, had sailed and was safely arrived in Spain. Before that insurance, to which both parties had assented, could be done, there was no insurance to do. Will any one say that the defendants could, in such a case, have recovered from the plaintiffs the premium of a policy never made, merely because it had been agreed to be made? In what form of action either at law or in equity, could they have called upon the plaintiffs to pay a premium upon an adventure known to be terminated before the risk could be incurred?

Again. Suppose that before the plaintiffs receive this note, they have had information that the vessel had sailed and was lost, what would the defendants have said if the plaintiffs had written them thus: "Gentlemen, the vessel you have agreed to insure is lost, we have never paid you the premium, nor even given a note for it; but the assent of the parties to the doing a thing is as binding as the thing done; pay us 10,000 dollars for our loss." Would not the defendants have justly replied, "you have never paid or secured to us our premium. Before the transaction could be completed you knew your vessel to be lost. How can you call upon us for an indemnity we never undertook?"

The assent of the parties is so far from placing an agreement about insurance out of the reach of external events, that it does not, even in numerous instances, prevent the parties themselves from retracting. The contract of insurance is perhaps of all others that of which the obligation most forcibly depends upon performance, in contradistinction to mere assent. To evince this, I will refer to a very ingenious writer upon the subject. Miller, 110, 383, 434, 534.

I have dwelt so entirely upon this third assignment of error, which appears to me to embrace the vitals of the cause, that I have nothing left to say upon the fourth, which is, that if the evidence did prove a contract, it ought not to have been produced in this, but another action.

*As to the objections of form; the in- [*155 complete verdict of the jury, the inadmissibility of the evidence, the incapacity of a corporation to contract, but by instruments peculiarly authenticated, and the insufficiency of this defense to meet this action; without feeling myself authorized to abandon them, I hope I have wasted no time in maintaining them. But the plaintiffs in this action are not only my clients, they are my friends. Their letters subsequent to the time when the dispute arose, very explicitly declare that they considered the whole proceedings as mere communications, and that they never considered themselves or the company as discharged from the obligations of the policy, and of the premium note. I have therefore been anxious to show that upon principles of law, of justice, of equity and of honor, their opinion was well founded; that the policy was not discharged; that they were and still are entitled to the indemnity, which they had purchased with so heavy a premium; and of course that there was error in the proceedings and judgment of the circuit court. If the object of the parties, to cancel conditionally the policy, was never completed, if the company, by their egregious mistake in the first instance, and by their dilatory proceedings in the last, were the real cause why it was never completed, it seems to me they have no reason to pretend that the plaintiffs ought to be bound by an unfinished project of settlement which cannot be carried into effect without discarding the most established rules of law, and the most unequivocal dictates of equity.

Hunter, contra.

The question is, was there a bargain made? Does the correspondence prove an agreement?

The objection to the form of the verdict is cured by the act of congress of 24th September, 1789. Vol. 1, p. 72, § 32.

1. It is objected that there can be no contract because it is not under the corporate seal, nor signed by the president, and countersigned by the secretary.

If the intention of the parties is clear, and the substance of the agreement has been reduced to writing, it is sufficient.

*The doctrine that a corporation can- [*156 not act but by its seal, may answer for the transactions of bishops, deans and chapters, abbots and monks, but, according to modern decisions, does not apply to mercantile corporations, and mercantile transactions. 2 Bac. Abr. 13, Gwillim's edition. The bank of England, the East India Company, and similar corporations may, by an agent, make promissory notes, draw and accept bills of exchange, and make all kinds of contracts and promises, like natural persons. It will be presumed that the authority so given to the agent is matter of record, or under the corporate seal.

The Providence Insurance Company are, by their charter, empowered to make policies, and other instruments without seal. The second section declares "that all policies of assurance and other instruments made and signed by the president of said company, or any other officer

thereof, according to the ordinances, by-laws, and regulations of said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof in manner as set forth in the constitution of said company hereinafter recited and ratified."

The fifth article of their constitution provides, that "The directors shall meet statedly once in every week, and at such other times as the president, or board of directors shall think necessary. The president, with two directors in rotation, shall assemble daily at the insurance office for the dispatch of business, agreeably to the rules and regulations of the general meeting of stockholders, and of the board of directors." "The president, with the two directors in rotation, shall have full power and authority, in behalf of the company, to make insurances upon vessels and property laden therein." "And all policies thereon shall be subscribed by the president, as president of the Providence Insurance Company, and countersigned by the secretary; and the president and committee of attending directors shall ascertain and agree for the premiums, and the security of the payment thereof, as they shall think proper." "All losses arising on any policy, subscribed as aforesaid, shall be adjusted by the president and board of directors."

157*] *If the great object of their institution may be accomplished without seal, *a fortiori* may be the means for attaining that object; *omne majus continet in se minus*. The provision in the charter that they might make policies and other instruments without seal was introduced for their ease and benefit; but it would be of no advantage to them if all their preliminary acts must still be under the corporate seal.

2. As to the rule *eo ligamine*, &c., it does not always apply to mercantile instruments. A charter party may be dissolved by parol. Abbott on Shipping, 260. And less solemnity is required in dissolving than in completing a mercantile contract. However strict the rule may be at law in other cases, yet it does not prevail in equity; and in questions of insurance, which is a contract founded upon broad, equitable principles, courts of common law are bound by the same rules of decision as courts of equity. Park, 3.

But in the present case the agreement to dissolve the policy was made by the same authority which made the policy. By the constitution of the company, the president and two directors have power to make insurance; and the agreement to dissolve was also by the president and directors. The note of the 6th of September was in the hand-writing of the secretary, who was acknowledged by both parties as the authorized agent of the company to signify their assent, and was by him delivered to Brown & Ives, the authorized agents of the plaintiffs. It contains the names of the directors, and purports to be by their authority; and although the authority of the secretary does not appear to be under the corporate seal, or on record, yet it is to be presumed that he was so appointed. Thus in the case of *Rex v. Bigg*, 3 P. Wms. 419, which was an indictment for erasing an indorsement from a note of the bank of England signed by one Adams, their cashier, it was contended that it was not a note of the bank, because not under the corporate seal, and the jury found that Adams was not authorized by the bank under their seal to sign notes for them, but was intrusted and employed by them for that purpose. Upon that indictment the prisoner was convicted; which shows that even in a capital case it *was held that a corporation ag- [*158 gregate may act by an agent although not authorized under the corporate seal.

But the plaintiffs have, by their bill of exceptions, admitted the note of the 6th of September, to be the answer of the company to their letter of the 3d, and therefore cannot now deny the authority of the secretary. Esp. Rep. *Neal v. Irvin*.

If the defendants had insisted upon the whole premium, this correspondence would have been a complete defense for the plaintiffs.

It is not necessary that the note should have been signed. Their charter authorizes the company to contract without signature. Signature is required only to policies and other instruments. It is not contended that this correspondence can be called an instrument, and yet it may be evidence of a contract. Even under the statute of frauds, which requires a note in writing signed by the party charged, it is not necessary that the signature should be at the bottom of the note. It is sufficient if the name of the party be written by him in any part of it. 1 Powell on Contracts, 286.

It has been said that mutual promises must be made at the same time, or both will be *nuda pacta*. This is true, but not applicable to the case. In making an agreement it is not necessary that the proposition on one part, and the assent on the other, should be both made at the same time. The assent may be either precedent, concomitant, or subsequent. 1 Powell, 131.

3. It is objected that the intention of the parties was not to contract, but to act; that there was no agreement, and that the correspondence amounts only to an incomplete negotiation for canceling the policy.

Nothing more is necessary to make an agreement or contract than the assent of both parties. In this case the plaintiffs requested, and the defendants gave their assent. The assent of the plaintiffs was precedent, and required nothing more to be done on their part. When the defendants assented to the proposition of the plaintiffs, the *bargain was closed, [*159 and neither could retract. Nothing more was necessary to be done; or if any thing remained it was only what ought to be done according to the agreement, and, therefore, it is to be considered as if done.

If notice was necessary, it was given to Brown & Ives, the agents of the plaintiffs, and from that time at least, the bargain was finished.

There is no objection in the record to the testimony of Mr. Jackson. It was only evidence of the usage and custom of underwriters in this country; and it is every day's practice to produce witnesses as to the custom of merchants, and the usages of trade. 3 Keb. 444, *Stanley v. Ayles*. 2 Stra. 1000; *Lumley v. Palmer*. Abbott, 133, 140.

As to the citations from Millar, they apply only to the commencement of a contract of in-

surance, not to its dissolution; and we hope our case is to be decided by English law, and not by Scotch metaphysics.

But even if we go to the civil law, here was the precise form of Roman stipulation. *Promittis? Promitto. Spondes? Spondeo.*

Martin, on the same side.

The question is, what was excepted to on the trial?

The letter of 21st of August, which was the beginning of the correspondence, was admitted by the plaintiffs to be read. The other letters were in answer, and were only a continuation of the correspondence, and therefore were properly admitted by the court. There is no objection, in the bill of exceptions, to Mr. Jackson's testimony. He was examined only to the usage of insurance companies, and as to the manner in which such agreements are considered among underwriters. That this is usual appears from the case of *Henkle v. Roy*, Ex. Assurance Company, 1 Vez. 317, which case also states the principle, that equity will consider that as done, which ought to be done. In mercantile cases the rule of law is the same as that of equity. 5 T. R. 229, *Tooke v. Holingworth;* Buller's opinion.

160*] *Brown & Ives were the agents of the plaintiffs, and, are to be considered as the plaintiffs themselves.

The words of the note of September 6th are not in the future tense, as has been alleged, but in the present. They are, "The directors are willing."

The last words of the note, mentioning the time when the premium note would become due, are relied upon. But they prove nothing, because at all events the plaintiffs were bound to provide for half of that note, and therefore it was proper to give them that information.

The words of the learned judge who tried the cause, are that "nothing remained to be done after the said note of the 6th of September, 1800, to discharge said policy; but that the same ought to be considered as settled and terminated in consequence of the plaintiffs' proposal and subsequent agreement thereto on the part of the defendants, as contained in said correspondence."

We admit that notice of accepting a contract must be in reasonable time. But the rule respecting bills of exchange, as to the shortest possible time, does not apply. It was the duty of Brown & Ives to have had some person at their counting house to receive the answer and transmit it to the plaintiffs; and the absence of Mr. Brown cannot be imputed as laches to the defendants.

The time when the contract was complete was when the note of the 6th was delivered at the counting house of Brown & Ives.

The effect of that note was to discharge the plaintiffs from one-half of the premium note, and if the vessel had arrived safe, the defendants could have recovered only the other half.

Pothier, in his Treatise on Obligations, vol. 1, p. 4, 5, defines an agreement to be "the assent of two or more persons, to form an engagement between them, or to dissolve or modify one already formed. *Duorum vel plurium in idem placitum consensus.*" "A contract in-
161*] *cludes a concurrence of the will of two persons at least, one of whom makes, and the other accepts, the promise." In the present case the assent of the plaintiffs is proved by their continued anxiety and wish to have that done which the defendants at length agreed to do.

Mason, in reply.

The question upon the merits of this case is very simple. Does the evidence prove a contract to cancel this policy; or does it only prove a negotiation on foot, with a view to that subject, not terminated?

We hold the latter.

Brown & Ives were not the agents of the plaintiffs, but only the instruments of communication. They had no power to contract, and the defendants knew it. As well may the postman who carries the letter be called an agent.

The plaintiff's letter of 21st of August contains no proposition, but merely asks for one.

The first offer is made in the note of 26th of August, signed by the secretary.

The letter of the plaintiffs of the 28th accepts what they mistook for the real offer. But the reply of the president, of September 1st, corrects the mistake and makes a new offer, and rejects the terms contemplated by the plaintiffs. Here, then, the thing ends. Did the plaintiffs' letter of the 3d renew the proposition? It contains no proposition; nor does it authorize Brown & Ives to make one. It is merely a letter of complaint.

They say "if we make this settlement," thereby clearly showing that they reserved to themselves an option to renew the negotiation or not, as they should judge proper. The worm-eaten state of the ship is alleged as the reason for their hope that the Spanish government would permit them to terminate the voyage at the Havanna; *not that the defendants [*162 would permit them to cancel the policy.

Suppose, then, the letter of the 3d of September as out of the question, would the note of the 6th make a contract, the former negotiation having ended? The renewal, or acceding by the defendants to a proposition which they had before refused, and which the plaintiffs considered as rejected did not revive the proposition of the plaintiffs, (if such it may be called,) contained in their letter of the 28th of August; and they could not be bound without a new assent.

The case is analogous to that of *Cooke v. Oxley*, 3 Term Rep. 653, where Oxley having proposed to sell to Cooke 266 hogshead of tobacco, at a certain price, gave him a certain time, at his request, to determine whether he would buy them or not. Cooke, within the time, determined to buy them, and gave notice thereof to Oxley; yet Oxley was held not liable in an action for not delivering them; for Cooke not being bound by the original contract, there was no consideration to bind Oxley.

Thus far on the effect of these communications as between man and man. We shall now endeavor to show that the defendants have done nothing in the course of this negotiation which was binding on them, and, therefore, the plaintiffs cannot be bound on their part.

It is not pretended that a simple contract cannot be dissolved by a parol agreement; but we say it must be such a parol agreement as will bind both parties.

The note of the 6th is neither an act, nor a declaration of the company. All the powers of a corporation aggregate are derived either from the common law, or from statute law. By the statute the seal is dispensed with, but other solemnities are substituted, with which they must comply. They can act as a corporate body only in the mode prescribed. There is no law or by-law which gives authenticity to such a note. The president and directors may speak as natural persons, and say what they will do in their corporate capacity, but they cannot bind the corporation but by the means provided 163*] *by law. They may make preliminary arrangements, but they can conclude nothing. That this was their own understanding, is evident by their not having made any record of these transactions upon their books, and leaving everything upon this loose, unsigned, note of their secretary.

It has been said that there was no exception to the testimony of Mr. Jackson; but the fact is not so. The words of the bill of exceptions are, "whereupon the counsel for the said Head & Amory did except to the aforesaid evidence," which includes the whole evidence offered on the part of the defendants.

Customs are of two kinds; general and special. The latter only are the proper subjects of oral proof; but then they must be proved by facts, and not by opinions. In this case the testimony was not as to fact or opinion, but as to the law. 2 Burr. 1216, 1220, *Edie v. E. I. Company.*

February 25th. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

This is a declaration on a policy of insurance, and the only question in the case is, whether the policy was vacated by a subsequent agreement between the parties. This question depends entirely on the legal operation of certain written communications between them, which appear in the record.

Messrs. Head & Amory, of Boston, had obtained insurance through their correspondents, Messrs. Brown & Ives, of Providence, on the cargo of the Spanish brig, the Nueva Empressa, at and from Malaga to Vera Cruz, and at and from thence to her port of discharge in Spain. An insurance was afterwards obtained on the brig, at and from Cuba, (she having been chased into the Havanna by British cruisers,) to her port of delivery in Spain.

The vessel having been detained in port, closely watched by cruisers till she was worm-eaten, Head & Amory became desirous of termin- 164*] ating their risk at the Havanna, *which could only be effected by permission of the government at that place, which was not to be obtained but with considerable expense. They therefore applied to the insurance company, through their correspondents, Brown & Ives, by a letter dated Boston, the 21st August, 1800, to know whether a conditional permission could be obtained from the underwriters, to terminate the voyage at the Havanna, provided the consent of the government could be obtained; and if so, on what terms that conditional permission would be granted.

The underwriters refused to make any conditional agreement, but offered to vacate both policies on terms mentioned in a letter signed by their president. Misunderstanding the letter as a proposition for vacating the policy on the cargo only, the terms proposed were acceded to, and a letter was written from Head & Amory to Brown & Ives, declaring their acceptance of the proposition, understood to be made by the insurance company, in such a manner as very clearly to show the mistake under which it was written. On seeing this letter, the misapprehension of the parties was discovered and explained, and the agreement considered as not being made; at the same time a new proposition was made for settling both policies. To this letter, declining absolutely any agreement respecting either policy singly, and proposing specific terms on which they would settle both, Head & Amory returned an answer dated the 3d of September, 1800, which was addressed to Brown & Ives, and is in these words. (See *ante*, p. 131.)

This letter was laid by Brown & Ives before the company, and their secretary returned the following note without a signature.

(See the note of September 6th, 1800, *ante*, p. 132.)

This note was forwarded by Brown & Ives to Messrs. Head & Amory, but before they received it, intelligence came to hand that the Nueva Empressa had sailed from the Havanna, and had been captured, and was condemned as a prize, late in the month of August. Head & Amory, therefore, insisted on their policy.

*Every thing respecting the delays [*165 in the communications is laid out of the case, because they do not appear to the court in any manner to affect it.

Richard Jackson, the president of another marine insurance company, was also examined, and testified that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing was in all respects as binding on the parties, as the thing done, according to the usage and practice among underwriters.

Upon this testimony, the court instructed the jury that the agreement to cancel the policy for the cargo was fully proved, and they ought to find for the defendants on that count. The jury accordingly found for the defendants, and the plaintiffs have sued out a writ of error to bring the cause into this court.

The opinion and instructions of the judges of the circuit court to the jury are said to be erroneous, because,

The communications which have been cited do not import a contract. They were negotiations preparatory to an agreement, but not an agreement itself.

The letter of the 3d of September, certainly manifests some degree of disappointment, at finding that the agreement supposed to have been concluded had not really been made; and also proves their opinion that the negotiation was not absolutely broken off, but was yet pending. "If we make this settlement," say they, "we shall make every effort by money and interest to have the adventure terminated at the Havanna, and the sooner we know the better." "The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium."

Yet the letter contains no direction to make any specific propositions to the company, and may be construed either as a mere inquiry

whether the company would cancel the policy for the insurance on the cargo singly, on the terms which had before been understood to have been offered, or as a new and positive proposition, the acceptance of which would complete the contract.

166*] *It is also very questionable whether the unsigned note delivered by the secretary is such an acceptance as to form, when taken with the letter of the 3d of September, an absolute agreement obligatory on the company.

It is a general rule that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable them to bind the company, the informality of the transaction, as has been very properly urged at the bar, is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties.

The communications stated in the record, lead to an event which might have been so readily completed, that it might have been, and probably was, supposed unnecessary to pass through the previous solemnities of a contract binding themselves to do that which, if really the wish of both parties, might so speedily be accomplished; so short a space of time was requisite to have the policy delivered up and canceled, that the forms of completing a contract to cancel it might have deemed useless. On this account, and on account of the known incapacities of a body corporate to act or speak but in the manner prescribed by law, it may well be doubted whether communications which between individuals would really constitute an agreement, were viewed by the parties before the court in any other light, than as ascertaining the terms on which a contract might be formed.

This course of reasoning relative to the intent of the parties, is plainly founded on the idea that the note of the 6th of September is, in its legal operation, a mere informal paper, which may perhaps amount to notice of an act, if such act was really performed, but which is not in itself an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September had been regularly accepted, this note might pos-

167*]sibly have been considered as notice *of that acceptance, but is not in itself an acceptance. If this idea be incorrect, so is the reasoning founded on it. If it be correct, then it follows, that no contract was made, because the proposition of the 3d of September, if it really was one, was not accepted by the company before it was withdrawn by Head & Amory. This leads us to inquire,

Whether the unsigned note of the 6th of September be a corporate act obligatory on the company?

Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

To this source of its being, then, we must recur to ascertain its powers, and to determine whether it can complete a contract by such communications as are in this record.

The act, after incorporating the stockholders, by the name of The Providence Insurance Company, and enabling them to perform by that name those things which are necessary for a corporate body, proceeds to define the manner in which those things are to be performed. Their manner of acting is thus defined: "Be it further enacted, that all policies of assurance and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof, in manner as set forth in the constitution of the said company, hereinafter recited and ratified."

An instrument, then, to bind the company must be signed by the president, or some other officer, according to the ordinances, by-laws and regulations of the company or board of directors.

*A contract varying a policy is as [*168 much an instrument as the policy itself, and, therefore, can only be executed in the manner prescribed by law. The force of the policy might indeed have been terminated by actually canceling it, but a contract to cancel it is as solemn an act as a contract to make it, and to become the act of the company must be executed according to the forms in which by law they are enabled to act.

The original constitution of the company, which is engrafted into the act of incorporation does not aid the defendants. That agreement does not appear to dispense with the solemnities which the law is supposed to require. It demands the additional circumstance that a policy should be countersigned by the secretary.

It appears to the Court, that an act not performed according to the requisites of the law cannot be considered as the act of the company, in a case relating to the formation or dissolution of a policy.

If the testimony of Mr. Jackson is to be understood as stating that an assent to the formation or dissolution of a policy, if manifested according to the forms required by law, is as binding as the actual performance of the act agreed to be done, it is probable that the practice he alludes to is correct. But if he mean to say that this assent may be manifested by parol, the practice cannot receive the sanction of this Court. It would be to dispense with the formalities required by law for valuable purposes, and to enable these artificial bodies to act, and to contract, in a manner essentially different from that prescribed for them by the legislature.

Nor do the cases which have been cited by the gentlemen of the bar appear to the court to apply in principle to this.

An individual has an original capacity to contract and bind himself in such manner as he pleases. For the general security of society, however, from frauds and perjuries, this gen-

eral power is restricted, and he is disabled from making certain contracts by parol. This disabling act has received constructions which take 169*] *out of its operations several cases not within the mischief, but which might very possibly be demanded within the strict letter of the law. He who acts by another acts for himself. He who authorizes another to make a writing for him, makes it himself; but with these bodies which have only a legal existence, it is otherwise. The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.

It is, then, the opinion of this Court, that the circuit court erred in directing the jury that the communications contained in the record in this case amounted to a contract obligatory on the parties, and, therefore, the judgment must be reversed, and the cause remanded for a new trial.

CHASE, *J.* I concur with my brethren as to the operation of the testimony given by the Providence Insurance Company in evidence to the jury, and that it created no legal obligation on the company; but I am also of opinion that the testimony given by them in evidence was inadmissible, and that the circuit court ought not to have permitted the same to have been given in evidence to the jury.

The judgment of reversal was as follows, viz.:

This cause came on to be heard on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, the Court is of opinion, that there is error in the proceedings and judgment of the said circuit court in this, that the court gave it in charge to the jury, that the several written papers in the record contained, and the testimony of Richard Jackson, in the said record also stated, did in law amount to full proof of a contract entered into between the plaintiffs and defendants, which was obligatory on both parties; whereas it is the opinion of this court, that the instruments of writing and testimony aforesaid, do not in law amount to a contract. It is 170*] therefore considered *by the Court, that the judgment aforesaid be, for this cause, reversed and annulled, and that the cause be remanded to the said circuit court to be again tried, with direction that the testimony, in the said record contained, does not amount to evidence of a contract concluded between the parties and that the defendants do pay to the plaintiffs their costs.

LITTLE *et al.* v. BARREME *et al.*

A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.

The act of the 9th of February, 1799, did not authorize the seizure upon the high seas of any vessel sailing from a French port; and orders of the President of the United States could not justify such a seizure.

Qu. whether probable cause will excuse from damages?

ON the 2d of December, 1799, the Danish brigantine Flying Fish was captured, near the island of Hispaniola, by the United States frigates Boston and General Greene, upon suspicion of violating the act of Congress, usually termed the non-intercourse law, passed on the 9th of February, 1799, vol. 4, p. 244, by the 1st section of which it is enacted, "That from and after the first day of March next no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

*And by the 5th section it is enacted, [*171

"That it shall be lawful for the President of the United States to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of March, 1799, and are as follows:

"SIR—Herewith you will receive an act of Congress further to suspend the commercial intercourse between the United States and France, and the dependencies thereof, the whole of which requires your attention. But it is the command of the President that you consider particularly the fifth section as part of your instructions, and govern yourself accordingly.

NOTE.—*Seizure, when warranted*—see note, 6 L. ed. U. S. 111.

"A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

172*] *"Whenever, on just suspicion, you send a vessel into port to be dealt with according to the aforementioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation:

"At the same time that you are thus attentive to fulfil the objects of the law, you are to be extremely careful not to harass or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens."

In the district court of Massachusetts, the vessel and cargo were ordered to be restored, without damages or costs. Upon the question of damages, the honorable Judge Lowell delivered the following opinion:

"This libel is founded on the statutes of the United States, made to suspend the commercial intercourse between the United States and France, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants.

"The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

"The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by Samuel Goodman, a Prussian by birth, but now an inhabitant of the Danish Island of St. Thomas; that the master was born in, and is now of, the same island, but for several years had been employed in vessels of citizens of the United States, and sailed out of our ports; that he speaks our language perfectly, in the accent of an American, and has the appearance of being one. The mate is a citizen of the United States, born here, and having always continued such. The rest of the seamen are Englishmen, Portuguese and Negroes. The supercargo a Frenchman. The 173*] vessel had carried *a cargo of provisions and dry goods from St. Thomas's to Jeremie, and was returning thither, loaded with coffee when captured. That during the chase by the American frigates, the master threw overboard the log-book, and certain other papers. That there was on board a protest signed by the master, supercargo and several seamen, in which they declared that the vessel had been bound from St. Thomas's to Port-au-Prince, and was compelled by Rigaud's vessels to go into Jeremie, which was false and totally unfounded; and that, after the capture, the master inquired of his seamen whether they would stand by him respecting this pretense.

"That the statutes of the United States prohibiting intercourse with France and its dependencies had been long before known at St. Thomas's, and that it had been since a common practice there to cover American property for the purpose of eluding the law.

"If a war of a common nature had existed between the United States and France, no question would be made but the false papers found on board, the destruction of the log-book and other paper, would be a sufficient excuse for the capture, detention and consequent damages. It is only to be considered whether the same principles, as they respect neutrals, are to be applied to this case.

"My mind has found much difficulty in settling this question. It is one altogether new to me, and arises from the peculiar imperfect war existing at this time between the United States and France. I have embraced an opinion with much diffidence, and am happy that it may be revised in the superior courts of the United States.

"On what principles is the right to belligerent powers to examine neutral vessels and the duty of neutrals to furnish their ship with proper papers, and to avoid such conduct as may give cause to suspect they are other than they pretend to be, founded? Do they not necessarily result from a compromise of their respective rights in a state of war? Neither of the belligerent *powers have an origi- [*174 nal and perfect right to capture the property of neutrals, but they have a right, unless restrained by treaty, however disguised or covered by the aid of neutrals.[1] It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages has been, on the one hand to exercise, and on the other to prevent, this examination, and to establish a principle that neutral vessels shall be furnished with the usual documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention; except the eventual condemnation of the property; and even this, by some writers, has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation which confer these rights, or impose these duties. They are the result of common practice, long existing, often recognized, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

"It does not appear to me to be material what is the nature of the war, general, or limited. Nothing can be required of neutrals but to avoid duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary to attach to them the duties, and to belligerent nations the rights, resulting from

1.—It is believed that there has been an error in copying this passage. It is, however, printed verbatim from the transcript of the record. The words to be supplied probably are, "to search for and seize the property of their enemies" to be inserted after the word "treaty."

a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of St. Thomas, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the United States had prohibited intercourse, and having had long and full knowledge of the state of things, its 175*] inhabitants were, *as I conceive, bound not to interfere or attempt to defeat the measures taken by our government in their limited war. We find, however, that these attempts have been frequent; that American vessels have, in many instances, been covered in that island, and the trade which our government has interdicted has been thus carried on. It behooved, then, those of its inhabitants who would avoid the inconveniences of restraint to act with openness, and avoid fraud and its appearances.

"This construction of the state in which the United States are, (although I am of opinion that, abstractedly from other considerations, it would give them the rights of belligerent powers,) places the neutral powers in no new predicament, nor imposes the necessity of any new documents, or other conduct than they were obliged to from the pre-existing state of war between most of the great naval powers.

"On the whole, I am of opinion that no damages are to be paid the claimants for the capture and detention, and do so decree, and that each party bear their own costs."

From this decree the claimants appealed to the circuit court, where it was reversed, and 8,504 dollars damages were given.

The following is the decree of the circuit court:

"This court having fully heard the parties on the said appeal, finds the facts stated in the said decree to be true, and that the said Little had instructions from the President of the United States, on which the action in the said libel is founded, a copy of which instructions is on file. And it further appearing that the said brigantine and her cargo were Danish, and neutral property, and that the said George Little knew that the said brig at the time of the said capture was bound and sailing from Jeremie to St. Thomas's, a Danish and neutral port, and not to any French port; this court is of opinion that although Captain Little had a right to stop and examine the said brig, in 176*] case of suspecting *her to be engaged in any commerce contrary to the act of the 9th of February, 1799, yet that he was not warranted by law to capture and send her to a port of the United States. That it was at his risk and peril if the property was neutral; and that a probable cause to suspect the vessel and cargo American will not, in such case, excuse a capture and sending to port.

"It is, therefore, considered, adjudged, and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs."

The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court.

The cause was argued at December term, 1801, by Dexter, for the appellants, and by Martin and Mason, for the claimants.

February 27. MARSHALL, *Ch. J.*, now delivered the opinion of the Court.

The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December, 1799, on a voyage from Jeremie to St. Thomas's, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law.

The judge before whom the cause was tried, directed a restoration of the vessel and cargo as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American.

On an appeal to the circuit court this sentence was reversed, because the Flying Fish was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

*During the hostilities between the [*177 United States and France, an act for the suspension of all intercourse between the two nations was annually passed. That under which the Flying Fish was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French Republic, to be forfeited together with her cargo; the one half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same.

The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels "to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound, or sailing to, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the "act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States; and that the 5th section

gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the legislature seems to have prescribed 178*] *that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she been really American.

It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of Congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect.

A copy of this act was transmitted by the Secretary of the Navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause: "A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

These orders given by the executive under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in 179*] which the probable cause *which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral.

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the Flying Fish to suspect her of being an American would excuse Captain Little from damages for having seized and sent her into port, since, had she been an American, the seizure would have been unlawful?

Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.

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*DUNLOP & CO. v. BALL. [*180

To induce a presumption of payment from the age of a bond, 20 years must have elapsed exclusive of the period of the plaintiff's disability.

Legal impediments to the recovery of British debts existed in Virginia until the year 1793.

THIS was a writ of error to the circuit court of the District of Columbia, sitting in Alexandria. The only question in the case arose upon the following bill of exceptions:

"In this case the plaintiffs were admitted to be, and always to have been, British subjects, residing in Great Britain, and the defendant to be, and have been, a native and always a citizen of the now state of Virginia, and this suit was commenced on the day of , in the year 1802. The debt was contracted in 1773, in Virginia, at which time the bond was executed on which the suit was brought. It was also admitted that the plaintiffs had an agent authorized to collect their debts, so far as the plaintiffs could authorize the same to be collected, during the whole time from the date of the bond to this day; which agent resided in the county in which the defendant lived; also open war subsisted between Great Britain and Virginia, from the 19th day of April, 1775, until September, 1783.

"Further to repel the presumption of payment, the plaintiffs produced the following acts of the general assembly of Virginia upon the subject of British debts contracted before the peace, which acts are in the words following:" (Here were inserted the acts dated in March,

1785, and Dec. 1787; May, 1781, and Nov. 1781;) "And the fourth article of the treaty of peace of 1783, and the 6th article of the treaty of peace of 1794, between Great Britain and the United States." The plaintiffs also gave evidence that William Wilson, their agent, delivered over the bond to William Hunter, Jun. in 1776, to be collected, at which time he (William Wilson) went to Europe. And when he returned, in 1784, he received back the bond from W. Hunter. Some time after the year 1789, he delivered the said bond to James Johnson for collection, who returned it, and neither of those persons stated that the money, or any part, was collected; that Johnson died in 1797.

Whereupon the counsel for the defendant prayed the court to instruct the jury, that from the length of time they ought to presume payment of the aforesaid bond. Upon which the court instructed the jury that from the 181*] *length of time stated in the facts above agreed on, the bond, in law, is presumed satisfied, unless they should find from the evidence that interest was paid on the bond within 20 years from the 5th of September, 1775, (the time of the last payment,) or that a suit or demand was made on the said bond within 20 years from the last-mentioned time, exclusive (in both cases) of five years, five months, and twenty days, taken out of the act of limitations.

To which opinion of the Court the plaintiffs, by their counsel, except, &c.

The defendant relied on the plea of payment, and on the length of time to support it.

E. J. Lee, for the plaintiffs in error, relied principally upon the legal impediments which existed in Virginia, to repel the presumption arising from the lapse of time.

He contended that the rule that the lapse of 20 years shall induce a presumption of payment of a bond, is not an absolute and arbitrary rule, but at most is only prima facie evidence, and induces nothing more than a presumption.

Any circumstances which can reasonably account for the delay of the plaintiffs in prosecuting their right, without supposing the bond to be satisfied, may be given in evidence to destroy that presumption.

From the year 1774 to 1791, the plaintiffs were incapacitated to maintain a suit, and to recover the money by legal process.

The first impediment was caused by the expiration of the fee bill on the 12th of December, 1774, whereby the courts of justice were shut against all persons. This impediment was general, and continued until the commencement of the war, on the 19th of April, 1775.

From this period until the peace, in September, 1783, the state of war prevented British subjects from bringing suits in our courts, if no other impediment had existed. The first act of assembly of Virginia, applying to British creditors in particular, is that passed in October, 182*] 1777, sequestering *British property, and suspending executions, until the further order of the legislature, in all cases where a British subject was plaintiff, and a citizen of the commonwealth defendant. Chancery revisal of Laws, p. 64.

The 2d act of impediment is that of November, 1781, c. 22, s. 3, p. 147, to suspend executions in certain cases.

The 3d is the act of May, 1782, c. 44, s. 2, p. 165, to repeal so much of a former act as suspends the issuing executions upon certain judgments until December, 1783.

The 4th is the act of October, 1782, to amend an act entitled an act to repeal so much of a former act as suspends the issuing of executions on certain judgments until December, 1783.

The 5th is the act of December, 1783, c. 45, p. 182, to revive and continue in force the several acts of assembly for suspending the issuing of executions on certain judgments until December, 1783, p. 218. This last act expired in July, 1784.

If the legal impediments had ceased in the year 1784 with the expiration of this act, we should still have been in time with our suit: for it is brought within twenty years from that time. But these impediments did not cease at that period, but were still continued by the acts of 1785 and 1787.

In addition to these legal impediments, created by the acts of the legislature, were the decisions of juries and courts of law who supported the plea in bar that the plaintiff was a British subject for several years afterwards.

The report of the commissioners under the 6th art. of the treaty with Great Britain mentions a number of cases decided in the courts of Virginia to that effect, from which two only are supposed necessary to be cited.

The first is the case of *Warwick's Administrators v. Gaskins*, in Lancaster county, upon the plea that the testator was a British subject; the suit was dismissed in March, 1788.

*The next case is that of *Gibson, Donaldson & Hamilton, plaintiffs, against Bannister's Executors, defendants*, in Prince George's county, August, 1791, in which the plea that the plaintiffs were British subjects was sustained. [*183

The fact is notorious that it was the general opinion of the inhabitants of the state, and of juries, that a British debt could not be recovered. This is acknowledged to be the case in Mr. Chancellor Wythe's report of the case of *Page v. Braxton*, p. 127, in the year 1793, which was the first in which it had been decided in any of the superior courts that a British debt was recoverable.

MARSHALL, *Ch. J.* There can be no doubt of this fact. The only difficulty is, to show that it requires 20 years after the removal of the impediments, to create the presumption of payment. It may be a doubt, whether the same time after the removal of the impediments is necessary to raise the presumption, as if the bond had borne date at the time of such removal.

Swann, for the defendant, contended, that the time between the 19th of April, 1775, and Sept. 1783, being deducted from the age of the bond when put in suit, the residue being about 20 years and 6 months, should be considered as the lapse of time which was to induce the presumption that the disability of the plaintiff ceased on the ratification of the treaty of peace. There are no cases decided in the superior courts of Virginia, in which the plea of disability of the plaintiff, as being a British subject, has been allowed since the peace. The cases cited are county court cases, and do not appear in the record. They are facts which this court cannot notice.

But if we travel out of the record, other cases may be cited from other counties, in which contrary decisions have taken place. It is a fact that in Fairfax county, where the defendant always resided, British debts could always be recovered since the year 1783. If the cases cited against us are admitted to rebut the presumption, this fact is equally strong, and ought to be admitted to support it.

Lee, in reply. Although it was stipulated by 184*] the treaty *that all legal impediments to the recovery of debts should be removed, yet that did not alter the existing state of things. The obnoxious laws remained in full force in practice. The fact was, that the legal impediments were not removed. We are not now to consider what the law ought to have been, but what it was in practice. For if the impossibility of recovering the debt still remained, it destroyed all presumption arising from the lapse of time.

February 28. MARSHALL, *Ch. J.*, delivered the opinion of the Court. The only circumstance which could create a question in this case is, that 20 years had not elapsed, exclusive of the period during which the plaintiffs were under a legal disability to recover, before the action was brought.

The principle, upon which the presumption of payment arises from the lapse of time, is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule.

That no presumption could arise during a state of war, in which the plaintiff was an alien enemy, is too clear to admit of doubt. But it is not so clear that, upon a bond so old as this, the same length of time after the removal of the disability is necessary to raise the presumption, as would be required if the bond had borne date at the time of such removal.

It appears, from the decisions of the courts of Virginia, from the pleas in bar in the federal courts, and particularly from the observations of the Chancellor of Virginia, in the case cited, that it was the general understanding of the inhabitants of that state, that British debts could not be recovered. And, until the year 1793, there was no decision of the superior courts that such debts were recoverable.

The only question is, whether, in case of an old debt, the same time is required to raise the presumption, as in the case of a debt accruing since the impediments have been removed.

In such a case it is not easy to establish a new 185*] rule, and *the Court think it best to adhere to the old decisions, that twenty years must have elapsed exclusive of the period of the plaintiff's disability; and are of opinion that the circuit court erred in directing the jury that payment ought to be presumed.

The judgment of the Court is entered upon the minutes in the following terms:

The Court having heard the arguments of counsel, and maturely considered the same, is of opinion (and do adjudge, order, and decree accordingly) that the circuit court erred in instructing the jury, "that from the length of time, they were to presume the bond, in the record mentioned, to be satisfied, unless they should find, from the evidence, that interest was paid on the bond within twenty years from the 5th of September, 1775, the time of the last payment, or that a suit or demand was made on said bond within twenty years from the last mentioned time, exclusive, in both cases, of five years, five months, and twenty days, taken out of the act of limitations;" there being circumstances in this case which oppose the presumption which would have arisen from the length of time which has elapsed since the date of the bond.

And this Court doth further adjudge, order, and decree, that this cause be remanded to the said circuit court, to be there tried, with directions that there is no presumption of payment of the said bond, as directed by the said circuit court.

Cited—8 Pet. 420; 4 McLean 284.

BLAKENEY *v.* EVANS.

If a man agrees to do certain work, and he does it jointly with another, he is still entitled to recover upon the agreement.

A SPECIAL action of assumpsit was brought, in the circuit court of the District of Columbia, sitting at Alexandria, by Evans against Blakeney, upon the following written agreement:

"I will rent of Mr. Evans thirty-one feet of ground on King street, by one hundred feet deep to a ten feet alley, for which lot I will pay him 13*l.* 10*s.* per annum, in yearly payments, the rent commencing from the 1st day of November, 1799.

*"I will also agree to find work and [*186 materials in my line for Mr. Evans's houses, provided he will find the same in his line for my house I intend to build on the above described lot, each work and materials to be measured and valued agreeably to the customary mode in Alexandria, and whatever balance there may be on either side at any time they choose to have the work and materials valued, is to be paid in cash on demand." Signed "Abel Blakeney, John Evans. September 3d, 1799."

The action was brought to recover a balance due upon this valuation. The defendant pleaded the general issue.

The plaintiff produced in evidence the following writing: "Alexandria, March 23d, 1802. We, the subscribers, being called on by Messrs. Evans and Burford, on the one part, and Abel Blakeney on the other, to measure and value sundry jobs of work done by the parties, each for the other, and have done the same to the best of our knowledge, and, upon comparing the accounts, find a balance in favor of Evans and Burford, of fifty-two pounds, ten shillings, and one penny." Signed "Daniel Bishop, Isaac McLean;" and proved by the said Isaac McLean, that the work and materials were measured and valued agreeably to the customary mode in Alexandria, and that according to such measure and value, that balance was due from the defendant to the plaintiff. That he and the said Bishop were called upon by Evans and Blakeney, and not by the said Burford; but that he was present, and the witness understood from all the parties that he was interested in the work. To the admission of this evidence, the defendant took a bill of exceptions, and brought a writ of error.

March 1st. The transcript of the record was submitted to the court without argument, who affirmed the judgment, with ten per cent. damages, and costs, observing, that the meaning of the agreement was, that each party should procure the work to be done, and not that they should do it personally.

187*] *CHURCH v. HUBBART.

If it be inserted in a policy, that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned for an attempt to trade illicitly, the underwriters are not liable for the loss.

The right of a nation to seize vessels, attempting an illicit trade, is not confined to their harbors, or to the range of their batteries.

Foreign laws must be proved like other facts. They must be verified by oath, or by some other such high authority that the law respects not less than the oath of an individual.

The certificate of a consul of the United States, under his seal, is not sufficient. A certificate of the proceedings of a court under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence.

If the decrees of the Portuguese colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence.

ERROR from the circuit court for the district of Massachusetts, in an action on the case, upon two policies of assurance, whereby John Barker Church, Jun. caused to be insured twenty thousand dollars upon the cargo of the brigantine Aurora, Nathaniel Shaler, master, at and from New York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New York. At the foot of one of the policies was the following clause: "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other was inserted the following: "N. B. The insurers do not take the risk of illicit trade with the Portuguese."

The vessel was cleared out for the Cape of Good Hope, and Mr. Church went out in her as supercargo. On the 18th of April she arrived at Rio Janeiro, where she obtained a permit to remain fifteen days, and where Mr. Church sold goods to the amount of about 700 dollars, which were delivered in open day, and in the presence of the guard which had been previously put on board, and to all appearance with the approbation of the officers of the customs. On the 6th of May she sailed from Rio Janeiro bound to the port of Para, on the coast of Brazil, and on the 12th, fell in with the schooner Four Sisters, of New York, Peleg Barker, master, bound to the same port, who agreed to keep company; and on the 12th of June they came to anchor about four or five leagues from the land, off the mouth of the river Para, in the bay of Para, about west and by north from Cape Baxos, and about two miles to the northward of the cape "on a meridian line drawn from east to west." The land to the westward could not be observed from the deck, but might be seen from the mast-head.

The destination of the vessel after her departure from Rio Janeiro, was by the master kept secret from the crew, at the request of Mr. Church, and the master assigned as a reason why they came to anchor off the river Para, that they were in want of water and wood, which was truly the case, the greater part of the water on board having been caught a night or two before, and the crew had been on an allowance of water for ten days.

*After the vessels had come to anchor, [*188 Mr. Church with two of the seamen of the brig, and the mate of the schooner with two of her seamen, went off in the schooner's long boat to speak a boat seen in shore, to endeavor to obtain a pilot to carry the vessels up the river, that they might procure a supply of wood and water, and, if permitted, sell their cargo.

Shortly after the long boat had left the schooner, the latter got under way, (the master of the brig having first gone on board of her,) proceeding towards shore; and observing a schooner-rigged vessel coming from the westward, from whom they expected to get a pilot, they fired a shot ahead of her to bring her to, but not regarding the first shot, a second was fired, when she came to, and her master came on board apparently much alarmed, as if he supposed the schooner and brig to be French. The persons in the Portuguese boat got off in a squall of wind and rain, leaving their captain on board the Four Sisters.

Mr. Church, and the others who went on shore with him, as well as the second mate of the schooner, who was sent on shore with the master of the Portuguese vessel, and in search of Mr. Church, were seized and imprisoned; and on the 14th of June, both the brig and schooner were taken possession of by a body of armed men, on board of three armed boats, and carried into Para. The masters and crews were imprisoned, and underwent several examinations, the principal object of which seemed to be to ascertain whether they were not employed by some of the belligerent powers to examine the coast, &c. whether they had not come with intention to trade; whether they had not traded at Rio Janeiro, and why they had kept so close along the coast. They denied the intention to trade, but alleged that they were obliged to put in for wood and water, and to refit. On the 28th of July, the master of the brig was put on board a vessel for Lisbon, but was taken on the passage by a Spanish vessel, and sent to Porto Rico, from whence he obtained a passage to the United States. The brig Aurora was armed with two carriage guns mounted, and about one hundred weight of powder.

It was in evidence also, that when vessels belonging to foreigners go into Rio Janeiro, they allege a pretense of *want of repairs, [*189 want of water, or something of that kind, on representing which, they obtain leave to sell part of their cargo for repairs, and to remain a certain time, usually twenty days, and then, by making presents to the officers, they are not prevented from selling the whole; but, without those presents, they would probably be informed against. Such trade is a prohibited trade, but it is frequently done without a bribe.

The defendant, to prove that the trade was illicit, offered a copy of a law of Portugal, entitled "A law by which foreign vessels are prohibited from entering the ports of India, Brazil, Guinea, and Islands, and other provinces of Portugal," which, after reciting a prior law of

1591, prohibiting foreign vessels, and foreigners of whatever station or quality, to go, either from the ports of Portugal, or from any other ports whatever, to the conquests of Brazil, without special license of the king, ordains, "That from the day of the publication hereof, no vessel whatever, of any foreign nation, shall be permitted to go to India, Brazil, Guinea, or Islands, nor to any other province or islands of my conquests, either already discovered, or that may be discovered hereafter." (The Azores and Madeira are excepted.) "and I am further pleased to order, that no stranger whatever shall be permitted to go in any vessels belonging to my subjects, even though he be an inhabitant of my kingdoms." "And any foreign vessel that shall hereafter go to any of the said ultramarine ports against the contents of this my law, I am pleased to order, that it shall be seized with all the cargo, as well that of the master and proprietors of the said vessel, as of any other persons; and further, that all those who, on board of said foreign vessels, shall load any goods or merchandise, shall lose all whatever else they possess, and they shall be banished for life to Africa, without remission, and no petition for pardon shall be received from them, nor shall it be valid even if dispatched; and any foreigner who, in any ship of his own, or any other, or in any ship or vessel of my subjects, shall go to said ports contrary to this my law, besides incurring the loss of all his property, shall likewise incur the penalty of death, which shall be put in execution against him without appeal, by order of any governor, captain or judge before whom they are accused, 190*] even if such execution *in other cases should not come within their authority; and the same penalty of death shall be incurred by any of my subjects who shall freight said vessels, or by any other manner send them either on their own account, or on any other person's account. to said ultramarine possessions, which shall be put into execution against them in the manner above mentioned, without appeal. And all those who in any manner shall go against this my law, may be denounced by any person whatever, and the denouncer shall be entitled to, and receive one-half the goods appertaining to the accused, and the other half shall be forfeited to my treasury. And I am further pleased to order, that all those who from henceforth shall in any manner act against the said law made by the king my father, whom God keeps, or shall change their voyage, or cause the same to be done, shall be accused in the manner above mentioned by any person whatever. And I hold as strong and valid all the contents of this my law, and order that it should be fully complied with and observed, notwithstanding any contrary laws, orders, gifts, privileges, contracts, or any grants either general or particular, being all hereby repealed, as if each one in particular was herein mentioned. And this law shall be as valid as any letter made in my name, signed by myself, and passed through chancery, notwithstanding the ordinance of book the second. title the 40th, which orders the contrary. And that the knowledge of the contents hereof should be made manifest to all, I order the High Chancellor to cause it to be published in chancery, and to pass a certificate of the same on the back hereof, and have it registered in the books of my exchequer court, India house, custom house of this city of Lisbon, and in all other parts of the kingdom of Portugal; for which purpose the comptroller of my exchequer shall send copies hereof to the said ports, and similar ones to all the ports in India, Brazil, Guinea, and Islands, to the end that this my law be there published and registered, and reach to the knowledge of all. Made in Valladolid, the 18th of March, 1605.

"The Secretary Luis de Figueiredo had it written.

(Signed) "KING."

*"I, William Jarvis, Consul of the [*191 United States of America, in this city of Lisbon, &c. do hereby certify to all whom it may or doth concern, that the law in the Portuguese language, hereunto annexed, dated the 18th March, 1605, is a true and literal copy from the original law of this realm of that date, prohibiting the entry of foreign vessels into the colonies of this kingdom, and as such, full faith and credit ought to be given it in courts of judicature or elsewhere. I further certify, that the foregoing is a just and true translation of the aforesaid law.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Lisbon, this 12th day of April, 1803.

(Signed) "WILLIAM JARVIS."

Another law was produced, said to be made at Lisbon, on the 8th of February, 1711, certified in the same manner, entitled, "A law in which is determined the non-admission of foreign vessels into the ports of the conquests of this kingdom," which directs, "That orders should be given to the governors of the conquests, not to admit into any of their ports the vessels of any foreign nation, unless they went in with the fleets of this kingdom, and returned with the same, in conformity to treaties, or obliged by tempestuous weather, or for want of provisions; in which cases, providing them with the necessaries they require, they ought to be ordered out again, without permitting them to do any business; and, as this cannot be done without the consent and tolerance of the governors, which requires a speedy and efficacious remedy on account of the consequences which may result from a toleration and overlooking of this traffic, and the equity of justice requiring that so great an injury should be avoided, and the inflicting a punishment on those who should in any way be concerned in such an illicit trade with foreigners; I am pleased to order that the persons who shall traffic with them, or shall consent that such traffic shall be carried on, or, knowing it, shall not hinder it, such person, being a governor of any of the ultramarine conquests, *shall incur the penalty of [*192 paying to my treasury the three doubles of the salary which he receives, or may have received, by such office of governor, besides losing all the gifts he holds from the crown, and remaining inhibited from ever being employed in any other offices or governments for the future; such person being an officer in the army, or of justice, or any other private person, being a Portuguese and a subject of this kingdom, shall incur the penalty of confiscation of all his goods and possessions, one-half for the denouncer, and the other half for my royal treasury."

Then follow other provisions for the detection and punishment of offenders against the law; and an order to all governors of the ultramarine conquests to carry it into execution, and that it should be published and registered in all necessary places.

To prove that the vessel was seized for illicit trade, the defendant produced the following paper, purporting to be a copy of "the sentence of the governor of the capital of Para, on the brig Aurora."

"In consequence of the acts of examination made on board the brig Aurora, questions put to Nathaniel Shaler, who it is said is the captain of her, and to those said to be the officers and crew, and according to the act of examination, made in the journal annexed, which they present as such passport and dispatches, together with other papers; I think the motives hereby alleged for having put into a port of this establishment are unprecedented and inadmissible, and the causes assigned cannot be proved. I therefore believe it to be all affected for the purpose of introducing here commercial and contraband articles of which the cargo is composed; (if there are not other motives besides these, of which there is the greatest presumption;) 1st. Because it cannot be supposed that an involuntary want of water and wood would take place in thirty-four days' voyage from Rio Janeiro, where the said vessel was provided with every necessary, until she passed the Salinas, without alleging and proving an unforeseen accident when there was none in sixty-four days' passage from New York to said port of Rio Janeiro, and it appears by these 193*] papers, and by the information *from the commanders of registry or guard at the Salinas, and it is not to be believed that they did not see that land at the hour of the morning which they passed it on the 9th day of the present month, as well as they were seen; and when it ought to be supposed that they should have solicited immediately the remedy for such urgent necessity as they wished to make it. 2d. Because, after they were in sight and opposite to the village of Vigia on the 12th of the said month, having also got clear and passed safely by the shoals, and after by violent means having boarded and obliged different vessels to board him, it does not appear that any of those that were brought to the village as prisoners, alleged the want of water as a motive for coming in, nor that they had made the least endeavors, or demanded to be supplied with such want; it being very well known, on the contrary, that all their endeavors were to obtain Pratic, and to proceed to this capital, alleging the pretext of being leaky, but which, from the examination made on board by the masters of the arsenal, did not appear to be true. 3d. And, finally, because in the space of eight or ten days from the time they passed the cape of St. Agostinho, till they passed by the Salinas, should their want of water be true, they might have supplied themselves with it, in any of the numerous ports on the northern coast of the Brazils till that of Pernambuco, or they would have directed their course directly for the destined port of Martinico and Antilles as they say: it appearing very strange they should come to sound all the coast, the excuse of the winds not being admissible. But by the same informer's journal it appears that from the 28th of May, when by observation they were northward of St. Agostinho, they had constantly the trade winds upon the quarter until the 3d instant, with which they steered always along the coast, when they ought only to have gone to this latitude to have continued the same winds to the said islands, and to have got clear of the calms and currents of the coast; if it had not been their only intention to look for the same coast and to this port for business and smuggling, which he could not perform at the Rio Janeiro for the reason which is specified in the letters annexed to folio—; it being presumed that the master of this brigantine *ought to be understood as having the [*194 same disposition as that of the schooner Four Brothers, with which he sailed and fell into conversation.

"Therefore, I command, that in conformity to the law made on the 5th October, 1715, the observance of which has been so repeatedly recommended and revived to me by government, let their papers be brought to the house of justice to be continued as prescribed in the same law and laws of the kingdom, (they remaining in prison until the final decision,) for which they gave cause by the hostile means which they practiced.

"Palace of Para, the 27th June, 1801.

"*D. Francisco de Souza Coutinho.*"

"On the 27th June, 1801, these deeds were given to me by his excellency the Governor and Captain General of State, D. Francisco de Souza Coutinho, with his sentence *ut supra*, of which I made this term; and I, Joseph Damazo Alvares Bandiera, wrote and finished the same.

"It is hereby determined by the court, &c. that in the certainty of it being affected and unprecedented that the brig Aurora, Captain Nathaniel Shaler, putting into this port as in the decision fol. 43; as it is justly declared and adopted for the same incontestable causes there specified, that in consequence thereof, and of the respective laws thereto applying, she ought to be condemned, they concurring to convince that it was the project of the said captain (if he had no other reason besides these, of which there is suspicion) to look for a market for the merchandise which were found, not only as it appears by the letters hereto annexed, but in the society and conversation in which he sailed with the schooner Four Brothers, which captain is convicted, by very clear proofs, of such an intention, and the same specious pretext with which he pretends to color the cause for putting into this port, manifesting in this manner that he was not ignorant of the laws of the state concerning coming in and doing business therein.

*"Therefore, they declare him to [*195 have incurred the transgression of the order fol. 1 to 107, and decree of the 18th March, 1605, and they order that after proceeding in the sequester on the vessel and cargo, to send the captain as prisoner, with the necessary information by the competent secretary, that his Royal Highness may be pleased to determine about him, as may be his royal pleasure.

"Para, 27th June, 1801. D. Jono de Almeida de Mello de Castro, of the Council of State of the Prince Regent our Lord, and his minister and Secretary of State of the foreign affairs and

war department, &c. do hereby certify that the present is a faithful copy taken from the original deed relative to the brig Aurora. In witness whereof, I order this attestation to be passed and goes by me signed and sealed with the seal of my arms. Lisbon, the 27th January, 1803.

"Signed,

D. Jono de Almeida de Mello de Castro."

"I, William Jarvis, Consul of the United States of America, in this city of Lisbon, &c. do hereby certify unto all whom it may concern, that the foregoing is a true and just translation of a copy from the proceedings against the brig Aurora, Nathaniel Shaler master, at Para, in the Brazils, which is hereto annexed and attested by His Excellency Don Jono de Almeida de Mello de Castro, whose attestation is dated the 27th January, 1803.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, in Lisbon, this 16th day of April, one thousand eight hundred and three.

"WILLIAM JARVIS."

The bill of exceptions, besides the foregoing, stated a variety of dispositions, papers and other evidence, which it is deemed unnecessary here to insert, and then proceeded as follows:

"Whereupon the said plaintiff did then and there insist, before the said court, that the said paper writings offered in evidence as aforesaid, 196*] by the defendant ought *not to be admitted and allowed to be given in evidence to the jury on the said trial, in behalf of said defendant; but the said judges did then declare and deliver their opinions, that the same paper writings ought to be admitted in evidence to the jury.

"Whereupon the said counsel for the said defendant, did then and there insist, before the said judges, that the said several matters so produced, and given in evidence on the part of the said defendant as aforesaid, were sufficient, and ought to be admitted and allowed as sufficient evidence, to prove that the loss of the said brig and cargo was by a peril within the exception made in the aforesaid policies respecting seizure by the Portuguese for illicit trade; and, therefore, that the said Church ought to be barred of his aforesaid action, and the said defendant, acquitted thereof. And thereupon the said defendant by his counsel, did then and there pray the said judges to admit and allow the said matters and proof, so produced and given in evidence for the defendant aforesaid, to be sufficient evidence to bar the said Church of his action aforesaid.

"But to this the counsel of said John Barker Church, Jun. on behalf of said Church, did insist before the said court, that the matters and evidence aforesaid, so produced and proved on the part of the said defendant were not sufficient, nor ought to be admitted or allowed, to bar the plaintiff of his action, and that it did not prove the loss of the said brig and cargo to be by a peril within the exception contained in said policies, respecting seizure by the Portuguese for illicit trade, but that the evidence, on the part of the plaintiff, did prove the same loss to have happened through a peril for which the underwriters on said policies were liable, by the terms thereof.

"And the said William Cushing, Esq. did then and there deliver his opinion to the jury aforesaid, in the words following, to wit:

"The first objection to this action is that it is brought in the name of John B. Church, Jun. when the contract was not made with him, but with his father, John B. *Church. [*197 But from the evidence of Mr. Samuel Blagge, it is plain the policy was made for the son, in pursuance of the express application and direction of the witness. The property of ship and cargo is proved to be in the plaintiff.

"The principal question is, whether the brig Aurora and cargo (insured by these policies) were seized by the Portuguese for (or on account of) illicit trade? If so seized, the insurer is not liable; if not seized for illicit trade, the defendant must answer for the sums by him insured.

"The brig went to Brazil for the purpose of trade; first to Rio Janeiro, where, with leave, part of the cargo was sold, then proceeded to Para. It is pretty well understood that a trade there is illicit and prohibited, unless particular license can be obtained; sometimes it is obtained, sometimes not; and in want of leave seizures have been made.

"It seems that the seizure and sequestration which took place at Para, were on account of attempting to trade there. The sentence of the governor of Para appears to me decisive as to this point, that there was an attempt to trade, and that was against the effect of the Portuguese law referred to in the decree. It is contended that this vessel was not within the Portuguese dominions, and, therefore, not in violation of any of their laws.

"It appears that the vessel was hovering on the coast of Para, and anchored upon that coast, and that the plaintiff, with others from the vessel, went on shore in the boat among the inhabitants.

"It is said that this sentence has no appearance of an admiralty decree; but there does not appear any other authority at Para to condemn for illicit trade than that of the governor. The governor does undertake to decide, and I do not know that he had not authority, according to their modes of colony government, so to do. One thing seems certain, that is, that the property was seized and sequestered and taken away, by *the governor's sen- [*198 tence on account of prohibited trade; in part at least.

"As to a design against the country, it is said there were suspicions. It does not seem probable that the government of Para could seriously think the country endangered by a few Americans coming with a cargo for trade.

"I am, therefore, of opinion, that it falls within the meaning and true intent of the exceptions in the policies, viz.: 'that the insurers should not be liable for seizure by the Portuguese for illicit trade,' and that you ought to find for the defendant."

"Whereupon the said counsel for the plaintiff did then and there, in behalf of the plaintiff, except as well to the said opinion of the said judges in relation to the said paper writings, as to the opinion of the said Cushing, delivered to the said jury," &c.

Stockton, for plaintiff in error, contended that the circuit court had erred, 1st. On the

general merits of the case; and, 2d. In admitting improper evidence to go to the jury.

1st. As to the merits. The exception in the policies is of the case of seizure for illicit trade, nor of seizure for an attempt to trade. The latter case is within the policy, and is one of the risks which the underwriters have taken upon themselves. Actual trade, and a consequent seizure therefore, must both concur in order to protect the underwriters. The evidence stated in the record, if it proves anything, does not show that the seizure was for any act of illicit trade. To make the most of it would be to say that it was a seizure on suspicion. But it rather seems to be an act of violence, a marine trespass, not warranted even by the law which the defendant has produced. It appears in the record that the trade has been, generally speaking, interdicted ever since the year 1591, and that this fact was known to both parties. Every general history of the country proves the general prohibition of the trade, but that it is sometimes permitted. The intent to trade is not an illicit trade. The real import of the policy is this, "we know the general prohibition of the trade, but that permission is sometimes granted. Go on with the 199*] voyage, *try to get permission, but see that you do not trade without leave; if you do, it is not at our risk. Underwriters are always presumed to know the nature of the voyage, and the course of the trade. "In general," says Lord Mansfield, in *Pelley v. Royal Ex. Insurance Co.* Park. 42, 43, (47,) "what is usually done by such a ship in such a voyage, is understood to be referred to by every policy and to make a part of it, as much as if it were expressed." The same principle is recognized in *Noble v. Kennoway Park*, (49,) 44, Doug. 512.

No objection can be taken to the policy because it was upon a voyage for a trade illicit by the laws of Portugal, although a policy upon a trading voyage made illegal by our own laws, might be vacated. Park, 268, (236,) *Delmada v. Motteux. Planche v. Fletcher*, and *Lever v. Fletcher*.

The intention to trade can never be construed an actual trading. The difference between the intent and the act, in the case of a deviation, is taken in Park, 359, (314,) *Foster v. Wilmer*, and *Carter v. Royal Ex. Insurance Co.*

If the intention could be taken for the act, the vessel might have been seized by the Portuguese on the very day she left New York, and the underwriter would be discharged.

The sentence does not go on the ground of illicit trade. At most it only expresses a suspicion. Besides, the vessel was seized five leagues from the land, at anchor on the high seas. The seizure was not justified by their own laws. She was not within their territorial jurisdiction. By the law of nations territorial jurisdiction can extend only to the distance of cannon shot from the shore. Vattel, b. 1, c. 23, s. 280, 289. A vessel has a right to hover on the coast. It is no cause of condemnation. It can, at most, justify a seizure for the purpose of obtaining security that she will not violate the laws of the country. The law which is produced forbids the vessel to enter a port, but does not authorize a seizure upon the open sea. Great Britain, the greatest commercial nation in the world, has extended her revenue laws the whole length of the law of nations, to prevent smuggling. But she authorizes seizures of vessels only within the limits of her ports, or *within two leagues of the coast; [*200 and then only for the purpose of obtaining security. 4 Bac. Abr. 543.

The reason that the supercargo went on shore was the want of water; and the evidence proves that the want was real. For this purpose he had a right to go on shore, and although he thereby placed his person in their power, yet that did not bring the vessel into port.

The sentence is not evidence of the facts which it recites. It is conclusive only as to the very point of the judgment. Peake's Law of Evidence, 46, 47. It shows on its face that the seizure was made, not for an actual trading, but on suspicion of an intention to trade.

2d. The circuit court erred in admitting the evidence which was objected to.

1. It did not appear to be the sentence of a court having competent jurisdiction. 4 Rob. 55, *The Henrick and Maria*. "A legal sentence must be the result of legal proceedings, in a legitimate court, armed with competent authority upon the subject matter, and upon the parties concerned; a court which has the means of pursuing the proper inquiry, and of enforcing its decisions."

The court may, perhaps, take judicial notice of the proceedings of a court of admiralty, but this cannot apply to the sentence of a governor. The circuit judge declared the sentence to be evidence, because he did not know that there was any other tribunal. But the jurisdiction of the court ought to appear. The laws which are produced do not show the authority of the governor to condemn. Peake's L. E. 47. 48.

2. But the laws themselves are not sufficiently authenticated. They are only certified by a secretary of state with his sign manual and private seal. They ought at least to be certified under the great seal. A private act of this country must be proved by a sworn copy compared with the roll. So of foreign laws. They must be proved as facts, by testimony in court. 1 P. Wms. 431, *Freemoult v. Dedire*. Cowp. 174, *Mostyn v. Fabrigas*. 2 East, 260, 272, 273, *Collet v. Lord Keith*.

*It appears by the testimony in the [*201 record that the vessel was not seized for an attempt to trade but captured on suspicion of being an enemy, or as a spy sent by the French.

3. The sentence is not duly authenticated. Is a secretary of state a proper certifying officer of a judgment of a court in the colonies? To ascertain what is a sufficient mode of authentication, the principles of the common law must be our guide. By that law there are only three modes. 1. Exemplification under the great seal; 2. A sworn copy proved by a person who has compared the copy with the original; 3. The certificate of an officer specially authorized *ad hoc*.

It has not even the seal of the court. If the court had no seal, that fact ought to have been proved. Why was it not certified under the great seal? One nation will take notice of the national seal of another. Why was not the American consul sworn? Of what validity is the certificate, or the seal of a consul? Why have they not produced a sworn copy of the proceedings? An American consul is not a

certifying officer. The court can take no more notice of his certificate than of that of a private person. There is no case to be found in a court of common law where it has ever been received as evidence. Bull, N. P. 226, 227, 228, 229, 10 Co. 93, *Leyfield's Case*. 9 Mod. 66, *Anon*, 1 Mod. 117, *Greene v. Proude*. 2 Snow. 232, *Hughes v. Cornelius*, 2 Lord Raym. 863, *Green v. Walker*. Peake's L. E. 48.

Adams, for defendant.

From the papers which have been read to the court, and from the statement of the case made by the gentleman who opened the cause in behalf of the plaintiff in error, it becomes unnecessary to make any preliminary observations to possess the court of the questions between the parties now to be decided. The verdict of the jury, and the sentence of the court being in favor of the defendant, the underwriter on the two policies, the judgment, it is presumed, will of course be affirmed, unless the objections stated against it by the plaintiff in error should be deemed by this court sufficiently substantiated, and of such a conclusive character as 202*] necessarily to require a reversal. It *is, therefore, incumbent on us, only to meet the exceptions taken by the plaintiff's counsel against the judgment of the circuit court; which exceptions are two: 1st. Against the construction given by the circuit judge to the policies; and, 2d. Against the evidence admitted for the defendant; the one of substance, the other of form. The one involving the merits of the only question upon which the issue of this litigation can depend, and the other only pointed at the weight and authenticity of the evidence admitted by the circuit court. The one founded on the position, that the defendant has no good bar to the claim of the plaintiff against him; the other resting on the basis, that strong and unanswerable as his defense may be, the proof that supports it was not clothed with that official solemnity which could alone entitle it to credit, and that it wanted that most powerful of all tests of truth—a bit of sealing wax.

I shall ask the liberty of inverting the course of argument adopted by the gentleman who opened the cause, because in point of time the objection against the admission of the evidence naturally precedes the discussion on its legal operation. He certainly was aware of this, and it is presumable that he himself inverted the natural order of his argument, only because he wished to reserve for the last, the point upon which he placed his principal, perhaps his only, reliance for success. A similar motive, however, must produce the contrary effect upon me, and induce me to return into that direct road, that broad highway, from which he deviated, only because the winding path gave him a shorter passage to the term at which he was desirous to arrive. For my own part, though confident, as before the decision of this court I ought to be, that the objections against the evidence are not so powerful as that gentleman's eloquence represented them, though persuaded that this court will concur rather with the opinion of the circuit court, than with that of the plaintiff's counsel, even upon this point, yet I will candidly confess that I feel more sanguine upon the question to the merits, than upon the question to the forms; for if the evidence can but show its face in the cause, we think it must require the utmost refinements of ingenuity to raise the shadow of a doubt upon its operation.

The objection against the evidence divides itself into two branches:

*1. Against the two Portuguese laws. [*203

2. Against the sentence of condemnation by the governor at Para.

Before I examine the reasons and authorities upon which these papers are respectively questioned, I must make one remark, which will be alike applicable to the attacks upon both. All the arguments by which they are assailed, rest only upon the rules and not upon the principles of evidence. I do not mean to say that the rules of evidence are not founded upon principles. I know them to be founded upon the soundest principles; but the operation of the rule which is positive, and, in some sort, arbitrary, is not always conformable to the principles upon which it is founded. Thus written evidence is in its nature of superior weight to mere parol testimony, for *verba volant, litera scripta manet;* words barely spoken are fleeting, but when written become permanent. From this principle is derived the rule that parol testimony shall not control the operation of a written instrument; yet it often happens from various causes, that parol testimony is stronger than written evidence, and in such cases it is the practice of all courts to receive it in contradiction to the general rule. Thus, as all the positive rules of evidence are derived from some principle, so in their operation they are always governed by this principle at once of reason and of humanity, that no man can be required to perform impossibilities. Hence all the positive rules and gradations of evidence are subject to this exception, and both in courts of law and of equity no party can be required to produce evidence of a higher order than he can obtain. It cannot possibly be necessary to produce the authorities, with which the books teem, of cases in which evidence of a lower order has been admitted, when the higher evidence, appropriate to the cause, was not accessible to the party. But if the principle itself be recognized, I trust it will be in our power to show that the defendant comes within the rule of its application, and that this testimony was the best which it was in his power to obtain.

These observations will furnish an answer to the rules and authorities which the gentleman adduced in support *of his objections, [*204 both against the laws, and against the sentence of condemnation.

First, as to the laws.

We are told that foreign laws must be proved; and what the foreign law is; and the authorities alleged in support of this assertion are, Cowp. 174, and 2 East, 260, 273.

This we are not at all disposed to deny; though reasons might be given why the rule ought not to be admitted, in its fullest latitude, in this country.

This question is, however, quite immaterial to us in the present case; because we did adduce proof of these foreign laws, and the only point to settle is, whether it was good and sufficient proof.

It is said that foreign laws must be put on the footing of private laws, and must be au-

thenticated, 1st. By an exemplification under the great seal; or, 2d. By a sworn copy from the rolls.

To this we answer,

First, that the rules for the proof of foreign laws ought not to be put upon the footing of private laws; for this plain reason, that every subject can obtain, of right, an exemplification under the great seal, or a sworn copy, from the rolls, of a private act of parliament. But it is not the practice of all foreign governments to issue exemplifications under the great seal; or to keep their laws in rolls of parchment. It is not the practice, for instance, in Portugal, as is apparent from these laws themselves. The practice appears to be to register the laws in sundry public offices, and one of them, the comptroller of the exchequer, is required to send copies to the possessions abroad; but it does not appear that any subject, much less any foreigner, can obtain copies of them by application to any officer whatsoever. The first law is dated at Valladolid, was made by a king of Spain, while Portugal was under the dominion of that kingdom, and was a public law. To require, therefore, an exemplification, or a copy from the rolls of this, would be as if a party, in these 205*] *United States should be called upon to produce an exemplification, under the great seal of England, or a copy from the rolls of parliament, of a public act of parliament, passed in the reign of Queen Elizabeth, in order to prove it a law in this country. A copy from the rolls, therefore, where there are no rolls to copy; an exemplification under the great seal of Portugal, of records in the chancery of Spain, are impossible things; a party can never be required to produce them, and the authentication of these foreign laws, at least, cannot be put on a footing with that of private statutes in Great Britain.

Yet even if the rules relative to private statutes were applicable to the case, we should certainly come within the exceptions which have been allowed in the British courts. The rule itself is founded rather on a quaint and artificial process of reasoning, than upon a fair and liberal principle; and when the object of a private statute is in any degree public, or is of a nature to be notorious, the English judges do relax from the rigid muscle of the common law, and receive the printed statute book as evidence. 2 Bac. Abr. 609, Gwillim's edition, and the authorities there cited.

If the principles recognized in these authorities are just, they apply eminently to this case. Here is a law, public in its nature, known to all the world for these two centuries, and confessedly known to both the parties in the present action. On principle, therefore, a printed copy would be admissible; and if, by the reasoning of the English judges, the printed statute book derives authenticity from the types of the king's printer, surely this copy of a foreign law must be allowed to derive more authenticity from the official certificate of so respectable an officer as a consul.

But with all submission to the opinion of the court, I contend, that under the circumstances of this case, the certificate of the consul was the best evidence, which in the nature of the thing could be produced, of these laws. To whom else could the parties have applied? Even in England, a copy of public acts of parliament, from the rolls, would not be furnished to individual applicants. In Portugal there is every reason to presume no such copy could be obtained. As it respects the first law, made by *a king of Spain two hundred years [*206 ago, it may be considered as demonstrated. The jealousy of the country with regard to any intercourse between foreigners and their colonies, might, and probably would, have made it dangerous for any foreigner to apply for a copy, under the great seal, or with any extraordinary authentication, of these laws. And after all, when obtained, would the great seal of Portugal, or the signature of the Chancellor of Portugal, have been so well known to this court as the seal and signature of an officer of our own government residing there?

We are asked for an office copy, certified by an officer intrusted *ad hoc*. But why is credit given to office copies? Because the officer is publicly known; because his business to keep the records is equally notorious, and courts of justice will take notice of it. Surely this can give no credit to the office copy of a Portuguese clerk or secretary. Surely neither the name, nor office, nor trust, nor duty of a scribe in the chancery at Lisbon, can be so well known to this court, as the consul commissioned by the executive government of our own country.

We are called upon for a sworn copy; but by whom should the affidavit be made? By the consul, said the gentleman. And before whom? This he did not say, but it could be only before a Portuguese magistrate. And who is to authenticate the magistrate's certificate of the oath? The consul. So that in the end the authenticity of the whole transaction must depend upon the consul's certificate. The magistrate, who administers oaths, is a person of notoriety to his own government; but to make him equally known to the tribunals of foreign nations, requires, in general practice, the attestation of some officer recognized by the law of nations. Such an officer is a consul; and where no public agent of a higher rank from the same nation is resident, I cannot imagine any attestation of the laws of one country, to the courts of another, so well entitled to credit, as that of the consul from the nation to whose courts the attestation is to be made.

I have observed, that by the Portuguese practice the laws are registered, and not enrolled. There is an express authority that a copy attested by a notary public *of an agree- [*207 ment registered in Holland, may be given in evidence; and if a public notary's certificate is sufficient to authenticate a registered agreement, I see not why a consul's certificate should not be equally well adapted to authenticate a registered law. 12 Viner, 123.

Let me add, that in this country there are peculiar reasons for unscrewing the most rigorous positive rules for the forms of evidence, in these cases where transactions beyond seas are to be ascertained. The intercourse of European nations with one another is carried on by a continual and almost daily interchange of mails. In six weeks a communication and its return may be accomplished from one extremity of Europe to the other. Defects of forms in obtaining evidence may be repaired within the term of a court in session, or at most from one

quarterly term to another. An accident by the loss of papers transmitted by the post offices seldom happens, and happening, can speedily be remedied. The delay and expense to the party is not necessarily of material importance to him, even if he is compelled to renew an experiment to obtain papers properly authenticated. The same inflexibility of rule must, in the nature of things, much more powerfully check and retard the pace of justice in this country. There is no regular and periodical communication of mails; for instance, between the United States and Portugal. Instructions to get evidence can be sent, and answers received, only by the occasional conveyance of commercial navigation. Six months, on an average, is the shortest period of time within which answers to letters can be received. If any of the accidents of the seas happen to the orders transmitted, or to the documents returned, the time requisite to receive them is more than doubled. This court, the court of final resort for most cases in which these rules of evidence can apply to the matter in dispute, sits but once a year. It is remote from many of the cities where causes requiring evidence from abroad must in general arise. If an end of litigation is an object of importance to the public welfare; if it be of the greatest interest to all individual suitors, every inducement, public and private, must combine to prescribe rules of facility, and not rules of rigor for the mere formalities of evidence to be brought 208*] from beyond the Atlantic. *If, then, the unbending maxims of the common law really required for foreign laws a different authentication than the certificate of a consul, there would still be the most cogent reasons for admitting it as sufficient in this country.

The same reasons apply still more forcibly to the sentence of the governor of Para.

How is it possible to require that a suitor should produce an exemplification, a sworn copy, or an office copy, of a document, when he is forbidden, on pain of death and confiscation, to set his foot in the country where alone those modes of authentication could be obtained? The practice of the Portuguese government appears upon the face of these papers. The governor transmits to the Secretary of State at Lisbon the original sentence of condemnation, with the proceedings upon which it was founded. And the Secretary of State, who remains in possession of these original papers, furnishes, under his hand and seal, a copy of them to the public agent of the nation to which the condemned vessel and cargo belonged. If this evidence is not of so high a nature as an exemplification under the broad seal, it derives, from the high and important station of the attesting officer, a higher credit than a mere office copy, or even than a copy attested by the affidavit of an obscure individual. 3 Dallas, 19–42, *Bingham v. Cabot.*

The laws, therefore, and the sentence of the governor are authenticated by the best evidence which, in the nature of things, was attainable by the party; and if this court should be of opinion that it ought to have been rejected, I should be altogether at a loss to instruct my client, where or how to apply for better, unless the court would themselves condescend to give their directions; the methods suggested by the plaintiff's counsel being altogether impracticable.

But it is said the sentence was not of a court of competent jurisdiction upon the subject matter; and we are called upon to prove the jurisdiction of the court.

This objection was made by the gentleman before he questioned the evidence as to the laws; and he appealed *to the laws themselves [*209 to support it. He said the laws themselves speak of judges; that this court will not presume the jurisdiction of the governor of a province; and that it is not like a court of admiralty, which is a court for all the world.

But, first. The laws do, in many places give, by necessary implication, and in express words, jurisdiction to the governor.

Secondly. The second law does speak of other judges; but they are appointed for the trial of the governors themselves, and of Portuguese subjects offending against the laws, and not of foreigners. Indeed, most of the penalties of the second law are pointed against the subjects of Portugal engaging in, or conniving at, the forbidden traffic, as those of the first law are chiefly directed against the foreigner. And,

Thirdly. The comparison between the governor's court and a court of admiralty is inapplicable, for the very reason which the gentleman suggests. A court of admiralty is a court for all nations; and no such court can exist, where all nations but one are excluded upon the most vindictive penalties. The gentleman's arguments against the colonial jurisdiction of a governor might be of weight, addressed to the court of Lisbon, to persuade them to open the ports of their colonies to all the world, and establish courts of admiralty in the ports of Brazil; but they cannot take from the governor the jurisdiction given by the laws, and further recognized by the attestation of the Portuguese Secretary of State to the papers transmitted by him.

2. I shall now return to the first point of the gentleman's argument, and considering the evidence as duly authenticated, examine his objections against the opinion of the circuit judge, relative to the construction of the policies.

The opinion of the judge was, that the loss came within the exceptions in the policies, and, therefore, that the underwriter was not liable.

*The plaintiff by his counsel, says that [*210 the loss was not within the exceptions, and that, therefore, the underwriter was liable.

The question, therefore, is a question of construction upon the true intent and meaning of the exceptions contained in the policies; and it will be proper to state the words, in which the exceptions are couched, and then apply to them the facts in evidence, and the proper rules of construction adopted in similar cases.

The words in one policy are,

1. "The insurers are not liable for seizure by the Portuguese for illicit trade."

In the other,

2. "N. B. The insurers do not take the risk of illicit trade with the Portuguese."

In both instances the words are within the body of the policy, and in their effect are in the nature of a warranty *quoad hoc.* The meaning appears to be exactly the same in both instances, and had the words been, "warranted against seizure by the Portuguese for illicit trade," their force and meaning would have been exactly the same.

If there can be a reasonable doubt as to the

construction of these words, we must recur to the ordinary rules of construction, which govern the cases of warranties and exceptions. There is no rule more universally known than that, as for what the underwriter takes upon him in the policy, a large and liberal construction must be given to his words, to favor the assured, so for what is excepted out of the policy, or warranted by the assured, a rigorous and strict construction must be given, to favor the underwriter; upon the reasonable and reciprocal principle, that words introduced for the benefit of either party shall receive the construction most favorable to the interest of that party. Hence, if the meaning of these words were in either case equivocal, that construction which would be 211*] most *favorable to the underwriter, for whose benefit they were introduced, ought to prevail.

I apprehend, however, that there will be no occasion for resorting to this rule of construction. To me the meaning of the parties appears so obvious in the expressions used, that they are susceptible only of one construction.

It must be remembered that this was professedly a voyage for the purpose of illicit trade.

The voyage itself was illegal according to the Portuguese laws, and known to be so by both parties. The vessel, though bound to two Portuguese ports, was cleared out for the Cape of Good Hope, a deception not intended to be practiced on the underwriters, but on the Portuguese, and proving to demonstration, the full knowledge on the part of the plaintiff, that the mere act of going to Brazil was a violation of the Portuguese trade laws, subjecting his vessel and cargo to seizure and confiscation. Indeed, the gentleman who opened the cause for the plaintiff, in one part of his argument, admitted, and strenuously urged, this knowledge of the illegality of the voyage, and most ingeniously attempted to draw from it a deduction in favor of Mr. Church's claim. I shall notice this hereafter; at present I shall only remark, that the directly opposite inference appears to me the true one. It appears by the papers that the instructions to Mr. Blagge, in Boston, the agent who effected the insurance, were to obtain it at the Marine Insurance Office in preference. Yet the insurance was not effected there, nor at the other incorporated office then existing in Boston. They never make insurance of any kind on voyages known to be illegal. Mr. Church's agent, therefore, could obtain insurance only at the private offices of individual underwriters, and that on the express condition that they would take no risk for illicit trade, nor answer for seizure on that account.

The exception, therefore, is not, and could not be, against illicit trade; for this was intended; and it would have been absurd to warrant against what was the sole object of the voyage. But this was a risk which the underwriters would not assume; and their language in the 212*] *policy is, we will insure you against the usual risks of an ordinary voyage, and although you clear out for the Cape of Good Hope, you shall go to one or two ports of Brazil; but as your voyage by the laws of that country is illegal, we will bear none of the perils which this circumstance may lead you into with the Portuguese. Your profits from the voyage may be enormous; but you may get into trouble, and those chances you must take entirely upon yourself.

The language in the exceptions is conformable to this idea. It refers entirely, not to the act of the party, but to the acts of the Portuguese. It excepts, not against the illicit trade itself, but against seizure on that account; and against the risk with which it must be attended.

So that if there had been no sentence of condemnation, but merely an order for seizure, on account of illicit trade, by the governor of Para, the underwriters would have been discharged. There is some analogy between this exception and an ordinary warranty of neutrality; but this is a much stronger case. To falsify a warranty of neutrality, the sentence of a court of admiralty is necessary, because that alone can decide the question of neutral or not. But a warranty against detention for not being neutral, or against capture as enemy's property, would resemble this; and such a warranty would undoubtedly discharge the underwriters, from the moment of the detention or capture on that account, without needing the sentence of a court of admiralty on the question of prize or not.

The gentleman, in the principal part of his argument on this point, urged, however, that the exception was not against the *risk* of illicit trade, not against *seizure* for illicit trade, but against illicit trade itself; that is, against the sole object of the voyage. He says the language of the underwriters is, go and get permission to trade if you can; but take care not to trade without permission, and he has laid great stress upon the depositions, to show that all nations do trade there with permission. But the whole weight of this reasoning rests upon the idea, that the permission to trade, by the governor, *would have made the trade [*213 legal, and that the plaintiff did not intend to trade illegally.

This contradicts the whole tenor of the gentleman's argument, founded upon the known illegality of the trade. It contradicts the words of both exceptions which explicitly refer, not to the trade, but to its perils, and it contradicts the whole tenor of the testimony, as well as what is known, and what I shall prove, that permission could not make the trade legitimate.

We are told, however, that the voyage alone could not be within the policy, because it was at and from New York to one or two Portuguese ports in Brazil; and authorities have been cited to show that underwriters are bound to know the course of the trade.

The voyage alone was not without the policy, in respect to all the perils undertaken; but it was without the policy in respect to the perils excluded by the exception. Thus, although the vessel was cleared out for the Cape of Good Hope, and the course from Rio Janeiro to Para was as wide as possible from that of such a destination, yet it was within the policy, and the underwriters could not have discharged themselves on the ground of deviation. Thus far they were bound to know the course of the trade; and they did know it, for they expressly declared they would take no risk arising from the peculiar character of the trade on which the vessel was bound. As to the authorities which the gentleman has read to show that no nation takes notice of the revenue

laws of another, and that underwriters may be bound by insurance on a trade illicit by the laws of the country where it is carried on, I shall not dispute them; but they seem altogether inapplicable. The difference between the case of *Lever v. Fletcher* and ours, is, that there the underwriters had not thrown the risk of illicit trade out of the policy by any express exception. In ours they have. Had our policies been without this exception, undoubtedly the underwriters must, and would, have paid for this loss. But can any one imagine that if in that case of *Lever v. Fletcher* the words of our exception had been in the policy, Lord Mansfield would have told the jury that the underwriter might be liable for a risk of illicit trade, which they had, in so many words, excluded?

214*] *It is said that all nations do trade with permission; and to this I have replied that even such permission does not legitimate the trade. This is proved by the deposition of one of the plaintiff's witnesses, who testifies, "that when vessels go into Rio Janeiro, belonging to foreigners, they allege a pretense of want of repairs, want of water, or something of that kind, on representing which they obtain leave to sell part of the cargo for repairs, and to remain a certain time, usually 20 days, and then by making presents to the officers they are not prevented from selling the whole, but without those presents they would probably be informed against. Such trade is a prohibited trade, but it is frequently done without a bribe."

From this process, which is confirmed by historical testimony, it is apparent that the Portuguese governors have no authority to license the trade. The same thing is equally clear from the most ancient of these laws.

The principles of the Spanish and Portuguese governments have always, from the earliest periods of their colonial establishments, been founded on this total exclusion of strangers. In the autumn of the year 1604, a treaty of peace was concluded between Philip III. of Spain, and James I. of England. These two nations had, before that time, been for many years at war, and just then their political interests attracted them towards a close alliance together. In the negotiations for the peace this jealousy of the Spaniards against any commercial intercourse between foreigners and their colonies formed one of the points upon which the greatest difficulties occurred. Spain insisted, not only that British subjects should be excluded from all trade to the Indies, but that James should expressly prohibit them from engaging in such trade by his royal proclamation. This the British government peremptorily refused. The parties were for some time on the point of breaking off at this very knot; and they finally could meet on no other terms than those of total silence on the subject. Spain, therefore, as a substitute for negotiation, immediately afterwards issued this decree, which has never since been repealed; and when Portugal, some forty years afterwards, asserted and maintained her independence, she adopted, and has ever since practiced on the same law. But in times when the mother country has been at war, and unable to superintend, with the usual keen-

215*] ness of observation, *the conduct of the colonial governors; when she is unable, from the obstructions in her navigation, to furnish the colonies with the supplies they are accustomed to receive from her in peaceable times; when the demand for these supplies swells the prices of articles to exorbitant rates, and the governors are at once assailed by the impulse of opportunity, of necessity, and of temptation, they have always occassionally yielded to the force of those inducements, and in various modes have sacrificed the severity of official duty to the sweets of profitable corruption. They shut their eyes and open their palms. Tney connive at the trade, and secure to themselves a large portion of its advantages. But the modes of transacting this business are themselves the most decisive proofs of its illegality. To show this, and as a comment upon the depositions which have been read in this case, I must ask permission to read a short passage from Raynal's Hist. of the Indies, v. 6, p. 326.

"The illicit trade of Jamaica was carried on in a very simple manner. An English vessel pretended to be in want of water, wood or provisions; that her mast was broken, or that she had sprung a leak, which could not be discovered or stopped without unloading. The governor permitted the ship to come into the harbor to refit. But for form's sake, and to exculpate himself to his court, he ordered a seal to be affixed to the door of the warehouse where the goods were deposited; while another door was left unsealed, through which the merchandise that was exchanged in this trade was carried in and out by stealth. When the whole transaction was ended, the stranger, who was always in want of money, requested that he might be permitted to sell as much as would pay his charges, and it would have been too cruel to refuse this permission. It was necessary that the governor, or his agents, might safely dispose in public of what they had previously bought in secret; as it would always be taken for granted that what they sold could be no other than the goods that were allowed to be bought.

"In this manner were the greatest cargoes disposed of."

Thus we see that the modes of procedure in these cases are uniform, and hence we may duly estimate the real secret both of Mr. Church's and Captain Barker's want of *water [*216 and of wood. The fuel, of which they stood in need, was the produce, not of the forests, but of the mines. The thirst they suffered was the thirst of gold; and as the clown in the play says that Carolus must be the Latin for one and twenty shillings, so here, as from time immemorial, want of wood and water, on the coast of Brazil, is the Portuguese for want of money.

The fact, therefore, that foreigners do sometimes trade in Brazil, can be of little avail to the plaintiff's cause. Truly they do trade; at great hazard, and sometimes with great success. But as Mr. Church took the chance of this success upon himself, so he must be content to bear the consequences of its hazards, it being expressly so stipulated in the contract with the underwriters.

His counsel, however, has endeavored to assist him with another distinction between trade and an attempt to trade. "There is, "says he, "no exception in the policies against an attempt to trade;" now here was no actual trading; for

the seizure and confiscation took place before that could be accomplished.

If this be a solid distinction, and can bear at all upon this cause, it is very certain that the words of the exceptions in both the policies were very insignificant and immaterial, both to Mr. Church and to the underwriters. If the perils which they so cautiously excluded from the policy were only such as could arise from actual trading, after bargain and sale of the cargo, the exceptions themselves were not worth the ink with which they were written. The only risk of the trade, the only peril of seizure for the trade, to which Mr. Church could possibly be exposed, was before he could effect his sales. Could he once have got over the danger of going to the port, and of landing his goods, there was no danger of any subsequent seizure for illicit trade. To say, therefore, that an attempt to trade is not within the exceptions, is to say that the exceptions meant nothing at all; that they were precautions against misfortunes which could never happen; anxious guards against impossible contingencies; it is to remove the railing of security from the borders of the precipice which needs it, to the middle of a plain where it can have no use. Strange indeed must be the construction which supposes parties so keen to 217*] penetrate, and *fence themselves against a peril which could not befall, and so blind to the foresight of the very thing that did happen, and was most likely to happen. It is the attempt to trade which constitutes the offense punishable with seizure and confiscation. When the trade is once effected, the danger is removed; the governor's connivance is secured; the laws are soundly slumbering under the specific opiate of corruption, and the governor, instead of seizing the property, is satisfied with partaking of its proceeds.

It is, then, manifest that the voyage itself, especially when accompanied with the actual landing of persons from the vessel, constitutes the illicit trade. So it is there understood, and so it is understood by the trade laws of our own, and of all other countries. The gentleman has taken the definition of smuggling from the English law books, and has argued as if all illicit trade were synonymous with it. Smuggling is indeed said to be the landing or running of goods contrary to law; but in the British revenue laws, and our own, there are many acts of illicit trade which subject to seizure and confiscation without the landing of the goods. Laws U. S. vol. 4, p. 425, § 84, and p. 439, § 103.

The gentleman to illustrate his distinction between an attempt to trade, and actual trade, compared it to the case of deviation, and has read an authority, Park, 359, 361, ( ) to show that an intended deviation, never carried into effect, does not vacate a policy, though an actual deviation does. But deviation consists of a single fact, and the intent can never be taken for the thing. Trading consists of a great variety of acts, each of which constitutes part of the thing. Navigation is trade; fishery is trade; bargain and sale of goods is trade, and the attempt to accomplish this, in the revenue and colonial laws of all countries, is equivalent to the last act of bargain and sale.

The intent to deviate is so totally distinct from its accomplishment, that there can be no such thing as an attempt at deviation. As to trade, carrying goods from one place to another is as much an act of trade as selling the goods carried. We say of a ship that she is a London or an Indian trader. An important branch of our business is the carrying trade. The word itself, like many others, *has [*218 various meanings, and must be understood in the sense dictated by the subject matter to which it relates. Thus, by the Portuguese laws, going to Brazil for the purpose of trade, is itself illicit trade; as by our collection laws, a false entry of goods for the benefit of a drawback, or an importation of beer or spirits in casks or vessels different from those prescribed by law, would be acts of illicit trade in our own country.

The second ground, upon which the gentleman alleges that the loss was within the policy is, that this was not a legal seizure for illicit trade; but a mere marine trespass; a violent, outrageous trespass committed by the governor. This, he says, appears, 1. From the testimony; and, 2. Upon the face of the sentence.

If the meaning of the exceptions be such as I have contended, and as their express words import, this question might fairly be laid out of the case. If the exceptions were meant against seizure, and the risk of illicit trade, the only fact the underwriters can be required to establish is, that the property was seized for illicit trade. Whether the seizure was legal or not, is not for them to prove, as Mr. Church reserved that peril for himself. Let us, however, examine whether, either from the testimony or from the sentence, it was so outrageous a proceeding on the part of the governor of Para. That it was, on the contrary, conformable both to the law of nations and to the Portugese laws, will, I think, not be very difficult to prove.

It is said that the testimony proves that the vessel was at anchor five leagues from the shore. That by the law of nations, cannon shot is the boundary of territorial jurisdiction. And, therefore, that the governor of Para had no authority to seize and condemn the vessel and cargo.

First, as to the fact. It will be found upon examining and comparing the depositions, that they were manifestly drawn up with a view to taking this ground. The distance and the bearings from Cape Baxos, the extreme south and east point of land at which the Bay of Para pours into the Atlantic, is laid down in all the depositions with most minute attention, and three depositions repeat *not only the [*219 distance at which the vessels lay from that Cape, but also the exact distance northward of it by a meridian line drawn due east and west. Captain Shaler, however, only undertakes to say the distance from Cape Baxos was four or five leagues, and he candidly confesses that, at the time, both he and Captain Barker did call the place where they were anchored the Bay of Para. Now it is very apparent from their geographical bearing, so precisely laid down, which was west, and by north, about four or five leagues distant, and only two miles north, that they called it by its right name, or that they were at least within a bay.

Thus, then, stands the fact. They were about four or five leagues from Cape Baxos, and within the bay.

Secondly, as to the law. The gentleman read a passage from Vattel, to show that cannon shot from the coast is by the law of nations the utmost bound of territorial jurisdiction. B. 1, s. 289.

This passage is evidently restricted to the extent to which the rights of a neutral territory extend in time of war. The rule is apparently laid down for the sake of the inference from it, that a belligerent vessel cannot be taken under the cannon of a neutral fortress.

It is a very indefinite rule indeed, even for the purpose to which it extends, for it makes the extent of a nation's territory depend upon the weight of metal, or projectile force of her cannon. It is a right which must resolve itself into power; and comes to this, that territory extends as far as it can be made to be respected.

But this principle does not apply to the right of a nation to cause her revenue and colonial laws to be respected. Here all nations do assume at least a greater extent than cannon shot; and other passages from Vattel show the distinctions which are acknowledged on this point. B. 1, s. 287, 288. It will also be remarked, that the territorial rights of a nation are extended in the utmost latitude to bays. Thus, then, Mr. Church's vessel was completely within the territorial jurisdiction of Brazil.

But the gentleman read an authority from 4 220*] Bac. Abr. *543, upon smuggling. "The British revenue laws," says he, "go as far as the law of nations will permit, and they extend the right of boarding smugglers only to two leagues."

Instead of appealing to Bacon's Abridgment, and British laws, I prefer looking into our own statute book, and take there the measure which our own government has asserted for the extent of our jurisdiction. Laws U. S. vol. 4, p. 320, s. 25, 26, 27, and p. 437, s. 99. Here we see the principles are assumed of exercising this jurisdiction four leagues from the coast, and at indefinite distances within bays. All this is perfectly conformable to the law of nations. But it proves that the Aurora, when at anchor within the Bay of Para, and four or five leagues from Cape Baxos, was completely within the territorial jurisdiction of the governor of Para.

I have here said nothing of Mr. Church's going on shore for purposes of trade, nor of the imprudent conduct of the people with whom he was associated, which probably occasioned the exercise of the governor's authority.

Either of these facts, however, would have warranted the governor in seizing the vessels, even if they had not been within his territorial jurisdiction. Mr. Church's going on shore was, under these laws, an act of hostility, which undoubtedly gave the governor a right to seize the vessel in which he came, as well as his person. But a much more offensive act of hostility was committed by the vessel in company with which Mr. Church's vessel was. For it appears from the testimony that they had forced a Portuguese schooner, in the bay, to board them, by firing two guns successively to bring her to; and had detained the master of that schooner on board their own vessel, because they wanted a pilot. The people in the Portuguese schooner were excessively alarmed; nor is it surprising they should be. They immediately went into port, and doubtless complained of the usage they had received. Now I ask, what sort of laws they would be which, under such circumstances, should deny to the government of a country, the right to touch a vessel thus conducting, because she is anchored *four or five leagues dis- [*221 tant from the shore? I cannot dwell upon this argument. The governor of Para knew of no such laws. The next day he sent three armed gun-boats, which took possession of both the vessels. And far from seeing anything outrageous in this procedure, I think the governor would have been guilty of a high breach of duty had he done otherwise.

But Mr. Church really wanted water, and had a right to go on shore to procure it. After the deposition of Van Voorhies, with the commentary of Raynal, it is scarcely possible to hear this allegation without a smile. It is, however, very conclusively answered by the governor's sentence, and I shall notice it in examining the objections to that. The court will need no argument to show that if Mr. Church wanted water, it was his own fault, and in consequence of his own purpose. But further, the testimony is expressed that he went for trade as well as for water, and this alone made him liable to the loss of his vessel and cargo.

But the testimony shows the seizure was on account of their being French spies.

When these vessels and their force was known, there could be very little occasion to fear them as enemies. But I have no doubt questions of the kind were put to the witnesses as they state in their depositions; and the reason for those questions is explained by that imprudent firing and forcing of the Portuguese schooner to board them, which I have before noticed. It was very natural that the people of the Portuguese schooner should be alarmed; and, on going ashore, that they should communicate their alarms, which would of course be immediately spread with exaggeration. Such acts of direct and violent hostility within the bay, might, and in all probability would, be imputed to French cruisers, and not to American traders; to a nation with which Portugal was at war, and not to a people with whom she was at peace. Hence, suspicions probably at first existed which led to the examination of the witnesses on those questions. But when the truth was discovered, the governor gives the real reasons for his decision.

*Thus much, to justify the governor's [*222 sentence, from the testimony; upon which I shall conclude with one more observation. It is extremely probable that this firing of guns, and the violence done to a Portuguese schooner, was the foundation of all the severity used towards Mr. Church, his companions and their property. When he landed in the evening, most probably the people of the Portuguese schooner had got in before him. They had doubtless entered their complaint, and represented the detention of their captain on board the American vessel. The offense was irritating to the highest degree. It must, in any civilized country, have alarmed the sympathies, and roused the resentments, of the people. It was one of those cases which call in a voice of thunder upon the ruling power of a country to exercise, with firmness and rigor, all its force for the protection of the laws, and the personal

security of the subject. Let us, but for a moment, suppose one of our own coasting vessels to go into a harbor of Chesapeake or Delaware bay with intelligence that she had been forcibly brought to, and her master taken from her, by a vessel at anchor within four or five leagues of the shore. Is there a governor of one of these states, who, upon such a representation made to him, would not feel it his duty to use the strongest arm of the law to protect his fellow citizens, and to punish the outrage? Surely not. He would immediately send an armed force and take possession of the vessel; and if upon the examination it should appear that the vessel itself came for the purpose of prohibited trade, in the name of common sense, and common justice, what indulgence could the supercargo or crew of such a vessel expect at the hands of the public officers of the country? If

> In the corrupted currents of this world
> Offense's gilded hand can shove by justice,

she must, in truth, gild her hand, and not arm it with steel. Had the governor of Para been ever so much disposed to grant Mr. Church the permission to trade, he could not have indulged his inclination after what had taken place.

The sentence itself seems also to carry its 223*] own justification *with it. The order and sentence condemn the property on account of their having put into a port of the establishment; and of their having incurred the transgression of the decree of the 18th March, 1605.

When we apply the facts in evidence to the law of 18th March, 1605, we find that Mr. Church and his property had actually incurred these penalties. They certainly had put into a port of Brazil; and for trading purposes. They had even traded at Rio Janeiro; and although that was to a small amount, and with permission, the governor of Para, comparing their traffic there under pretense of distress with their conduct afterwards in coming within his own province, might justly recur to that former act as connected with the present one in constituting the offense against the law.

But the sentence goes further. It states the reasons upon which it is founded. It recites the allegations of the captain in his defense, and assigns the reasons of the court for disbelieving them. It notices in a special manner the pretense of wanting water, and very conclusively disproves it.

First. Because they were only 34 days from Rio Janeiro; and had suffered no want of water, in a voyage of double that time from New York to that place. The reason is certainly logical in substance if not in form. If they were supplied with water for more than 60 days from New York, why were they not supplied for an equal length of time from Rio Janeiro? No accident being even pretended for the failure of their supply.

Secondly. Because they had neglected to supply themselves, as they might have done, at various places along the coast.

Thirdly. Because they had, at their first landing, alleged a wish to traffic and not to obtain water.

Fourthly. Because they had alleged that the vessel had sprung a leak, which, upon regular examination of the ship, had proved not to be the case.

*Fifthly. Because they were steering [*224 their course wide from the pretended destination of their voyage, and had neglected to sail for the trade winds, which they would have wanted for that destination.

Sixthly. Because they must be considered as accessory to the hostile acts of the vessel with which they were in company; against which vessel the proofs were decisive. And,

Seventhly. Because these false allegations were themselves a proof that the person who made them was not ignorant of the laws he had violated.

Far from considering this sentence, therefore, as an outrageous act, I cannot avoid expressing the opinion, that it indicates a sound judgment, a sincere respect for the rights of humanity and of innocence, and a punctilious adherence to the law of nations, and the duties of hospitality. Certain it is, that the governor's reasoning led him to a conclusion which was just in fact; for Captain Shaler tells us that on his examination he denied that trade was intended, and he also tells us that trade was intended. The governor, therefore, had not learnt the truth from him; but he had discovered it by just deductions from fair premises, though in direct opposition to Shaler's declaration.

The regard for the rights of humanity and the duties of hospitality is apparent from the anxious care with which the governor details his reasons for believing that the want of water was falsely alleged; mere pretense; mere affectation; for this solicitude to disprove the fact, is the strongest implication that had he believed the want of water real, and unintentional, he would not have seized the vessel. The variance between the professed destination of the vessel and the course of her navigation, would be strong presumptive proof in any judicial court. The company kept by the two vessels together, and the landing of the two parties from them in the same boat, and at one and the same time, would, upon the principles of the common law itself, have made each party a principal to the hostile, and illegal acts of the other. And what reasoning can be better founded *than that the allegation of falsehood [*225 proves the knowledge, the consciousness of illegal conduct in the person guilty of it. The order of seizure, therefore, contains a charge of unlawful acts, knowing them to be unlawful, and even in our own country, where the freedom of our citizens requires that every accusation should be direct, precise and pointed, I know of no one essential ingredient of indictment which is not contained in this order of seizure by the governor of Para. The sentence of condemnation is founded upon it, and adopts its conclusions. It has, therefore, all the material characteristics of a legal condemnation for illicit trade; and must be a decisive bar against Mr. Church's claim of indemnity upon these policies.

I have now gone through the examination of the grounds upon which the exceptions of the plaintiff against the judgment of the circuit court were attempted to be supported by his counsel. It has been my endeavor to show that the evidence was properly admitted, and that its operation was justly held conclusive against his demand in this action. I shall not detain the court with any further argument.

but leave the remainder of my client's defense to the management of abler hands.

Mason, on the same side.

It is objected that this is the sentence of the governor, and it does not appear that he had admiralty jurisdiction. But the record produced does not state the condemnation of the vessel to have been made by the governor, but by a court. The governor only ordered the vessel to be seized, the captain and crew imprisoned, and their papers to be sent to the house of justice. But the condemnation begins with these words: "It is hereby determined by the court," &c., and goes on, "Therefore they declare him to have incurred," &c.

It is admitted that the trade is illegal. A permission obtained by bribery and corruption cannot make it lawful,

But it is said that two things must concur to bring the case within the exception to the policy; an act of trading, and a seizure for that cause.

226*] *Why should the underwriters insure against the risk of attempting to trade, and yet refuse to insure against a seizure for actual trade, when the whole risk of the insured was in the attempt? For after the water and the wood are gone, and the vessel, in due form, sprung a leak; when the goods are landed, and one of the doors of the warehouse sealed, and the other left open, all risk is past; for although the trade does not become lawful, yet a security is gained against prosecution.

It is objected that the Portuguese had no right, by the law of nations, to legislate respecting vessels in the situation in which this vessel was seized.

But every nation has a right to appropriate to her own use a portion of the sea about her shores; and to legislate respecting vessels coming within that line. A vessel, coming within the line, contrary to the municipal laws of the country, may lawfully be seized. Vattel, b. 1, s. 287.

The insurers did not take the risk of illicit trade; that is, of the unlawfulness of the trade. The word trade cannot be confined to the act of landing, or of selling the goods, but must mean the general course of the trade. And if any risk attended the attempt to land, or sell the goods, it was certainly one of the risks of the trade, and clearly within the letter of the exception. But if the evidence respecting the laws of Portugal, and the sentence, ought to have been rejected, still enough remains to show that the loss is within the exception. For it is admitted that the trade which the voyage was intended to effect, was illicit; the testimony shows that the vessel was seized by the Portuguese, and the jury had a right to infer that the seizure was on account of such illicit trade.

Martin, in reply, made two points.

1st. That the evidence was not admissible.

2d. That if admissible, it did not warrant the instruction given by the judge to the jury.

1st. As to the admissibility of the evidence.

227*] *Foreign laws must be proved as private acts of parliament. Public laws are permitted to be read from the statute book, not because that is evidence, for no evidence is necessary, as the judges are presumed to know the law, but the statute book is permitted to be read, to refresh their memory. Our courts are not bound to notice the laws of Portugal; they must, therefore, be proved by evidence. And in this, as in every other case, the best evidence which the nature of the case will admit, must be produced; that is, the evidence produced must be such as does not show better evidence in the power of the party producing it.

The customs and usages of a foreign country may be proved by testimony of persons acquainted with them, by a public history, or by cases decided. But an edict, registered in any particular office must be proved by a copy, authenticated in one of three modes.

1st. By an exemplification under the national seal; and this is admitted as evidence, because one nation is presumed to know the public seal of another. Peake's L. of Ev. 48.

2d. Under the seal of the court, which seal must be proved if it be of a municipal court, or

3d. By a sworn copy collated by a witness.

An exception has been allowed, as to the seal of courts of admiralty, in cases under the law of nations, because they are courts of the whole civilized world, and every person interested is a party. 1 Rob. 296, *The Maria.*

A copy certified by a person authorized *ad hoc*, is good in his own, but not in a foreign country, without evidence of his being such an officer.

Why is not a copy of the law produced, certified under the great seal of Portugal? In excuse for not producing such a copy, they ought at least to show that they have demanded it, and that it has been refused.

They might have applied to the officer who kept the *original, for a certified copy. [*228 If they have done so, and have been refused, where is their evidence of that fact?

They might have got a witness to compare a copy with the original, and proved it.

The laws themselves, if authentic, show that there is a place where they are registered, and where the defendant might have applied.

The certificate of the consul is no authentication. He was not an officer authorized by the laws of this country to certify that the magistrate of the foreign country, before whom an oath has been taken, was a magistrate authorized to administer such an oath. He was not authorized *ad hoc;* and his certificate is not better than that of any other person. England, a great commercial nation, has many consuls in foreign countries, yet there is no case decided in England, in which the certificate of one of her consuls has been held to be evidence in the courts of common law.

As to the case of the notarial certificate, cited from 12 Viner, a notary public is an officer of the law of nations. In the case cited he was an officer of Holland, not of England; and the reason why the court allowed his certificate to be evidence, seems to have been, that the opposite party had also taken a like copy from the same notary.

The common mode of obtaining evidence was open for the defendant, and he ought to have availed himself of it, by taking a commission to Portugal to examine witnesses there.

The case of *Bingham v. Cabot*, from 3 Dallas, Cranch 2,

19, is not in point. The question was not made as to the validity of the certificate of the register of the court of admiralty, respecting the order given by the Marquis de Bouille, nor was the decision of the court given upon that point.

There is no proof that the law of 1605 was 229*] ever *adopted by Portugal; but if it was, yet that is not the law upon which the governor proceeded, for he himself says he proceeded upon the law of 15th of October, 1715.

The sentence of the governor was not a sentence of a court of admiralty. It was not conclusive. The decrees of courts of admiralty are only conclusive when deciding upon questions of the law of nations; Peake's L. E. 47. When deciding upon other questions, they are to be considered as mere municipal courts. This was not a question of the law of nations, but of their own municipal law.

Even if it was a court of admiralty, deciding upon a question of the law of nations, no evidence could be admitted of its decree, but a copy under the seal of the court. But the judgment of a municipal court, upon a municipal law, must be proved like any other fact. Even the seal of the court would not be sufficient, without other evidence, that there was such a court, having such a seal.

Another objection to the evidence is, that the proceedings at large ought to have been set forth, not the sentence alone; and even the sentence is not complete, for it refers to other pages of the proceedings which are not produced. Peake's L. E. 26. Loft's Gilbert, 24, 25. Bull. N. P. 228.

It has been said that in this country the rule of evidence ought to be relaxed, on account of the distance from Europe, and the difficulties in procuring testimony.

This might be a good argument before a legislature, but it cannot alter the law in this court.

The rules of evidence already established ought to be strictly guarded. To break in upon them would be to strike out every star and every constellation which can guide us through the tempestuous sea of legal litigation.

There is no evidence that the original proceedings were sent to the secretary of state in 230*] Portugal. There is no *certificate of the clerk of any court. If it is a copy of the original proceedings, the appear to have all taken place on the same day. The judgment is only an interlocutory decree, and is not signed by any body. The officer who certifies that it is a true copy resided at Lisbon, and not at Para. There is no evidence that he was authorized *ad hoc*, and he has affixed only his private seal.

In order to make a legal sentence, there must be legal proceedings, in a legitimate court, armed with competent authority upon the subject matter, and upon the parties concerned. 4 Rob. 55, *The Henrick and Maria.*

The defendant must show the law which gives the court of Para jurisdiction, and that the authority has been pursued.

The authority of the court does not appear; and it is contrary to the natural principles of justice to condemn the vessel without giving the owner an opportunity to be heard. In this case there was no monition issued. No forms were pursued either against the vessel or the owner, and the evidence shows that he had no notice. The sentnce, if it proves any thing, does not show that the condemnation was for illicit trade, or even for an attempt to trade; and it cannot be evidence of any collateral fact.

As to the pretended act of hostility, it was by another person, not the owner or master of his vessel. It was in its nature equivocal, and is explained away by the testimony.

2d. The instruction of the judge to the jury ought not to have gone further than that if they were of opinion that the vessel was seized for illicit trade, the insurers were discharged; but if for any other cause, they were liable.

If any ground of condemnation can be gathered from the sentence, it is that of being an enemy, and not illicit trade. Although the trade is generally prohibited, yet it is a well known fact that foreign ships do trade there, and have done so for a century. It is not illegal to insure smuggling voyages against the risk of seizure by a foreign government. There is no instance of a vessel being seized for going along shore, or into the ports of the colonies of *Spain or Portugal for the purpose of [*231 trading, if they could gain permission, provided they did not actually trade without permission. There must be some act done more than going into port. This must be the construction of the law.

Such is the construction given to the English law which prohibits foreign vessels from going into their ports. They are not liable to seizure unless they go *mala fide*. Reeves' Law of Shipping, 203.

The premium is 20 per cent., which implies extraordinary risks. In the case of *Graves v. The Boston Marine Insurance Company*, now pending in this court, the premium was only 20 per cent., and yet no such exception was made.

The exception is not a warranty. Policies are to be construed in favor of the insured. The exception is the language of the insurers, and to be taken most strongly against them. It means only legal seizures. A warranty against all claims, means all legal claims. The general clause of the policy is against all seizures; the exception, therefore, must mean all legal seizures.

No act of trading is proved. If the intention makes the offense, a Portuguese vessel might have seized the Aurora on the day after her leaving the port of New York, and carried her to Portugal and condemned her. If, then, her sailing with the intention to trade was not an act of illicit trade, something further was necessary to constitute the offense.

The policy does not except the risk of seizure for suspicion of illicit trade. It is a general rule that words are to be construed most strongly against the person using them, and who ought to have explained himself.

If the evidence respecting the laws and the sentence be rejected, the remaining evidence will only show that a seizure was made, but not that it was lawful; and for all unlawful seizures the underwriters are liable. Legal seizures only are excepted. To make it a lawful seizure it must be for some act done; not merely upon suspicion. The underwriters meant that the plaintiff should go and *try to [*232 get permission to trade; but if he attempted to

trade without leave they would not take the risk.

March 5th. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

If, in this case, the court had been of the opinion that the circuit court had erred in its construction of the policies, which constitute the ground of action; that is, if we had conceived that the defense set up would have been insufficient, admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the policies. If the proof is sufficient to show that the loss of the vessel and cargo was occasioned by attempting an illicit trade with the Portuguese; that an offense was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "The insurers are not liable for seizure by the Portuguese for illicit trade."

In the second policy the words are, "The insurers do not take the risk of illicit trade with the Portuguese."

The counsel on both sides insist that these words ought to receive the same construction, and that each exception is substantially the same.

The Court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived for supposing any intention in the contracting parties to vary the risk.

For the plaintiff it is contended, that the terms used require an actual traffic between the 233*] vessel and inhabitants, *and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by common usage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the Crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese." Now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation *after the very act had been [*234 committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. If the danger did not commence till the vessel was in port, or till the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law. But as a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the

high seas for contraband of war is universally 235*] *admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *guarda costas* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at lenght of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. 236*] Indeed, the *right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American government, no such principle as that contended for has a real existence.

Nothing then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the Aurora, by the Portuguese governor, was an act of lawless violence.

The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese," is an exclusion only of that risk, to which such trade is by law exposed, will be readily conceded.

It is unquestionably limited and restrained by the terms "illicit trade." No seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the restriction of foreign commerce with its dependencies, can come within this part of the contract, and every seizure which is justifiable by those laws and regulations must be deemed within it.

To prove that the Aurora and her cargo was sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury.

The edicts of the crown are certified by the American consul at Lisbon to be copies from the original law of the realm, and this certificate is granted under his official seal.

Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice. The principle *that the best testimony [*237 shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony attainable, by the party who offers it, applies to foreign laws as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

In this case the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which to use its own language, the laws of this country attach full faith and credit.

Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated that to require respecting laws or other transactions, in foreign countries that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation would be rejected, unless the fact should appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy. Indeed, in this very case the very testimony offered would contradict such a presumption. The paper offered to the *court [*238 is certified to be a copy compared with the original. It is impossible to suppose that this copy

might not have been authenticated by the oath of the consul as well as by his certificate.

It is asked in what manner this oath should itself have been authenticated, and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken.

The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

The paper offered as a true copy from the original proceedings against the Aurora, is certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the Secretary of State for foreign affairs, and the consul certifies the English copy which accompanies it to be a true translation of the Portuguese original.

Foreign judgments are authenticated.

1. By an exemplification under the great seal.
2. By a copy proved to be a true copy.
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained an admissible substitute for either of them.

If it be true that the decrees of the colonies 239*] are transmitted *to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence of the verity of what was so certified; but the certificate offered to the court is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury.

Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read on the certificate of the consul. Interpreters are always sworn, and the translation of a consul not on oath can have no greater validity than that of any other respectable man.

If the court erred in admitting as testimony papers which ought not to have been received, the judgment is of course to be reversed and a new trial awarded. It is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true in point of fact, the inference is not correctly drawn. There must be a new trial, and at that new trial each party is at liberty to produce new evidence. Of consequence this court can give no instructions respecting that evidence.

The judgment must be reversed with costs, and the cause remanded to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go to the jury, unless they be authenticated according to law.[1]

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*WILLIAM MASON AND OTHERS, [*240
LIBELLANTS,
v.
SHIP BLAIREAU.

One-third part of the gross value of the ship and cargo allowed for salvage, and one-third of the salvage decreed to the owners of the saving ship and cargo.

If one of the salvors embezzles part of the goods saved, he forfeits his right to salvage.

A detention at sea to save a vessel in distress, is such a deviation as discharges the underwriters, and the owner stands his own insurer.

If a vessel in distress is abandoned at sea by the master and all the crew, excepting one man, who is left either by accident or design, he is discharged from his contract as a mariner of that vessel, and entitled to salvage.

If apprentices are salvors, their masters are not entitled to their share of the salvage, but it shall be paid to the apprentices themselves.

The courts of the United States have jurisdiction in cases where all the parties are aliens.

THIS was a libel for salvage, filed in the district court of the United States for Maryland district, by the master, officers, crew, owner, and freighters of the British merchant ship The Firm, against the French ship Le Blaireau.

The facts stated in the proceedings and evidence were as follows:

The ship Le Blaireau, James Anquetil, master, on a voyage from Martinique to Bordeaux, laden with sugar, on the 30th of March, 1803, at 10 o'clock at night, in lat. 35. 46. N. long. 46. west from Paris, was run down by a Spanish 64 gun ship, called the St. Julien, commanded by Francisco Mondragora, which struck the bow of the Blaireau, carried away her bowsprit and cutwater close to the seam of the stem, started three planks of the bends, and all above them, and crushed to pieces the larboard cathead. Before morning there were three and a half feet of water in the hold, and the Spanish commander not being able to wait for an attempt to repair The Blaireau, he took her crew and passengers on board his ship, excepting one man, Thomas Toole, an Irishman, who could not be found, as it was alleged by the officers and crew of The Blaireau in their protest, but who was,

1.—In the argument of this case, a question was suggested by CHASE, *J.*, whether a bill of exceptions would lay to a charge given by the judge to the jury, unless it be upon a point on which the opinion of the court was prayed; and doubted whether it would within the statute of Westminster.

MARSHALL, Ch. *J.*, thought that it would, and observed that in England the correctness of the instruction of the judge to the jury at *nisi prius*, usually came before the court on a motion for a new trial, and if in this country the question could not come up by a bill of exceptions, the party would be without remedy.

NOTE.—*Salvage awards in federal courts*—see note, 30 C. C. A. 280. *Rights of seamen as salvors*, —see note, 64 L. R. A. 193.

as he himself alleged, prevented by force from getting into the first boat, and afterwards refused to go in the second boat, being determined to remain on board The Blaireau. Toole, being thus left alone, cut away, as he alleged in his libel, the anchors, and the bowsprit, (which had been left hanging,) to lighten her bows, put her before the wind, and hoisted a signal of distress. In this situation she was, the next day, found and boarded by the ship Firm, bound on a voyage from Lisbon to Baltimore. The persons on board of The Firm were,

Charles Christie, one of the charterers of the ship.
William Mason, master.
William Stephenson, mate, shipped at 4*l.* sterling per month.

241*] *John Falconer, carpenter, at	£5	5	0
Daniel Ross, boatswain, - - -	2	10	0
George Glass, cook, - - -	2	10	0
Samuel Monk, Martin Burk, John Brown Hall, John Blackford, John Wilson, and Mark Catlin, } mariners, - -	2	0	0
Joachim Daysontas, a boy, - -	1	1	0

John Moat, and } apprentices to the owners of
John M'Mon, } The Firm, and
Negro Tom, a slave of the Rev. Mr. Ireland.

It was admitted that the ship Firm is about the burden of 330 tons, carpenters' measure, but 500 tons can be laden on board of her; that she is of the value of ten thousand dollars, and is owned by John Jackson, of London, but chartered to Charles B. Young and Charles Christie, who had a cargo of salt on board, of the value of 4,000 dollars. The proper complement of men to navigate The Blaireau was at least sixteen hands. She was a faster sailer than The Firm. They laid to together for two or three days during the bringing in The Blaireau, for the purpose of taking out part of her cargo, and rendering assistance from The Firm. The sum of 2,000*l.* sterling was insured upon The Firm to cover her value and freight.

Upon taking possession of The Blaireau she had about four feet of water in her hold, and could not have swam more than twelve hours longer. There was great risk and peril in taking charge of her. She was brought into the Chesapeake bay after a navigation of nearly three thousand miles, by six persons who went on board of her from The Firm, and the man who was found on board. Part of her cargo was taken out to lighten her forward, and put on board The Firm; and part of it shifted aft. The Blaireau was navigated by the people of The Firm without boat or anchors. She was obliged to be pumped in fair weather by all hands every two, three or four hours, half an hour at a time, and in blowing weather every hour, a quarter of an hour at a time. Her bow was secured by 242*] coverings of leather, copper *and sheet lead nailed on, and pitch and turpentine in large quantities poured down hot between the planks and the coverings. The labor of working The Blaireau by the men on board was great and severe, and they had frequently thought of abandoning her, but fortunately persevered. She was a slight built vessel, and constructed without knees, and was very weak. The fore-

stay was gone, and the foremast was secured by passing a large rope through the hawse holes, and securing it to the foremast head. It was the opinion of several experienced sea captains that the bringing in The Blaireau was a service of great risk and peril, and nearly desperate, and such as they would not have undertaken.

The persons who went on board The Blaireau from The Firm were, Charles Christie, supercargo, and one of the charterers of The Firm: William Stevenson, first mate; John Brown Hall, and John Wilson, seamen; John Moat, a boy, and Negro Tom.

Mason, the master, and Stevenson, the mate, were the only persons capable of taking an observation and navigating the vessels, or either of them, into port.

A claim was put in by the French consul in behalf of the owners of The Blaireau. It appeared in evidence that William Mason, the master of The Firm, had embezzled part of the cargo of The Blaireau, to the amount of at least 1,760 dollars and 71 cents.

On the 14th of July, 1803, His Honor, Judge Winchester, made the following decree:

The counsel for the parties respectively intervening in this cause were heard by the court, and their argument, together with all and singular the proceedings and testimony in this cause, were by the court maturely considered:

And it appearing to the court that the circumstances of extreme danger under which the salvage of the ship Blaireau and cargo was effected, require a salvage and compensation as liberal as is consistent with precedents and legal principles; that the danger, labor and service *of the persons actually employed in [*243 navigating and bringing in the said ship, greatly exceeded the danger, labor and service of the persons who remained on board the ship Firm; and that their compensation should exceed at the rate of fifty per cent. the compensation of those who remained on board the ship Firm; that among the persons on board The Blaireau, the station, trust and services of William Stevenson and Charles Christie, entitle them to a compensation exceeding that of seamen, at the rate of 50 per cent., and that the apprentices, cook, and negro slave should not be classed with seamen, nor seamen with the carpenter and second mate, and there not being any general rule by which to settle the proportions of salvage among persons of those different stations, but that the same must depend upon the sound discretion of the court, applied to the circumstances of every particular case; that William Mason, captain of the said ship Firm, having fraudulently embezzled and secreted, with intent to appropriate the same to his own use, lace, and other articles of a large value, which constituted a part of the cargo of the said ship Blaireau, is not entitled to any salvage or other compensation; that in strictness the officers and crew are the only salvors; and the owners of the ship Firm and cargo, as such, can only come in for any share of salvage, upon the consideration of the risk to which their property was exposed; that upon these principles salvage should be paid to and among the persons entitled thereto, at the rate of three fifths of the net proceeds of the sales of the said ship and cargo; and that of this sum one-ninth part of the net

salvage will be a just and liberal compensation to the owners of that ship and her cargo for any hazard to which their property was exposed.

It is, this 14th day of July, 1803, by me, James Winchester, judge of the district court of the United States, for Maryland district, and by the power and authority of this court, ordered, adjudged and decreed, that the net amount of sales of the said ship Blaireau, her tackle, apparel, and furniture and cargo, (after deducting the costs in the cause, and the sum of three hundred and eighty-eight dollars, heretofore decreed by consent to Charles Christie for expenses and disbursements relative to the 244*] said ship Blaireau and cargo,)* amounting, as stated by the clerk of this court, to the sum of sixty thousand two hundred and seventy-two dollars and sixty-eight cents, shall be paid, applied and disposed of, to and among the persons, and in the manner following, to wit:

To the owners of the ship Firm and cargo, the sum of four thousand and eighteen dollars and fourteen and three quarter cents, to be divided between them in the proportions of their respective interests agreeably to the admitted estimation thereof, to wit:

To the owners of the ship Firm, for the value of the said ship and freight on eighteen thousand dollars; and,

To the owners of the cargo of the said ship on four thousand dollars.

To the persons on board the said ship Blaireau, as follows, to wit:

To William Stevenson, the sum of three thousand four hundred and three dollars, and sixty-three and a quarter cents.

To Charles Christie, the sum of three thousand four hundred and three dollars and sixty-three an a quarter cents.

To Brown Hall, John Wilson and Thomas Toole, seamen, each, the sum of two thousand two hundred and sixty-nine dollars and eight and three-quarter cents.

To John Moat, an apprentice boy, the sum of eleven hundred and thirty-four dollars and fifty-four and three-quarter cents.

And that there be retained a like sum of eleven hundred and thirty-four dollars and fifty-four and three quarter cents in this court, to and for the benefit of such person or persons as may hereafter make title to the same as owner or owners of the said Negro Tom.

To the persons on board the said ship Firm, as follows, to wit:

245*] *To John Blackford, second mate, the sum of eighteen hundred and ninety dollars and ninety and three quarter cents.

To John Falconer, carpenter, the sum of eighteen hundred and ninety dollars and ninety and three quarter cents.

To George Glass, the cook, and John M'Mon, an apprentice, each, the sum of seventeen hundred and fifty-six dollars and thirty-six and three-quarter cents.

To Daniel Ross, Samuel Monk, Martin Burk, Mark Catlin, and Joachim Daysontas, (sailors of The Firm,) the sum of fifteen hundred and twelve dollars, and seventy-three cents each.

That no salvage or compensation whatever shall, for the cause above recited, be paid to the said William Mason, but that the libel in this cause filed, so far as it relates to the claim of the said Mason personally and only, shall stand, and the same is hereby dismissed.

And it is by these presents further ordered, adjudged, and decreed, that the residue of the proceeds of the sales aforesaid shall be deposited in the bank of Baltimore, in the name of this court, and to the credit of this cause, to the use and the benefit of such person or persons as may in this court make title thereto, as owner or owners of the said ship Blaireau and cargo, or such person or persons as may be legally authorized by them to receive the same.

(Signed,) JAMES WINCHESTER,
Judge Md. Dist.

From this decree, an appeal to the circuit court was prayed by William Mason, the master of The Firm; by the owner of The Firm; by the claimants of The Blaireau, and by the charterers of The Firm.

Upon the appeal, additional testimony was adduced, in the circuit court, but it does not seem to affect the principles upon which the rates of salvage ought to be awarded.

*On the 27th of December, 1803, the [*246 circuit court, held by His Honor, Judge Chase, decreed as follows:

The court having heard the parties on the appeal in this cause, by their counsel, and fully examined the evidence, exhibits and proofs, and maturely considered the same, do order, adjudge and decree, and it is hereby ordered, adjudged and decreed by the said court, that the decree of the said district court be, and hereby is, in all things affirmed, (and, with respect to the said Mason, with the costs of his appeal,) except only so far as the said decree shall hereinafter, by this decree, be changed or altered.

And it is now further ordered, adjudged and decreed by this court as follows, to wit:

That there be paid to John Jackson, of St. Paul's parish in the county of Middlesex, in the united kingdom of Great Britain and Ireland, (who appears to this court to be the owner of the ship Firm,) the sum of two thousand eight hundred and seventy dollars twelve cents and eight dimes, on the amount of the value of the said ship estimated at the sum of ten thousand dollars.

That there be paid to Charles Bedford Young, and Charles Christie, Jun. (who appear to this court to be the owners of the cargo on board the said ship Firm) the sum of one thousand one hundred and forty-eight dollars and five cents on the amount of the value of the said cargo, estimated at the sum of four thousand dollars.

That there be paid to William Stevenson, the sum of two thousand two hundred and sixty-nine dollars eight cents and nine dimes.

That the salvage money adjudged by the district court, and affirmed by this court, to be paid to John Moat, (who appears to this court to be an apprentice to the above-named John Jackson, owner of the ship Firm,) be paid by the clerk of this court to the said John Moat, or to his proctor or attorney in fact for the use and benefit of the said John Moat; and that the said salvage money be not paid to the said John Jackson, or to his *attorney, or to any other [*247 person or persons whatsoever, who shall claim the said salvage money as owner or master of the said apprentice; and that the said salvage

money remain in court until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be paid to John M'Mon, (who appears to this court to be an apprentice to the above-named John Jackson,) be paid by the clerk of this court to the said John M'Mon, or to his proctor or attorney in fact, for the use and benefit of the said John M'Mon; and that the said salvage money be not paid to the said John Jackson, or to his attorney, or to any other person or persons whatsoever, who shall claim the said salvage money as owner or master of the said apprentice; and that the said salvage money remain in court until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be retained for the owner of Negro Tom, be paid to the Rev. John Ireland, (late of this state, but now of the united kingdom of Great Britain and Ireland,) who appears to this court to be the owner of the said Negro Tom, or to the Rev. Joseph G. I. Bend, and Lewis Atterbury, who appear to this court to be the attorneys in fact of the said John Ireland, and who have expressed in writing to this court, that they, being duly authorized by the said John Ireland, will immediately, on the receipt of the said salvage money, manumit the said Negro Tom, according to the law of the state of Maryland, and will pay the said Negro Tom one-fifth part of the said salvage money, and have consented that the same may be retained by the clerk of this court for the use of the said Negro Tom.

And it is further ordered, adjudged and decreed, that the appellants (except William Mason) pay no costs in this court on the appeal.

(Signed) SAMUEL CHASE.

Upon this judgment separate writs of error were sued out by William Mason, the master, 248*] John Jackson, *the owner, William Stevenson, the mate, Charles Christie, and Charles B. Young, the charterers of The Firm, and by the French claimants of The Blaireau.

William Mason assigned for error, that no part of the salvage was decreed to him for his own use, on account of his merits and services.

John Jackson, the owner of The Firm, assigned for error, that he was not allowed a reasonable proportion of salvage; that the whole sum allowed and decreed to the owner and freighters, ought to have been decreed to him; and that the sums decreed to the two apprentices ought not to have been ordered to be paid to themselves or their proctor only.

William Stevenson, the mate, assigned for error, that the share assigned him was inadequate to his services, merits and situation.

Christie and Young, the freighters of The Firm, alleged that the proportion allowed to the owner and freighters of The Firm was too small in proportion to their risk; and that the proportion awarded the freighters was too small compared with that awarded to the owner.

The case was now argued by Harper, for the owners of The Blaireau, for Christie & Young, and for the apprentices; by Hollingsworth, Attorney of the United States for Maryland district, for the libellants generally; by Martin, Attorney General of Maryland, for Jackson the owner, and Mason the master, of The Firm, and for the owners of The Blaireau; and by S. Chase, Jun. for the owners of The Blaireau. As this was the case of a French ship saved by a British ship and brought into a port of the United States, a preliminary question was suggested by Martin, whether a court of the United States had jurisdiction, and could condemn a part as salvage. He did not mean to urge the point, but he thought it his duty to read some authorities for the consideration of the court. He believed the question had not been finally settled; but his *own opinion was in [*249 favor of the jurisdiction. Sir W. Scott, in the case of *The Two Friends*, 1 Rob. 234, inclined to the same opinion; which seems also to be adopted by Browne, in his View of the Civil and Admiralty Law, vol. 2, p. 278.

To carry the property saved into the ports of the salvor, or of the owner of the property, would, in many cases, be impossible, and in most cases would be attended with great difficulty and inconvenience to the salvors, and would expose the property to risk. There seems to be no good reason why the question of salvage, which is a question of the *jus gentium*, and depending upon general principles, should not be decided by the courts of admiralty of any civilized nation.

In reply to the doubt suggested respecting the jurisdiction, it was said by Hollingsworth, that an admiralty court may have jurisdiction by submission; where it may be withdrawn by protest. Here all the parties have submitted themselves to the jurisdiction.

The claimants of The Blaireau assigned for 1st. error. That the whole amount of the salvage was more than in equity and good conscience the salvors were entitled to, and that it ought not to have exceeded one-third of the value of the ship and cargo.

2d. That Toole having been shipped as a mariner on board The Blaireau, at certain wages, was not entitled to salvage.

3d. That William Stevenson ought not to be allowed any part of the salvage money, because he had embezzled a part of the property on board of The Blaireau, and had also concealed a part, with intent to convert it to his own use.

I. For the claimants of The Blaireau, it was urged, first, That three fifths of the value of the ship and cargo was too great a proportion for salvage.

Secondly. That Mason's share of the salvage, and the reduction made by the circuit court in the amount of *Stevenson's share, [*250 ought to go to the use of the claimants, and not to the benefit of the other salvors.

Thirdly. That Toole ought not to have salvage.

Fourthly. That the amount of embezzlement, over and above what was proved upon Mason, should be deducted out of the general sum allowed for salvage.

1st. That the salvage is too high, appears, 1st, from general usage; 2d, from the principles of reciprocity between the courts of this country and those of Great Britain; 3d, from analogy to cases of recapture.

1. As to general usage.

Vessels derelict are droits of the admiralty, and in these cases the crown is liberal in its reward of the salvors. But where a claim intervenes, it becomes a question of *quantum meruit*.

A vessel totally abandoned is in much more danger than when even one man only is left on board. He may hoist a signal of distress, he may cut away the anchors, or he may even stop a leak. Beawe's Lex Mer. 158. This, then, is a case less meritorious than that of derelict. One is a case of liberality, the other of justice. Yet in the case of *The Aquila*, a derelict, 1 Rob. 38, 39, only two-fifths were allowed to the salvors. And in 1 Rob. 263, in the note, Sir William Scott declares the liberal principles by which he is governed in cases of salvage. If then, Sir Wm. Scott, acting upon these principles, allowed but two-fifths in a case of absolute derelict, in a country where it is the national policy to encourage adventurous seamen, and where the very existence of the nation depends upon its maritime spirit, surely three-fifths is too much to be allowed in a case of simple salvage.

The case of *The Beaver*, in 3 Rob. 237, was more desperate, and the service more hazardous and meritorious than the present, and yet only one-fourth was allowed for salvage.

The lives of those on board of The Firm were in very little danger. They were a little 251*] to the S. W. of the *Azores; and near the trade winds. They might have gone to a French island, or to the Azores, without the least danger. What hazard was there to those on board The Blaireau? They were nineteen days in company with The Firm. A fact which shows what idea they had of their danger, is, that The Blaireau, being the fastest sailer, parted from The Firm for several days, when they might have shortened sail, and kept in her company.

Of late the English courts of admiralty have inclined to diminish the rate of salvage. Formerly one-half was allowed in England, in cases of derelict. In the time of Colbert, it was fixed by France at one-third. But in England it has since varied, and now depends upon the particular circumstances of the case; but in no case has so high a salvage as three fifths been allowed. In the case of *The William Beckford*, 3 Rob. 286, one-thirteenth was allowed; and in the case of *The Franklin*, 4 Rob. 147, only one-sixteenth. In cases of recapture it has been fixed by statute at one-sixth, and one-twelfth. In the case of *The Mary Ford*, 3 Dall. 188, which was a derelict, only one-third was given for salvage.

2d. The principles of reciprocity will not warrant so large a proportion as three-fifths.

The salvors are British subjects; and the courts of England adopt the rule of reciprocity. If no rule has been established by the nation of the salvor, they make a rule.

What is the rule in the English courts? Two-fifths is the greatest rate of salvage allowed by them during the last century, and if the salvors had carried The Blaireau into their own country, this is the utmost they would have received. If our citizens should have a case of salvage in their courts, they will not be allowed more than two-fifths. Indeed, there is only one case where so much as one-third has been allowed, and that was a case of derelict.

3d. The principles of analogy to cases of recapture, will not justify so large a proportion for salvage as has been decreed by the district court. 252*] *By the Laws of the United States, vol. 5, p. 39, 40, one-eighth only is allowed for recaptures made by a public vessel of the United States, and one-sixth if made by a private vessel. The same proportion is also adopted by England. Abbott, 258.

2d point. Mason's share of the salvage, and the reduction made by the circuit court in Stevenson's share, ought to go to the benefit of the owners of The Blaireau. The crime of one of the salvors ought not to enure to the benefit of the others.

3d point. Toole is not entitled to salvage.

When seamen save their own vessel, by recapture, or otherwise, they cannot claim salvage, for the same reason that their wages are refused in case of wreck or capture. To reward them for saving their vessel from peril would be a temptation to put her in danger.

If Toole had voluntarily remained on board for the purpose of endeavoring to save the vessel, after she had been abandoned by all the rest of the crew, the case might be different. But his remaining on board was an involuntary act, and what he did was with the sole view of saving his own life. When The Firm approached him, he begged to be taken off from the wreck. He did only his duty in continuing on board after there was a chance of saving her. His services were not meritorious, inasmuch as he was bound to do every thing in his power to save the vessel, and yet he is put upon a par with the seamen of The Firm, who were volunteers, and under no obligation to do any thing towards saving The Blaireau.

While a sailor remains on board, contending with no other enemies than the elements, he is entitled only to his wages. No case can be produced in which he has been considered as entitled to salvage. Salvage does not consist in being saved, but in saving. Beawe's Lex Mer. 157, 158.

The reason why a seaman shall lose his wages if the ship be lost is, that he may be induced to use his utmost *exertions to save it; [*253 and this shows that he is obliged to hazard his life to the utmost for that purpose. And even if he actually loses his life, and the ship is also lost or captured, his representatives cannot recover his wages. It is upon the same principle that a common carrier is answerable for the whole value of the goods if they are taken from him by superior force of robbers, and even if he should lose his life in their defense.

When did Toole lose his character of a mariner of that vessel? It is answered, when the captain and the rest of the crew deserted her. But they could not discharge him from his contract with the owners. They lose their wages, but Toole does not. The danger may possibly justify them in quitting the vessel; but because he was left alone, he did not cease to be a mariner of the ship. Suppose the rest of the crew had died, or were so sick as to disable them, and Toole had made a signal of distress, by means of which the ship should be saved; would that have entitled him to salvage? The real truth of the case is, that Toole was saved, not a salvor.

The cases cited from 19 Viner, 275. 1 Ld. Raym. 393, and 2 Salk. 654, to prove that mariners are entitled to salvage by saving their own ship, do not warrant the conclusion attempted to be drawn from them. The only

exception to the general rule is the case of rescue. In that case, and that only, it is admitted that the mariners are entitled to salvage.

4th. point. By comparing the original bill of lading of The Blaireau with the account of sales, it appeared that there was a deficiency over and above what was chargeable to the embezzlement of Mason and, it was contended, that as this could not be fixed upon any one of the salvors, it ought to be a charge against them all. But it did not appear whether a part had been taken on board of the Spanish ship.

In answer to these arguments in behalf of the owners of The Blaireau, it was said by the counsel for the salvors.

254*] *1. As to the general rate of salvage; that no fixed rate of salvage has yet been adopted in cases of this kind, but that it depends upon the sound discretion of the court applied to the circumstances of each particular case. 3 Dall. 190, 191, *M'Donough v. The Mary Ford*, 3 Rob. 249. "It is a claim upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles." 1 Rob. 234, 235, *The Two Friends*. And in the case of *The Sarah*, 1 Rob. 263, Sir W. Scott thus expresses his opinion. "I do not think that the exact service performed is the only proper test for the *quantum* of reward in these cases. The general interest and security of navigation is a point to which the court will also look in fixing the reward. It is for the general interest of commerce that a considerable reward should be held up; and as ships are made to pay largely for light-houses, even where no immediate use is derived from them, from the general convenience that there should be permanent buildings of that sort provided for all occasions, although this or that ship may derive no benefit from them on this or that particular occasion; so on the same principle it is expedient, for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and, therefore, when they are to be paid at all, they should be paid liberally. It is on these general considerations, and not merely to mete out the payment for the exact service performed in the particular instance, that the rewards should be apportioned in these cases; and it is in this view that I shall always consider them."

It does not depend upon principles of recapture, or of reciprocity; nor do the prize acts constitute any rule of salvage in cases not within those acts. 3 Rob. 249.

There can be no general rate of salvage stated when it is acknowledged that the only rule is a sound discretion. A rule which brings all cases to one dead level, can leave no discretion. How can we make reciprocity the rule, when every case must depend on its own circumstances? How can we compare dissimilar cases?

255*] *In this case The Blaireau was in imminent danger. It is a fact admitted that she could not have swam twelve hours longer. She must have been totally lost. She was derelict, abandoned by the captain and all the crew, except Toole, whom they did not know they had left in the vessel. As they could not find him they supposed he must have fallen overboard. The ordinance of Louis XIV. allows one-third in cases of wreck. But there can be no wreck, according to that ordinance, if any claimant appears. So that, in cases like the present, neither France nor England has any fixed rate of salvage. 1 Rob. 235, *The Two Friends*.

None of the cases cited equals the merit of this. Here was a navigation of 3,000 miles with death constantly staring them in the face; and a great part of the time almost constantly at the pumps.

In the cases of *The Aquila*, and of *The Mary Ford*, the two-fifths of the one and the one-third of the other, were of the gross value; but in the present case, the three-fifths awarded, are of the net amount of sales.

It is denied that the rates of salvage have of late been diminished. In the case of the *Dutch East Indiaman* at Dunkirk, mentioned in Beawe's Lex Mer. 158, one-half was given for salvage.

As to Toole, he was abandoned by his commander, and was therefore discharged from the service; he was no longer to be considered as a mariner belonging to the ship.

No general deduction can be made from the whole amount of salvage for any defalcation, if it be not fixed upon any one of the salvors; and in this case the deficiency is so small that it might have been taken on board the Spanish ship.

The next writ of error was by the owner and freighters of The Firm, who contended that one-ninth part of the whole salvage money was too small a share, in proportion to the risk of the ship, cargo and freight, and the service rendered by the ship.

*In the case of *The Mary Ford*, 3 [*256 Dall. 191, two -thirds of the whole salvage were given to the owners of the ship George; and in the case of the ship *William Beckford*, 3 Rob. 186, 289, fifty pounds were given to the owners of the boats.

In the case of *The Haase*, 1 Rob. 240, one-third of the salvage was given to the owner. In 1 Rob. 255, *The Amor Parentum*, something less than one-fifth of the salvage was given to the owner of the boat; and in the case of *The San Bernardo*, 1 Rob. 151, one-half was given to the owner.

In France the rule is two-thirds to the owners, and one-third to the officers and crew; the same proportion which was awarded in the case of *The Mary Ford*. In 2 Valin, 392, art. 33, of the French ordinances, the words are, "S'il n'y aucum contrat de societe, *les deux tiers* appartiendront a ceux qui auront fourni le vaisseau avec les munitions et vituailles, et l'autre aux officiers, matelots, et soldats;" and in his comments upon this article, in page 395, he says the same rule is also laid down as to private unarmed vessels.

In behalf of the freighters of The Firm, it was urged that their proportion of the sum to be allowed to the owner and freighters ought to be increased, because they became liable to the owner for the freight, even if the ship Firm had been lost. The general principle is, that the freight does not become payable if the ship is lost, unless there has been a deviation by the freighters. But if there has been a

deviation by the freighters for their benefit then they become liable for the freight, whether the ship arrives or not. There is the same law upon charter parties as upon policies of insurance. In this case the stopping on the ocean two days for the purpose of saving The Blaireau was a deviation, and this was done with the assent of the freighters by Charles Christie, who was one of them, whereby they became the insurers of the freight to Jackson, the owner of The Firm. After the deviation the whole risk of the freight, to the amount of 8,000 dollars, fell upon Christie & Young, and they ought to have salvage in proportion to 257*] *that risk; whereas it has been allowed them only upon the amount of the cargo valued at 4,000 dollars.

In answer to these arguments, it was urged by the counsel for Jackson, the owner of The Firm, that he clearly risked his ship; for the underwriters were discharged by three circumstances: 1st. By the stopping,[1] which was a deviation for the benefit of the owners. 2d. By taking in goods from on board The Blaireau, and thereby overloading The Firm; and, 3d. By diminishing the number of her crew; both of which last circumstances increased the risk, and violated the warranty of the policy.

But Jackson, the owner, not only risked his ship, but his freight also; for if the vessel had been lost he could not have recovered it of Christie & Young, the freighters. The assent of Christie could not bind his partner. It would have been an act in violation of the partnership. Nor could a parol agreement alter the charter party, or dissolve the owner from the obligation of his contract.

Jackson even run the risk of the cargo as well as of the vessel and freight, and therefore ought to have the whole share of salvage, allotted to the owner and freighters. For if Mason, who was the master of the vessel, appointed by Jackson, the owner, had departed from the terms of the charter-party, and thereby hazarded the cargo, and it had been lost, Jackson would have been liable to Christie & Young for the value of the cargo.

A stopping, if not for the purpose of the voyage, is a deviation; and it cannot be barratry when the act is for the benefit of the owners. To make it barratry it must be a fraud upon the owners. Park, 83. 1 Post. Dict. 1 Strange, 258*] 581. *Knight v. Cambridge*, Cowp. *143. *Vallejo v. Wheeler*, 1 T. R. 323. *Nutt v. Bourdieu*, 2 Str. 1183. *Seaman v. Fonereau*, Park, 90, 91, 93. 6 T. R. 379. *Moss v. Byrom*, Park, 299.

In reply, it was said, that the maxim is *volenti non fit injuria*. Christie consented to the act which amounted to a deviation, and, therefore, could maintain no action against Jackson grounded upon that act. The question is whether the freighters had not, by their own act, taken the risk of the freight upon themselves, In case of the loss of the vessel and cargo, Jackson might have recovered the freight from Christie & Young, because they would have been the cause of the loss. There is a difference between an assent to criminal acts, and a mere mercantile assent. It is not necessary that the assent should be under seal. It was the act of the freighters, and not a parol contract, which would have been the ground of Jackson's defense in any action which Christie & Young might have brought against him for the cargo, in case of a loss; and which also would have been the ground of his action against them for the freight, in the like event.

The next writ of error was that brought by William Mason, the master of the Firm; in support of which it was alleged that his act of embezzlement ought not to prevent a decree in his favor for a share of the salvage.

It is not, as has been suggested, to reward him for his crimes that he asks a decree in his favor. He has rendered most important services, and he claims his *quantum meruit;* a just compensation for his risk and his labor. This court cannot inquire into the fact of his crime. It is sitting here to decide questions upon the law of nations, and has no power to punish him for a crime committed after the service was rendered. He was the master of the ship, and no assistance could have been rendered to the Blaireau without his permission.

There is no obligation upon salvors to apply to a court of admiralty. If the property saved is in their possession, they have a good right to hold it against all the *world but the [*259 owner; and he cannot recover it from them without tendering reasonable salvage. The salvor may convert the thing saved to his own use, and no one can prevent him but the owner, who may tender reasonable salvage, and bring his action of trover.

It would not discharge the owner from the obligation of tendering salvage, to say that the salvor had converted the thing saved to his own use; *a fortiori* he may take a part for salvage, and it shall be deducted out of his reasonable share. But even if he took a part with intent to conceal and embezzle it, yet this cannot deprive him of reasonable salvage. The most that can be said is, that after being the sole means of saving the ship and cargo, he did not discover all the property, but intended to appropriate a part to his own use, not amounting to one-half his share of the salvage money.

The service rendered was complete. Whatever I have justly earned upon a *quantum meruit* is a debt due to me, for which I have a clear legal claim. If I labor for a man, and afterwards commit a crime upon him or his property, this can be no bar to my action for my wages. Suppose I labor for a man, earn my wages, and then set upon him and beat him, I am not thereby deprived of my wages. Suppose a wagoner employed to carry 100 barrels of flour; he carries part, and takes one barrel to his own use; can he not recover for what he carried?

When it is necessary to resort to chancery, you must go with clean hands; but that is because you have not a clear legal right. The salvor has a clear legal right to retain until salvage is paid. He does not go into a court of admiralty as a court of chancery. He claims a legal debt, a certain right.

1.—The Chief Justice observed, that although it was admitted by counsel that the stopping was a deviation, yet that was not to be considered as the opinion of the court; it being a point upon which they had great doubt; for if a stopping to relieve a vessel in distress would discharge the underwriters, no master would be justified in using an exertion to save a vessel in the most imminent danger of perishing.

But Captain Mason's conduct is represented as a crime. However improper his conduct may have been there is no law which can punish him criminally for it. When a man finds or saves a thing and converts it to his own use, he is not punishable by the law of nations, nor by any municipal law, unless it be by some positive statute.

260*] *But if he has committed a crime he is as liable to punishment after having been deprived of his salvage as he was before. It is to punish him twice for the same offense. You first fine him 3,000 dollars, and then turn him over to the courts of common law to be punished. If he has not committed a crime punishable by law, why do you impose upon him this fine of 3,000 dollars?

This court is sitting here as a court of admiralty to decide questions arising upon the law of nations, or upon facts committed on the high seas. But the offense was committed within the body of a county, and therefore this court cannot (even incidentally) hold jurisdiction of it.

If a man refuses to give up a thing saved on tender or salvage, the remedy is only trover or detinue; and the plaintiff can recover only the value after deducting reasonable salvage.

If the goods saved are once landed, a court of admiralty has no jurisdiction, and cannot decree salvage.

The principle that subsequent conduct shall make a man a trespasser *ab initio*, does not apply to the case of salvage. It is applicable only to those cases where a man has a particular right to go upon property for his own benefit; not where the entry is for the benefit of the other party.

To these arguments in favor of Mason, it was answered, that the principal objection to the decree, as it relates to him, is the want of jurisdiction, because the embezzlement was on land. But this does not appear to be the case. The facts stated induce a presumption that it was done at sea. But admitting that the embezzlement was on land, the court have jurisdiction of the principal object, salvage; and salvage is a claim of merit. In order to decide it, the court must judge of the demerit, as well as of the merit of the salvor. It is certainly competent for the court to ascertain *quo animo* he took the goods on board at sea. It is admitted that he could not be indicted for it; or if he could, that this court could not try it. But if 261*] he took them not *animo *salvandi*, but *animo furandi*, it is clear, upon principles of law as well as policy, that he is not entitled to salvage.

Salvage is grounded as well on the trust which the salvors have taken upon themselves, as on their risk and labor. Should they, after saving the thing, wantonly destroy it, or even suffer it to be lost by gross negligence, they would make themselves liable to the owner. Hence a duty and trust is imposed upon them by the situation in which they have placed themselves; and if, regardless of that duty, and in violation of that trust, and of the principles of moral rectitude, they attempt to plunder, to rob, to embezzle the property, they lose the character of salvors, and approach towards that of robbers and pirates. In such a case they cease to be meritorious; they forfeit whatever right they might have had, and to award them salvage would be to reward their crimes. They ought not to receive salvage upon that which they did not mean to save for the benefit of the owners, but to appropriate to their own use.

Salvage is given, upon principles of public policy, to encourage enterprise, honesty, and humanity; and the same principles of public policy will refuse it where these are wanting. The interests of society require that the line of distinction should be accurately marked between right and wrong, virtue and vice, merit and demerit. By the laws of *Oleron*, if any person shall take any part of the goods from shipwrecked persons, against their will, and without their consent, they shall be excommunicated, and suffer the punishment of thieves. 22 Vin. Abr. 537.

In reply, it was said by the counsel for Mason, that the goods were taken from The Blaireau into The Firm, *animo salvandi*. It was done openly. They were sent by Mason from The Blaireau, and taken into The Firm by Stevenson, the mate. It seemed to be the expectation of all that they were saving the whole for themselves. But their being mistaken in this respect ought not to prejudice their claim to reasonable salvage.

The next point was, whether Jackson, the owner of The Firm, and the master of the apprentices, is not entitled to receive their shares of the salvage; and in behalf *of the [*262 master, it was contended, that he is entitled to all the earnings of his apprentices. Harg. Co. Litt. 117, a, note 1; 6 Mod. 69, *Barber v. Dennis;* 12 Mod. 415; 1 Vez. 48, *Meriton v. Hornsby;* 1 Vez. 83, *Hill v. Allen*. In these cases from Vezey, it was adjudged, that the master was entitled, even in equity, to prize money earned by the apprentice, although it was not earned in his regular business.

In England, every owner of a ship is bound by law to take a certain number of apprentices to the sea. To encourage the master, the law gives him the whole earnings of the apprentices.

This was not a voluntary act of the apprentices; they were bound to obey the orders of the captain. But this is a question between British subjects, not arising upon the *jus gentium*, but upon the municipal laws of England, which this court, sitting as a court of admiralty, cannot decide.

The decree is, that the money shall be paid to the apprentices only, or their proctors or attorneys. But being under age, they cannot appoint a proctor to submit to the jurisdiction of this court, nor an attorney to receive their share of the salvage.

In answer, it was said in behalf of the apprentices, that the master's right attaches only to those earnings which flow from their ordinary occupation and industry, and not to anything given as a reward for an extraordinary and voluntary service rendered. When an apprentice goes on board a privateer, his business is to make prizes; it then becomes his ordinary occupation, and the master is entitled to his share of prize money.

Suppose a gentleman riding out in his carriage; his horses take fright, and run away; an apprentice runs out of his master's shop and stops the horses, for which service the gentleman gives him 100 dollars. Can it be contended

that the master has a right to the money? There is no difference between that case and the present.

In the case of *The Beaver*, 3 Rob. 239, Sir W. Scott distinguished between the master and his apprentice, and gave a share expressly to the apprentice.

263*] *In the present case, it was a voluntary act on the part of the apprentices. The captain had no right to compel them to risk their lives in this service. It was not within the course of their ordinary business. The cases cited only show that the master is entitled to what the apprentice earns in the regular course of business, whether it be that to which he was bound, or that in which he chooses to engage, in derogation of the rights of his master. But salvage is not a regular business; it is not a matter of contract. A mariner or an apprentice is bound only to do such duty as appertains to the ship on the voyage. If the master of the apprentices is entitled to their share of the salvage, because they are subject to the orders of the captain, by the same rule he would be entitled to the shares of all the seamen, for they are all equally under the command of the captain.

If the master claims a compensation for the risk of the loss of the labor of his apprentices, his share of the salvage for such risk ought to be much less than the shares awarded to the apprentices, which were founded upon their services, and the hazard of their lives.

In reply, it was said by the counsel for Jackson, the master of the apprentices, that in the case of *The Beaver*, Sir William Scott did not decide whether the master was entitled to the share of his apprentice, or not, but left that question to be determined by the laws of his country.

The case of a gratuitous gift is different from that of a right which has accrued, and which can be enforced by law; and, therefore, the case stated for illustration does not apply.

If the captain has no right to send his seamen to the assistance of a vessel in distress, it can never be in his power to render a service; and he loses all command over those who remain, because they may say, we were only bound to labor with the assistance of the others.

March 6th. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

264*] *In this case a preliminary question has been made by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested, except the owners of the cargo of The Firm, are not Americans, a doubt has been suggested respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it.

The previous question being disposed of, the court will proceed to consider the several cases which have grown out of the libel filed in the district court.

The first to be decided is that of the captain of The Firm, who, by the sentence of the circuit court, was declared to have forfeited his right to salvage, by having embezzled a part of the cargo of The Blaireau.

The fact is not contested, but it is contended that the embezzlement, proved in the cause, does not affect the right of the captain to salvage.

The arguments in support of this position shall very briefly be reviewed. It is insisted that the embezzlement was made after the vessel was brought into port, and this seems to be considered as a circumstance material to the influence which the embezzlement ought to have in the case. So far as respects the fact, the evidence is that the articles were brought on board The Firm when The Blaireau was found at sea, and the fraud was detected in the port of Baltimore. When the concealment took place does not appear, but it would be straining very hard, to presume that it took place after arriving in port. It is not, however, perceived that this need be the subject of very minute *in- [*265 quiry, since the fact must have occurred before he parted with the possession acquired by the act, on the merit of which his claim to salvage is founded.

It is also stated, that this court has no jurisdiction of the crime committed by the captain, and cannot notice it even incidentally.

If it was intended merely to prove that this court could not convict Captain Mason of felony, and punish him for that offense, there certainly could never have been a doubt entertained on the subject; but when it is inferred from thence, that the court can take no notice of the fact, the correctness of the conclusion is not perceived. It is believed to be universally true, that when a claim of any sort is asserted in court, all those circumstances which go to defeat the claim, and to show that the person asserting it has not a right to recover, may and ought to be considered. The real question, therefore, is, whether the claim for salvage is affected by the act of embezzlement; and if it is, the incapacity of this court to proceed criminally against the captain, forms no objection to their examining a fact which goes to the very foundation of his right.

The legal right of the salvors is insisted on, and it is said, that in trover for the ship and cargo by the owners salvage would be allowed to those who had rendered the service, and then openly converted them to their own use.

Yet the jury, trying the action, would determine on the right to salvage, and would inquire into any fact which went to defeat that right.

Whatever shape, then, may be given to the question, it still resolves itself into the inquiry, whether the embezzlement of part of the cargo does really intermingle itself with, and infect, the whole transaction in such a manner as to destroy any claim founded on it.

The counsel for this plaintiff contends, that the merits of Captain Mason as a salvor, are not impaired by the act charged upon him, because a crime is no offset *against a [*266

debt, and the claim for salvage is in nature of a debt.

This leads to an inquiry into the principles on which salvage is allowed. If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any persons whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice.

If we search for the motives producing this apparent prodigality, in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for those services, (one very much exceeding the mere risk encountered, and labor employed in effecting them,) is intended as an inducement to render them, which it is for the public interests, and for the general interest of humanity, to hold forth to those who navigate the ocean. It is perhaps difficult, on any other principle, to account satisfactorily for the very great difference which is made between the retribution allowed for services at sea and on land; neither will a fair calculation of the real hazard or labor, be a foundation for such a difference; nor will the benefit received always account for it.

If a wise and humane policy be among the essential principles which induce a continuance in the allowance of that liberal compensation which is made for saving a vessel at sea, we must at once perceive the ground on which it is refused to the person whose conduct ought to be punished instead of being rewarded. That same policy which is so very influential in producing the very liberal allowances made by way of salvage, requires that those allowances should be withheld from persons, who avail themselves 267*] of the opportunity furnished *them by the possession of the property of another, to embezzle that property. While the general interests of society require that the most powerful inducements should be held forth to men to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects thus preserved. This would certainly justify the reduction of the claim to a bare compensation on the principles of a real *quantum meruit;* and the losses in the cargo, which may be imputed to the captain, would balance that account, if, as is contended by his counsel, the court could not, on principles generally received, consider the act of embezzlement as a total forfeiture of all right to salvage.

But the case of a mariner, who forfeits his right to wages by embezzling any part of the cargo, is precisely in point. That case stands on the same principle with this, and is a full authority for this, since it cannot be denied that the right to salvage is forfeited by the same act that would forfeit the right to wages.

In the case of Mr. Stevenson, the fact is not clearly ascertained. If the embezzlement was fixed upon him, he as well as the captain ought to forfeit his salvage. But it is not fixed. Yet there are circumstances in the case, which, if he stands acquitted of the charge of unfairness, do certainly so implicate him in that of carelessness as to destroy his pretensions to superior compensation, and reduce his claim to a level with that of a common mariner.

The decree of the circuit court being approved so far as respects Captain Mason and Mr. Stevenson, the general rate of salvage allowed by that decree is next to be considered.

There is certainly no positive rule which governs absolutely the rate of salvage. Yet in fixing it, the common usage of commercial nations, and especially of those whose subjects are interested in the particular case, ought unquestionably to be regarded. In France, it appears that a service like that rendered the owners of The *Blaireau would have been [*268 compensated with one-third of the value of the vessel and cargo. In England the principle of reciprocity, if not adopted, is much respected, and to judge from the tenor of their cases on this subject, it is fairly presumable that the salvage which would be allowed in an English court in a case like the present, would not greatly vary from that which appears to be made by the ordinances of France.

This is unquestionably a case of great merit, and a very liberal salvage ought to be allowed. Yet that allowed both by the district and circuit courts appears to exceed any sum which those principles, which ought to be resorted to as guides in the case, will justify. Among the various adjudications of the courts of admiralty in England, to which country the salvors belong, no one has been found where so large an allowance has been made; and in France the nation of the owners of the property saved, a positive ordinance is understood to regulate this subject, and to fix the salvage at one-third of the gross value of what has been preserved.

Taking the whole subject into consideration, the court is disposed to reduce the rate of salvage, and to allow about two-fifths instead of three-fifths to the salvors. The vessel and cargo will then be really charged, in consequence of the savings produced by the forfeiture of the captain's claim, and the reduction of those of the mate and Mr. Christie, with not more than one-third of the gross value of the property.

In the distribution of this sum, the court does not entirely approve the decree which has been rendered in the circuit court.

The proportion allowed the owners of The Firm and her cargo, is not equal to the risk incurred, nor does it furnish an inducement to the owners of vessels to permit their captains to save those found in distress at sea, in any degree proportioned to the inducements offered to the captains and crew. The same policy ought to extend to all concerned, the same rewards for a service designed to be encouraged, and it is surely no reward to a man, made his own insurer without his own consent, *to return him [*269 very little more than the premium he had advanced.

The common course of decisions, too, has established a very different ratio for the distribution of salvage money, and the Court is of opinion that those decisions are founded on substantial considerations.

The owners of vessel and cargo, in this case, will be allowed one-third of the whole amount of salvage decreed, which third is to be divided between them in the proportion established in the district court, it being, in our opinion, very clear, that the owner of the vessel continued to risk the freight after as much as before the assent of Mr. Christie to the measures necessary for saving The Blaireau. That assent could only be construed to charge him with the hazards to be encountered by the cargo, and not to vary the contract respecting the freight.

The proportions established by the decree of the circuit court between those who navigated The Firm, and those who navigated The Blaireau, and between the individuals in each ship, are all approved with this exception. The case exhibits no peculiar merit in Mr. Christie, and, therefore, his allowance is not to exceed that of a seaman on board that vessel.

On the rights of Toole and the apprentices, this court entirely concurs in opinion with the district and circuit courts.

There was certainly no individual who assisted in bringing in The Blaireau, that contributed so much to her preservation as Toole. Every principle of justice, and every feeling of the heart, must arrange itself on the side of his claim.

But it is contended, that the contract he had entered into bound him to continue his endeavors to bring the vessel into port, and that the principles of general policy forbid the allowance of salvage to a mariner belonging to the ship which has been preserved.

270*] *The claims upon him, on the ground of contract, are urged with a very ill grace indeed. It little becomes those who devoted him to the waves to set up a title to his further services. The captain, who was intrusted by the owner with power over the vessel and her crew, had discharged him from all further duty under his contract, as far as any act whatever could discharge him, and it is not for the owner now to revive this abandoned claim.

Those principles of policy which withhold from the mariners of a ship their wages on her being lost, and which deny them salvage for saving their ship, however great the peril may be, cannot apply to a case like this. There is no danger that a single seaman can be induced, or enabled, by the prospect of the reward given to Toole, to prevail on the officers and crew of a vessel to abandon her to the mercy of the waves for the purpose of entitling the person who remains in her to salvage, if she should be fortunately preserved.

The claim of the master to the salvage allowed his apprentices, is one which the court feels no disposition to support, unless the law of the case be clearly with him. The authorities cited by his counsel do not come up to this case. The right of the master to the earnings of his apprentice, in the way of his business, or of any other business which is substituted for it, is different from a right to his extraordinary earnings, which do not interfere with the profits the master may legitimately derive from his service. Of this latter description is salvage. It is an extra benefit, the reception of which does not deduct from the profits the master is entitled to from his service. But the case cited from Robinson, where salvage was actually decreed to an apprentice, is in point. The counsel does not appear to the court to construe that case correctly, when he says that it does not determine the right as between the master and the apprentice. The fair understanding of the case is, that the money was decreed to the apprentice, and was to be paid for his benefit.

Considering the case strictly on principle, that portion of the salvage allowed ought to be paid to the master which would compensate him for having risked the future service of his apprentice; but as this would not amount to a very considerable sum, and as a liberal salvage has *already been decreed to the master, [*271 this further allowance will not be made in this case.

Upon these principles the following decree is to be entered:

"This cause came on to be heard on the transcript of the record of the circuit court, and was argued by counsel, on consideration whereof, this court doth reverse the sentence of the circuit court, so far as the same is inconsistent with the principles and opinions hereinafter stated:

"This Court is of opinion that too large a proportion of the net proceeds of the ship Blaireau and her cargo has been allowed to the salvors, and that 21,400 dollars is a sufficient retribution for the service performed, which sum is decreed to the claimants, except Captain Mason, whose rights are forfeited by embezzling a part of the cargo, in full of their demands. In distributing the sum thus allowed, this Court is of opinion that the owners of The Firm and her cargo ought to receive one-third of the whole amount thereof, of which one-third the proportion of the owner of the vessel ought to be to that of the owner of the cargo, as the value of the vessel and freight is to the value of the cargo; that is, as 18 to 4.

"It is further the opinion of the Court, that the remaining two-thirds of the salvage allowed, ought to be divided between those who navigated both The Firm and The Blaireau, excluding Captain Mason, in the proportions directed by the circuit court, with this exception, that the sum to be received by Charles Christie is to be the same with that received by a seaman on board The Blaireau.

"In every thing not contrary to the principles herein contained, the decree of the circuit court is affirmed, and the cause is remanded to the said circuit court to be further proceeded in, according to the directions given. The parties are to pay their own costs."

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*OGDEN, Administrator of CORNELL, [*272
v.
BLACKLEDGE, Executor of SALTER.

The ninth section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claim within 7 years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary.

Cranch 2.

A legislature cannot declare what the law was, but what it shall be.

The act of limitation was suspended as to British creditors during the war.

THIS was a case certified to this court from the circuit court of North Carolina, under the act of Congress, of 29th April, 1802, vol. 6, p. 89, s. 6, which provides for the event of an opposition in the opinions of the two judges, who are by law to hold the circuit court.

The certificate is in the following form, viz.:

"United States of America,
"North Carolina District.

"At a circuit court of the United States, begun and held at Raleigh, for the district of North Carolina, on Wednesday, the twenty-ninth of December, in the year of our Lord one thousand eight hundred and two, and in the twenty-seventh year of American independence.

"Present, the Honorable John Marshall and Henry Potter, Esquires.

"Robert Ogden, administrator *de bonis non*, with the will annexed of *Samuel Cornell v. Richard Blackledge*, executor of Robert Salter, deceased.

"State of the pleadings.

"This is an action of debt upon a bond given by the defendant's testator, to the testator of the plaintiff, on the 2d day of March, 1775.

"The defendant, among other pleas, pleads in bar an act of the general assembly of the state of North Carolina, passed in the year 1715, entitled, "An act concerning proving wills and granting letters of administration; and to pre- [*273] vent frauds in the management of *intestate estates; the ninth section of which is in the following words:

"And be it further enacted that creditors of any persons deceased, shall make their claim within seven years after the death of said debtor, otherwise such creditors shall be forever barred.

"To which plea the plaintiff replies, in substance, that the plaintiff's testator was, at his death a British subject, and the debt within the true intent and operation of the fourth article of the treaty of peace concluded between the King of Great Britain and the United States.

"To this replication the defendant demurs, and the plaintiff joins in demurrer.

"This case coming on to be argued at this term, it occurred as a question, whether the act of assembly, recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action.

"On which question, the opinions of the judges were opposed.

"Whereupon, on a motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court, to be finally decided.

"It is ordered, that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided, to wit:

"First. That Samuel Cornell, the plaintiff's testator, was, and until his death continued to be, a subject of the King of Great Britain; and the defendant's testator was, and till his death continued to be, a citizen of North Carolina.

*"Second. That the defendant's testa- [*274] tor died in the year one thousand seven hundred and eighty; and the defendant, in the same year, was qualified as executor.

"Third. That the plaintiff sued out his writ in this suit, on the fifth day of October, in the year of our Lord one thousand seven hundred and ninety-eight."

"United States of America,
"North Carolina district.

Seal of circuit court N. Carolina.

"I, William Henry Haywood, clerk of the circuit court for the district of North Carolina, do hereby certify the foregoing to be a copy from the minutes. Given under my hand and seal of office, at Raleigh, on the fifth day of January, in the year of our Lord one thousand eight hundred and two.

W. H. HAYWOOD, Clerk."[1]

Harper and Martin, for the plaintiff.

The only question in this case is, whether the plaintiff is barred by the ninth section of the act of assembly of North Carolina, passed in 1715. (Iredell's Digest of the Laws of N. Carolina, p. 30.)

1. The first inquiry involved in this general question is, whether that section was repealed before its operation upon the present case. We contend that it was repealed. 1st. By the act of assembly of North Carolina, passed in April, 1784, c. 23, p. 492,[2] which makes a *dif- [*275] ferent provision on the same subject. Its preamble refers to the ninth section of the act of 1715, and the second section makes the estate liable to creditors without being subject to limi-

1.—This being the first case under the late act of Congress, the certificate and statement are copied as a precedent which may be of use in future practice.

2.—A supplemental act to an act entitled an act for proving of wills, and granting administration, and to prevent frauds in the management of intestates' estates.

I. Whereas it is enacted in the ninth section of the said act, "That creditors of any person deceased shall make their claims in seven years after the death of such debtor, otherwise such creditors shall be for ever barred; and if it shall happen that any sum or sums of money shall hereafter remain in the hands of any administrator after the term of seven years shall be expired, and not recovered by any of kin to the deceased, or by any creditor in that time, the same shall be paid to the church wardens and vestry, to and for the use of the parish where the said money shall remain." And as there are no church wardens and vestry to make claim in such cases,

II. Be it therefore enacted, &c. That as soon as an administrator shall have finished his administration on such estates, and no creditor shall make any further demand, the residue of such estates shall be deposited in the treasury, and there remain without interest, subject to the claim of creditors and the lawful representatives of such decedent, without being subject to limitation or time.

III. And be it further enacted, &c. That the treasurer is hereby authorized and empowered, in all such cases, to demand payment of such administrator, and on refusal or delay, to give notice in thirty days to appear and show cause why he refuses or delays payment, and on non-appearance to enter up judgment, and thereon proceed to execution for the purposes aforesaid.

tation or time," which is a negative mode of expression, and clearly repeals the former provision in the act of 1715. But even without such negative words, a statute may be repealed by a subsequent act which makes a different provision on the same subject. 4 Bac. Abr. tit. *Statute*. And although the act of 1784 mentions only administrators, yet it evidently applies to executors also. Indeed, the term administrators comprehends executors, for every executor is an administrator; they both plead *plene administravit*, and the only difference between them is, that one is created by the act of law, and the other by the act of the party. Even the statute of treasons, 25 Edw. III. stat. 5, c. 2, in which it is declared to be petit treason, "where a servant slayeth his master," has always been construed to comprehend a servant who kills his mistress, or his master's wife; *a fortiori* in a remedial statute shall the term administrator include executor. If the ninth section of the act of 1715 was repealed by the act of 1784, the former was no bar to the plaintiff's action; for the seven years had not elapsed, after the death of the defendant's testator, before the repeal took place.

2d. But if the act of 1784 did not operate as a repeal, yet it is contended that the act of 1789, c. 23, (Iredell's Digest, p. 676,) clearly repealed the clause of limitation in the act of 1715. The 6th section enacts, "that all laws 276*] *and parts of laws that come within the purview and meaning of this act, are hereby declared void and of no effect." The only question upon this law is, whether the 9th section of the act of 1715 comes within its purview and meaning; and to show that it does, it is only necessary to read and compare the two acts together.[1]

But the legislature of North Carolina passed a law in 1799, (c. 26,) which declares, in substance, that notwithstanding the 6th section of the act of 1789, the 9th section of the act of 1715 was not repealed. This, however, cannot affect the present case, for this action was brought 277*] *in October, 1798, before the law of 1799 was passed. But even if it had been brought after the law of 1799, that act could not alter the past law, and make that to have been law which was not law at the time. To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial.

[The Court stopped the counsel, observing that it was unnecessary to argue that point.]

The act of 1789, by making a provision on the same subject, differing from that of 1715, would have repealed it without the express clause of repeal contained in the 6th section.

Should it be said that although the 9th section of the act of 1715 may be repealed, yet the present action is within the 4th section of the act of 1789, and barred thereby; the answer is, that the defendant has not pleaded that act in bar, and the Court will not notice a limitation unless pleaded.

2. The second inquiry involved in the general question is, whether, if the act of 1789 repealed the limitation of 1715, the latter had operated upon this case before the repeal.

The defendant's testator died in 1780.

The plaintiff's testator was a British subject, and his right of action was suspended, not only by the act of assembly of North Carolina, passed in 1777, c. 2, s. 101, (Iredell's Digest, p. 318,)[1] but by the law of nations, which prohibits an alien enemy from maintaining any *action in the courts of the nation with [*278 whom his sovereign is at war; and his right of action was not restored until the act of assembly of 1787, c. 1, (Iredell's Digest, p. 607,) declared the treaty with Great Britain to be the

1.—An act for establishing courts of law, and for regulating the proceedings therein.

"§ 101, PROVIDED, that no person who hath taken, or shall take, part with the enemies of America, or who hath or shall refuse, when lawfully required thereto, to take the oath of allegiance and abjuration required by the laws of this state, or who hath or shall remove from this state, or any of the United States, to avoid giving their assistance in repelling the invasions of the common enemy, or who hath or shall reside, or be, under the dominion of the enemies of America, other than such as are detained as prisoners of war, nor any person claiming by assignment, representation or otherwise, by or under any such person, shall have or receive any benefit of this act; but all right of commencing and prosecuting any suit or suits, action or actions, real, personal or mixed, shall be, and is hereby suspended, and shall remain suspended, until the legislature shall make further provision relative thereto."

1.—An act to amend an act entitled an act concerning proving of wills and granting letters of administration, and to prevent frauds in the management of interstates' estates.

§ 4. "And be it further enacted, &c. That the creditors of any person or persons deceased, if he or they reside within this state, shall within two years, and if they reside without the limits of this state, shall within three years, from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts and claims of every kind whatever, to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her or their debt as above specified, within the aforesaid time limited, he, she or they shall be forever debarred from the recovery of his, her or their debt in any court of law or equity, or before any justice of peace within this state."

There is a saving to infants, persons *non compos*, and femes coverts, and a proviso that the delay shall not be a bar, if it is at the special request of the defendant.

§ 6. "And be it further enacted, That all laws and parts of laws that come within the purview and meaning of this act are hereby declared void and of no effect."

An act to explain an act passed in one thousand seven hundred and eighty-nine, entitled an act to amend an act concerning proving of wills and granting letters of administration, and to prevent frauds in the management of intestates' estates, passed in one thousand seven hundred and fifteen, and for other purposes.

"Whereas doubts have been entertained whether that part of the ninth section of the said act passed in one thousand seven hundred and fifteen, which requires the creditors of any person deceased, to make their claims within seven years after the decease of such debtor, or be forever barred, is or is not repealed by the said act, passed in one thousand seven hundred and eighty-nine.

"1. Be it enacted, &c. That the said act passed in the year one thousand seven hundred and eighty-nine, shall not be considered as a repeal of that part of the ninth section of the act passed in the year one thousand seven hundred and fifteen aforesaid; but that the same shall be deemed, held and taken to be in full force."

law of the land, and directed the courts to decide accordingly.[1]

By the 4th article of the definitive treaty of peace, creditors are to meet with no lawful impediment to the recovery of their debts. The limitation, therefore, could not begin to run befor the removal of all such lawful impediments. The treaty was ratified on the 14th of January, 1784, and even calculating from that date, only five years had elapsed before the repeal.

It may be remarked also that this same Samuel Cornell is one of the persons expressly named in the act of confiscation of October, 1779, c. 2, (Iredell's Digest, p. 479,) and therefore it cannot be contended that he was not one of the persons whose rights of action were suspended by the act of 1777, c. 2.

At the time of the repeal the plaintiff was entitled to bring and maintain his action. No right had then vested in the defendant under the act of limitations, and therefore the principle does not apply, that the repeal shall not divest a right.

279*] *Acts of limitation do not absolve the debt; they only bar the remedy. 5 Burr. 2628, *Quantock v. England*. They are nothing more than legal impediments. The replication of the treaty was therefore good.

March 6th. CUSHING, *J.*, delivered the opinion of the Court, which was entered on the minutes as follows:

This court having considered the question, whether an act of assembly recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action; which question, in consequence of an opposition in the opinion of the judges of the circuit court for the district of North Carolina, was certified to this court to be finally decided, is of opinion, that the act of assembly recited in the said plea is, under all the circumstances stated, no bar to the plaintiff's action, the same having been repealed by the act of 1789, c. 23, at which time seven years had not elapsed from the final ratification of the treaty of peace between Great Britain and the United States; that being the period when the act of limitations began to run against debts due by citizens of the United States to British creditors.

280*] *M'ILVAINE v. COXE'S LESSEE.[2]

Quere, whether a person born in the colony of New Jersey before the war with Great Britain, and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he has ever since resided, and who has always claimed to be a British subject, can now take and hold lands in the state of New Jersey, by descent from a citizen of the United States?

Whether, by the act of the state of New Jersey of 4th October, 1776, he became a member of the new government against his will?

Whether he could expatriate himself after the peace?

Whether by expatriation a man becomes an alien to all intents and purposes?

ERROR from the circuit court for the district of New Jersey, to reverse a judgment given for the plaintiff below, upon a special verdict in ejectment.

The material facts of the case are stated in the argument of W. Tilghman.

W. Tilghman, for plaintiff in error.

The question which arises in this case is of great importance, and has never been decided in this court, nor in the state of New Jersey.

It is, in substance, whether a person born in the United States while they were British colonies, and who took no part in favor of the revolution, but joined the British army in an early stage of the war, and from that time to this, by the whole tenor of his actions and declarations, has shown his election not to be a citizen of the United States, but to adhere to the British Empire, was capable of taking land in New Jersey by descent in the year 1802.

There is no occasion to dwell minutely on the title. The lessor of the plaintiff had good title if Daniel Coxe, the younger, was capable of taking by descent from his aunt Rebecca Coxe, who died in 1802; that is to say, he has title to a certain undivided part, according to the law of descents in New Jersey concerning which there is no question.

Family disputes are always unpleasant; yet as laws regulating descent are merely of municipal creation, no one has a right to complain if, by a change of the law, he now receives a less portion than formerly, or even if he receives no portion at all.

*By the law of New Jersey, before the [*281 revolution Daniel Coxe would have taken all the estate of his aunt Rebecca, not only to the entire exclusion of his cousins, the children of his uncle William Coxe, deceased, but of his own sister, Mrs. Kempe. As the law now stands, we suppose he is entirely excluded.

In tracing the conduct of Daniel Coxe, from the commencement of the revolution to the year 1802, which it is necessary to do in order to decide the cause, nothing more is intended than to bring into view those facts from which the law must arise. It is far from our minds in doing this, to pass any censure on his conduct.

In revolutions every man has a right to take his part. He is excusable, if not bound in duty to take that part which in his conscience he approves.

I will now proceed to state the facts necessary to be attended to, in order to decide the cause.

The ejectment is brought for a messuage and 200 acres of land situated in Trenton, in New Jersey.

Daniel Coxe, the son, conveyed to John Redman Coxe, lessor of the plaintiff, who had previous notice of the defendant's claim.

The premises are part of the estate of Rebecca Coxe, deceased, and are of the value of 5,000 dollars.

1.—An act declaring the treaty of peace between the United States of America and the King of Great Britain, to be part of the law of the land.

"1. Be it enacted, &c. That the articles of the definitive treaty between the United States of America and the King of Great Britain, are hereby declared to be a part of the law of the land.

"2. And be it further enacted, &c. That the courts of law and equity are hereby declared in all causes and questions cognizable by them respecting the said treaty to judge accordingly."

2.—Present, Cushing, Paterson, Washington and Johnson, Justices. The Chief Justice did not sit in this cause, having formed a decided opinion on the principal question, while his interest was concerned. See the opinion of the court in this case, *post*, v. 4. p. 211.

Rebecca Coxe died at Trenton, in 1802, seized in fee of the premises, intestate and without issue.

In the year 1783, and before that time, she was a citizen of New Jersey, and so continued until her death. She left no brother or sister, but there were children of her two brothers Daniel and William, as follows, viz.:

1. Her brother Daniel, who died about 47 years ago, had issue Daniel Coxe (under whom the lessor of the plaintiff claims) and Grace Kempe, (widow of John Tabor Kempe, deceased,) both now living.

282*] *2. Her brother William, who died in 1801, left issue 5 children, viz. John, Tench, William, Daniel William, and a daughter Mary, all now living; also the following grandchildren, viz., children of his daughter Sarah, deceased, (late wife of Andrew Allen,) that is to say, Margaret, wife of George Hammond, Ann, Andrew, Elizabeth, Maria, John and Thomas; and of his daughter Rebecca M'Ilvaine, deceased, named Rebecca Coxe M'Ilvaine.

Daniel Coxe, who conveyed to the lessor of the plaintiff, was born in New Jersey, where he resided from his birth until some time in the year 1777, when he removed to the city of Philadelphia while or shortly before it was in the possession of the British troops.

From the time they took possession of the city in 1777, he has never resided in any place within the jurisdiction of the United States, but has resided in places under the actual jurisdiction and government of the King of Great Britain, and at the time of Rebecca Coxe's death he was residing and domiciliated with his wife and four children at London.

In the year 1775, and long before, he was more than twenty-one years of age, was a member of the king's council of New Jersey, and a colonel of the provincial militia.

In the years 1778 and 1779 he exercised a civil office in Philadelphia under the authority of the King of Great Britain.

When the army evacuated Philadelphia he followed it to New York, where he remained exercising a civil office under the king, until the final evacuation of that city by the British troops in 1783; until which time he remained possessed of his commissions and offices of member of the council and colonel of the militia, nor does it appear that he has since resigned either of them. He has never taken an oath of allegiance to the United States, or either of them, or of abjuration of the King of Great Britain, nor has he by any overt act ever exhibited himself as a citizen of the United States, or either of them. But between the signing of the definitive treaty of peace, and the death of Rebecca Coxe, he has done the following acts, viz.:

283*] *1. He has executed diverse writings stating himself to be of Great Britain, or of some other place in the British dominions.

2. He has for several years carried on trade and commerce as a British, and not as an alien, merchant, with all the rights and privileges belonging to a British merchant, by the laws of Great Britain.

3. He has held lands in England as a trustee.

4. Before and since the death of Rebecca Coxe, he has received a pension from the King of Great Britain, in consideration of his loyalty and attachment to the British king and government, and of his losses by reason thereof.

5. He did, soon after the treaty of peace, apply by petition to the commissioners to inquire into the losses by loyalists, &c., under certain statutes, viz.: 23 Geo. III. c. 80, 25 Geo. III. c. 76, 27 Geo. III. c. 29, 28 Geo. III. c. 40, 29 Geo. III. c. 62, or some or one of them, and by the said petition he did set forth that he was a British subject, who had suffered for his adherence to the British government, and prayed compensation therefor, &c. And he did receive compensation for his losses and sufferings, and for his estates and possessions, as a loyalist of the 1st and 3d titles or classes of the statutes, or some or one of them.

6. He did in 1795, or afterwards, and before the death of the said Rebecca Coxe, apply, as a British subject, to the commissioners under the 6th article of the treaty of amity, &c., of 19th November, 1794, and in his petition styled himself "Daniel Coxe, of London, in the kingdom of Great Britain," and stated that "he then was, and from his birth ever had been, a subject of the King of Great Britain, and under the allegiance of the said king."

An inquisition was taken in the county of Hunterdon, and state of New Jersey, August 1, 1778, by which it was found that he did, about the 9th of April, 1778, join the arms of the King of Great Britain, and did aid and abet them by acting as a magistrate of police, &c., against the form of his allegiance to the state of New Jersey, and against the peace of the same. Final judgment was entered on the said inquisition at October term, 1778, whereby *all his real and personal estate in the [*284 county of Hunterdon was forfeited and vested in the state of New Jersey. And at February term, 1779, process was ordered to be issued to the commissioners of said county for the sale of the said real estate.

Sometime in 1778 or 1779, he was attainted of treason against the state of Pennsylvania, in consequence of not surrendering pursuant to a proclamation issued by the supreme executive council of that state, dated 21st July, 1778, and of the said treason and attainder was pardoned on the 6th of December, 1802, by the Governor of Pennsylvania.

By virtue of the said inquisition, judgment, and process in New Jersey, his real estate in the county of Hunterdon was seized and sold, and is now held by the purchasers thereof under that state.

This case presents three subjects for consideration.

1. What was the situation of Daniel Coxe, with respect to his citizenship or alienage, from the commencement of the revolution to the definitive treaty of peace between the United States and Great Britain?

2. What was his situation from the time of the treaty to the death of Rebecca Coxe in 1802?

3. Supposing him to be an alien in 1802, is there any thing particular in his case to exempt him from the general incapacity of aliens to inherit land?

First. What was his situation between the commencement of the revolution and the treaty of peace?

He was an officer of the king's government.

a member of the council, and colonel of the militia, and, without doubt, under a positive oath of allegiance.

He never owed natural allegiance to the state of New Jersey. When the revolution was proposed, he had a right to choose his side. 1 Dall. 53, *Chapman's Case*, which was decided even in the very heat of the revolution.

285*] *He did choose to adhere to the British. The record states that he removed to Philadelphia before or while it was in possession of the British, and has adhered to them ever since. He never took the oath of abjuration of the King of Great Britain, or of allegiance to the United States, or any of them; nor has he by any overt act exhibited himself a citizen of the United States, or of either of them. His remaining in New Jersey until he found a safe opportunity of joining the British ought not, on general principles, to have bound him to any thing more than that local allegiance to which even foreigners are subject.

But it may be objected that inasmuch as he remained in New Jersey till the year 1777, and the act of 4th of October, 1776, (2 Wilson's N. J. Laws, 4,) declares that all persons then abiding there, not only owe allegiance, but are members of the then government, it must be concluded that he was a citizen.

I shall not deny the right of the state of New Jersey to take such precautions as they thought proper for the public safety; but at all events their object was no more than to deter persons from joining the enemy during the war, under fear of death, and loss of property.

They who joined the enemy were a class of people whom they did not wish to receive again as citizens. They could have no objection to their being aliens after the war. All such persons (provided they were convicted of treason, or had forfeited their estates) were for ever excluded from offices of trust or profit, civil and military, and from voting at elections of representatives, &c., by the act of the 11th of December, 1778. 2 Wils. N. J. Laws, 75, s. 23.

All these objects are answered by preventing Daniel Coxe from choosing his side after the 4th of October, 1776. Accordingly, Daniel Coxe was proceeded against with a view to the confiscation of his property, but he was never attainted. The same proceedings might have been had against an inhabitant of New Jersey, who joined the British between the 19th of April, 1775, and 4th of October, 1776; or even against an inhabitant of another state who 286*] *owned property in New Jersey. Act of 11th December, 1778. 2 Wils. N. J. Laws, p. 67, s. 2, and p. 68, s. 3.

Granting, then, the most that can be asked, that Daniel Coxe could not divest himself of his allegiance during the war, we cannot infer that the same impediment existed after the war.

This brings us to the second consideration.

2. What was the situation of Daniel Coxe from the peace to the year 1802?

The act of 4th of October, 1776, only declares those persons to be subjects who were then abiding there. All danger being over by the treaty of 1783, a new era began, when every man had a right to leave the country and transfer his allegiance where he pleased. This is a most important right; and although Daniel Coxe now disclaims it, he would then have thought its denial cruel and unjust.

Of all people the Americans are the last who ought to call in question the right of expatriation. They have derived infinite advantage from its exercise by others who have left Europe and settled here. It is denied by the constitution of no state, nor of the United States.

It is positively affirmed by the constitutions of some of the states, viz., Pennsylvania, Kentucky and Vermont, and by an act of assembly of Virginia.

The right is also asserted by the best writers on the laws of nature and nations. Vattel, b. 1, c. 19, s. 218, 223, 224, 225, &c. 1 Wyckefort, (*L'Embassadeur et ses fonctions,*) 117, 119.

The same right is also asserted by our own authors. 1 Judge Wilson's Works, 311–317, 1 Tucker's Bl. App. 426, (in a note.) Id. vol. 1, part 2, App. 96.

It is also recognized by our courts of justice, 3 Dall. 153, *Talbot v. Janson*. And the case of the Charming *Betsy, in the circuit [*287 court of Pennsylvania, 26th May, 1802.[1]

It has also been recognized by our government, who have received and accredited in public characters from England, many persons who resided in the United States at the time of the revolution, viz., Sir John Temple, of Massachusetts, Phineas Bond, Esq. of Pennsylvania, T. W. Moore, Esq. and Col. T. H. Barclay, of New York.

In the commissions of all these persons, they are said to be of London, or some other place in the English territories.

It has been also recognized by our legislature, who in their act of naturalization insist on persons coming from Europe renouncing their former sovereign.

It is recognized by England where other nations are concerned. They formerly allowed naturalization in their colonies after seven years' residence. They allowed it to officers serving four years in the royal American regiments, and they now allow it to persons serving three years in their navy.

Supposing, then, that Daniel Coxe possessed this right of expatriation, does it appear by the record that he exercised it?

If he did not, it is impossible that any person ever can.

To prove that he did, his conduct during the war is very natural.

The offices he held at Philadelphia and New York show that he risked his life and fortune with the British. If he was not then a British subject it was because the act of New Jersey of 4th October, 1776, estopped him from that right. Nothing on his part was wanting. After the peace he removed with his family, and has remained in England, openly avowing himself a British subject ever since.

*But to be more particular. [*288

1. He has carried on trade and commerce as a British, not an alien merchant. On this head the British are extremely jealous; none but bona fide British subjects enjoy this privilege. No American *postnatus* is allowed to hold a ship under the British navigation act; nor to trade to the British colonies, except under great

1.—S. C. in this court, see *ante*, p. 54.

restrictions; nor to be exempt from alien duties; nor to hold East India stock.

2. He has been pensioned not only for his losses, but for his loyalty and attachment to the British government.

3. He did, in 1795, or afterwards apply as a British subject to the commissioners under the 6th article of the treaty of 19th November, 1794, and in his petition asserted that he then was, and from his birth ever had been, a subject of the King of Great Britain, under the allegiance of the said king.

This treaty agrees to make compensation on the part of the United States to British subjects who have lost their debts by legal impediments.

Daniel Coxe might have returned to New Jersey after the peace and become a citizen by taking the oaths, &c. The attainder in Pennsylvania was no hindrance, for the treaty of peace protected him from prosecution.

Thirdly. Let us now examine whether the alienage of Daniel Coxe is attended with any particular circumstances enabling him to take land by descent, contrary to the general principles of alienage.

On the execution of the definitive treaty of peace, the United States and Great Britain were separate, independent governments. In that treaty ought to have been inserted any stipulation which the two nations wished to make touching the right of property to be held by individuals. And they have made some stipulations touching debts, and property both real and personal, but they were all confined to the security of property then held.

289*] *With regard to lands there was to be no restitution; but Congress were to recommend restitution without condition. 1st. To real British subjects. 2d. To persons resident in districts held by the king, and who had not borne arms against the United States. As to all other persons, they were allowed to go to the United States and remain 12 months to endeavor to get back their property, and Congress were to recommend restitution, they paying the possessors the bona fide cost. There were to be no future confiscations, nor was any person to suffer any future loss or damage, in his person, liberty or property.

By the treaty of 1794, British subjects, who then held lands in the United States, were, so far as regarded such lands, not to be considered as aliens; but they, their heirs and assigns, were permitted to hold, enjoy and dispose of the same in like manner, as if they were natives.

The general principle, that aliens cannot hold lands, has been adopted by New Jersey; but by an act of assembly of 14th November, 1785, they have made an exception in favor of mortgagees.

But it is objected that the constitution of New Jersey having adopted the common law of England, has adopted also the doctrine of *antenati*.

The adoption of the common law was to secure the liberty and property of the citizens of New Jersey, without regard to foreign nations, and not with a view of enabling British subjects to hold lands in that state. It was not meant to adopt those parts which were inconvenient, or inconsistent with our situation, such as that the king can do no wrong, personal and perpetual allegiance, &c. Besides, the constitution of New Jersey expressly excepts such parts as are inconsistent with the rights and privileges contained in that charter.

Now that charter is at variance with the principle of *antenati*, which is founded on the basis that natural allegiance cannot be shaken off; whereas the constitution of New Jersey declares that protection and allegaince are reciprocal.

*This doctrine of *antenati* is founded [*290 on *Calvin's Case*, which was determined 6 Jac. I. when the ideas of the royal prerogative were extravagant and absurd. The authority of that case is much shaken by the many absurdities it contains. Some of its principles are ridiculous, some contrary to the present law of England, and some contrary to our own constitutions. As instances of the ridiculous, may be cited his 4th union, which is of the three lions of England and that of Scotland quartered in one escutcheon, that Moses was the first reporter, that all infidels are devils, and perpetual enemies of Christians. One of the doctrines contrary to the present law of England is, that natural allegiance cannot be altered by the law or constitution of man, but is something celestial —*de jure divino*. Witness the English revolution of 1688. The same doctrine is also contrary to our constitutions. Witness our own revolution; the preamble to the constitution of New Jersey; and the naturalization law, which requires an oath of abjuration.

Wooddeson, vol. 1, lect. 14, p. 382, says, "When the king by treaty, ratified by act of parliament, cedes a country to another state, the inhabitants, though born under his protection, become effectually aliens, or liable to the disabilities of alienage in respect to their future concerns with this country; and similar to this I take to be the condition of the revolted Americans, since the recognition of their independent commonwealth."

An alien may take by purchase or devise, but not by descent; and this is the case even with a denizen. Vaughan, 278, *Craw v. Ramsay*.

What is the situation of the people of Louisiana? They have been transferred from England to Spain, from Spain to France, and from France to the United States. To whom do they owe allegiance?

The incapacity of aliens to hold lands is founded in public good and convenience. By suffering them to hold lands, the revenues will be transferred to strangers; population is prevented, and the state is deprived of the personal services of the landholders.

*But it is said we should act upon [*291 principles of reciprocity. That the British allow us to hold lands in England upon the principles of curtesy. If their decisions have proceeded upon those principles, it is no reason why we should allow the British to hold lands here. It may be their policy to maintain the principle, but it is not ours. They had fifteen millions of inhabitants, we had only three. It was their interest to secure their claims on this country by mortgages and purchases of lands. But our courts cannot decide upon such principles. But if their decisions are founded in law, there was no use in the stipulation of the treaty respecting the right to hold lands. It is only by admitting that the inhabitants of the two countries were aliens to each other, that any effect can be given to the treaty.

The principle of natural allegiance does not

apply as to this country. No *antenatus* ever owed natural allegiance to the United States. There can be but one natural allegiance, and that was due to the King of Great Britain American *antenati*, therefore, may hold lands in England, because they were born under the allegiance of the King of England; but English *antenati* cannot hold lands in America, because they were not born under the allegiance of the United States.

It is said in Tucker's Blackstone, vol. 2, App. note C, p. 54, that after the declaration of independence, according to the principles of the laws of England, which we still retained, the natives of both countries, born before the separation, retained all the rights of birth, *i. e.* of inheriting lands, &c., yet the preamble of the Virginia act concerning escheats, &c., passed May, 1779, 2 Tuck. Bl. App. p. 54, asserts that on the separation of the United States from the British empire, the inhabitants of the other parts of the empire became aliens and enemies to the said states, and as such incapable of holding the real or personal property which they had before acquired in the United States.

We say, then, upon the whole, 1st. That Daniel Coxe was always a subject of the King of Great Britain, and never was a subject or citizen of the state of New Jersey; and 2d, That if he was by force a subject of New Jersey, he had a right, when that force ceased to 292*] *operate, to return to his natural allegiance, and shake off the compulsory allegiance which had been forced upon him by the state of New Jersey, and which he always refused to acknowledge; and that he has done so. And lastly, that whether he was always an alien as to the state of New Jersey, or whether he is to be considered as an expatriated citizen, he is still an alien, and, therefore, incapable of taking lands by descent.

PATERSON, J. Suppose he expatriated himself since the peace, what is the consequence? Does he thereby become a complete alien, so as not to be capable of taking lands by descent afterwards?

W. Tilghman. So, I contend.

Rawle, contra. The title of John Rodman Coxe is good, unless Daniel Coxe, his father, was disabled to take by descent from his aunt, Rebecca Coxe.

But he was capable of taking, unless,

1. He was an alien; or,

2. Attainted of treason.

The latter is not found by the jury. He was, therefore, not attainted, nor incapable by reason of any crime.

That he was not an alien, I shall endeavor to demonstrate.

1. Every inhabitant of a state became, at the declaration of independence, a citizen of such state; so far as least as relates to the right of holding real estate.

2. He thereby owed allegiance to such state, and acquired capacity to take and hold lands in it.

3. Of this allegiance he could not divest himself. Of this capacity he cannot be deprived, except in the course of punishment for crimes.

If allegiance be considered as a contract, which requires the consent of both parties to make, it cannot be dissolved but by the consent of both.

*1. The first position is laid down in [*293 a qualified manner, because it is unnecessary to take a wider scope than the nature of the question requires. It is unnecessary to consider the entire doctrine of allegiance, and its incident treason.

The fullest extent to which I shall press this first position is, that prior to the declaration of independence we were all British subjects, and as such had the capacity to take and holds lands throughout the British Empire. That the renunciation of allegiance, the change of government, did not divest of that right, even those individuals who in no shape recognized or adhered to the new government. 1. Because it was not implied from the nature of the revolution; and, 2. Because it was necessary to its safety or success.

In the formation of a new government or society, the acts of the majority (what Rutherford, vol. 2, p. 18, calls the natural majority) bind the whole.

The members comprising the major part, are citizens by choice; the minority by force. It did not authorize the majority to seize the property of the minority. They were all members of the new state.

But by the opposite argument, the immediate effect of the revolution was to commit the grossest injustice on the minority; to deprive them of their possessions because they differed in opinion; to render them aliens, and divest them of their lands.

Such intentions were not declared.

The independence of America was a national act. The avowed object was to throw off the power of a distant country; to destroy the political subjection; to elevate ourselves from a provincial to an equal state in the great community of nations.

It was, therefore, a political revolution, involving in the change all the inhabitants of America; rendering them all members of the new society, citizens of the new states.

*The declaration of independence was [*294 not a unanimous act. It was the act of the majority. But the general sentiment of the day was, that it bound the minority. They were all equally considered as citizens of the United States. This principle was never questioned. The minority were never considered as aliens. Hence the penal laws of that time, made by the states, consider some of that minority as traitors.

Such intentions were not implied.

The people of the colonies were absolved from allegiance to the British crown. The political connection between the people of America and the state of Great Britain was dissolved; and in the language of the declaration of independence, the right "to levy war, conclude peace, contract alliances, establish commerce, and do all other acts, which independent states may of right do," was solemnly asserted, and publicly established.

To this distinguished act in the history of man, the assent of the people was essential. That assent was implied from the assent of the majority. The assent of the people could only be known by the assent of the states. Not a state dissented.

New Jersey was first. Her independent form of government was adopted on the 2d of July, 1776. But the division of the people who composed the states, and the disfranchisement of any part of them, were not necessary consequences of that assent. Every inhabitant continued a member of the society. Every inhabitant, therefore, continued to retain his property, whether real or personal.

But each individual state had to form its own government, and establish its own rules. We must, therefore, seek for those rules in the constitution of New Jersey.

The 1st, 2d and 3d articles organize the legislature, (which, by the 7th, is to choose the governor,) the 4th and 13th expressly vest the power of choosing officers in the inhabitants, who have resided in the county for 12 months, and who have property to a certain value. Thus the inhabitants, without distinction, are made members of the society, citizens of the state. 295*] Being citizens, all the *rights of acquiring and enjoying property attached to them.

But Daniel Coxe was then an inhabitant. Will it be denied that he then was a member of the society? that he could then hold lands?

The legislature of New Jersey assembled on the 27th of August, 1776, and on the 4th of October, passed a law which must remove all doubt on this part of the subject. Every person "abiding" within the state, and deriving protection from its laws, is declared to owe allegiance to it, and to be a member of it.

But every man who abode within the state received protection from its laws. It is found by the special verdict that Daniel Coxe did at that time abide within the state; he therefore owed allegiance to it, and was a member of it.

The inquisitions found by the jury were founded on two acts of assembly of New Jersey. By those acts it will appear, that the objects of such proceedings were, and only could be, persons owing allegiance to the state. The act of fifth June, 1777, (Wilson's edition of New Jersey Laws, Appendix, p. 5,) offers a pardon to "such subjects" of the state as had been seduced from their allegiance to it, and had joined the enemy; and enacts, that if they did not return by the first of August, their personal estate should be forfeited, and that if perishable, or likely to fall into the hands of the enemy, it should be sold. The alienation of it by such persons was declared to be void. But it did not forfeit the real estate.

This law speaks of their returning to their allegiance, not as alien enemies, but as offending subjects.

The first of the two oaths, required by that act, is in these words: "I, A. B., do sincerely profess and swear, that I do not hold myself bound to bear allegiance to the King of Great Britain. So help me God." The second oath is, "I, A. B., do sincerely profess and swear, that I do and will bear true faith and allegiance 296*] *to the government established in this state, under the authority of the people. So help me God."

The effect of taking these oaths was a pardon and restoration to the rights of a subject; not a naturalization as new subjects, but restoration "to all the rights of the other good subjects of this state."

The subsequent acts, prescribing the form of inquest, &c., refer to this act, and are founded upon the delinquency or treason of the offenders.

Many of the objects of that law having failed to avail themselves of its offered clemency, the act of 18th of April, 1778, was passed. (Wilson's Laws of New Jersey, p. 43.) This law was founded on the last, and expressly refers to it. By this act the real and personal estates of such persons are to be taken into possession; the personal to be sold, and the real to be rented out.

The preamble is in these words:

"Whereas many of the offenders mentioned and described in an act of free and general pardon, and for other purposes therein mentioned, have neglected to avail themselves of the benefit thereof: Therefore be it enacted," &c.

The next act of assembly is that of 11th December, 1778. By this act the estates of such "fugitives and offenders as are in the other acts described, are forfeited."

The first section relates to such fugitives and offenders, *i. e.* to inhabitants owing allegiance, &c.

The second section that every inhabitant of the state who, between the 19th of April, 1775, and the 4th of October, 1776, joined the enemy's army, or took refuge, or continued with them, or endeavored to aid them by counsel or otherwise and hath not since returned and become a subject in allegiance to the present government, by taking the oaths, &c. of allegiance, is declared guilty of high treason.

*This, however, does not reach the [*297 case of Daniel Coxe, who did not join the British army until the year 1777.

By the third section every person, not an inhabitant of this state, but of some other of the United States, seized of real estate, who, since the 19th of April, 1775, aided or assisted, &c., as before stated, is declared guilty of high treason against the state of New Jersey.

In both cases an inquisition finding the facts is declared to amount to a forfeiture of the offender's real and personal estate; and in both cases it is declared that such conviction shall not in any instance affect the person of any such offender.

It is, therefore, only and uniformly in respect to allegiance to a breach of the duties of a citizen to the state of New Jersey, or other of the United States, that the real estates are forfeited; and no authority can be collected from any of the laws, to proceed against real estate held by an alien; at least it is obvious that no such proceedings as are directed by these laws could be supported against an alien, merely as such.

2. That as a recognized inhabitant, as a member of the civil society, and a person owing (and permanently owing) allegiance to the state, he could hold lands within it, is a position too plain to be disputed.

The rule of the common law is, that all persons may hold lands, except aliens. 1 Bl. Com. 371. 2 Bl. Com. 249. But Daniel Coxe was not an alien. Daniel Coxe, therefore, may hold lands.

These two positions are supported by the collateral effect of the treaty of 1783. The 5th article recognizes the capacity of all persons, who have been the subject of judicial proceedings, to hold lands. Congress are to recommend to the legislatures of the several states, to

pass laws authorizing those persons who had adhered to the British cause to return to America, and there remain for 12 months, to obtain restitution of their estates.

In each case, therefore, the right to receive, and with it the right to retain and hold lands, 298*] are recognized; for *it would be absurd to suppose that he who is to receive it by virtue of the treaty, is immediately afterwards to have it wrested from him, as an alien.

On the subject of restitution, Congress were only to recommend, but on another, the treaty is peremptory. By the 6th article there were to be no future confiscations. As a part of the former proceedings, or connected with them, the treaty removes that obstacle to the plaintiff's recovery; for the inquisition could only operate on what Daniel Coxe was then seized of or entitled to.

It is contended by the opposite counsel that the treaty authorizes to hold only such lands as could be restored, not to hold new acquisitions.

But if our own laws could recognize a person as a citizen in part, and an alien in part, yet the 6th article gives them the right to hold new acquisitions as well as to retain what they held before. But the effect of the 9th article of the treaty of 1794 is still more extensive. It goes to exclude escheats *pro defectu sanguinis*. Neither they, nor their heirs or assigns shall be considered as aliens. If Rebecca Coxe had been a British subject, the plaintiff below could have claimed under her by virtue of the treaty. Shall he not then inherit because he was a citizen of the United States? By the treaty of 1783, *antenati* could retain lands in both countries. That of 1794 provides also for *postnati*. *Antenati* may not only hold, but pass lands to *postnati*.

3. The third position embraces two divisions.

1 Allegiance.

2. Capacity to hold and transmit lands.

1. Daniel Coxe could not, by his own act, get rid of the allegiance he owed to New Jersey.

2. He could not, except in the case of punishment for crimes, be deprived of his capacity to hold.

This point might be carried still further; and it may be contended that if he had expressly 299*] endeavored to devest *himself of a capacity to take and hold lands, yet his heirs, being citizens of the United States, might claim under him. But this is not now necessary. It is sufficient to show that as he denies any disclaimer of his capacity, so he cannot, by the interested views of his present opponents, be deprived of it; for the opposition is not now made by the state, but by private individuals who endeavor to blot him out of legal existence that they may double their portion of the inheritance.

It is a principle of the common law, (which law is expressly adopted by the 22d section of the constitution of New Jersey,) that no man can put off his allegiance. Hale's H. P. C. 68. 1 Bl. Com. 369. Foster's Cr. Law, 59. M'Donald's Case.

It is true that Blackstone speaks of that allegiance which is coeval with birth; distinguishing it from local allegiance, arising from temporary residence.

But the allegiance due from Daniel Coxe was not of the latter kind; it did not arise and terminate with his residence in New Jersey. It sprung from his inhabitancy in New Jersey, when it created itself a state, from his being then, in common with all around him, a subject of the king; from the change which those around him, in the course of successful resistance, made in the form of their political society, by acts in which the majority must compel the acquiescence of the smaller number. That the minority were bound by the acts of the majority, was decided by Ch. J. Ellsworth, in the circuit court in North Carolina, in the case of *Hamilton v. Eden*.

Birth is but evidence of allegiance. At the time of a revolution residence is equally evidence of allegiance to the new government. Indeed it is stronger if the person be of mature age. It may at least be considered as a new birth.

It was a natural allegiance; as society is natural to man, and allegiance is natural to society.

But without playing on the word, it may be characterized as permanent allegiance; the opposite of temporary.

*It is said that he never was to be [*300 considered as a citizen of New Jersey, or if he was, that he expatriated himself.

1. That, like Chapman, he made his election before any new government was formed, and on the dissolution of the old one; and, therefore, never was a subject of the state of New Jersey. But the distinction between these two cases will be wide and glaring.

Chapman left Pennsylvania the 26th of December, 1776; Coxe not till September, 1777. Chapman was acquitted because he had left the state before the 11th of February, 1777, on which day the laws of the then late province were to be revived, according to an act passed on the 28th of January, 1777; and on which day the act passed declaring what should be treason, and that all persons "now inhabiting, &c., within the limits of the state of Pennsylvania, do owe allegiance," &c. It was, therefore, declared that he was not a subject at the time of his quitting the state of Pennsylvania; and the Attorney General having averred that he was a subject and inhabitant of the commonwealth, it was held that the issue was not maintained on his part. If Chapman had resided in the state on the 11th of February, 1777, he would, on the very principles of his own defense, have been liable to indictment.

But Coxe was an inhabitant of the state of New Jersey on the 4th of October, 1776, when a declaratory law, similar to that of Pennsylvania, was passed. After which it was too late for him to attempt to change sides. He was then fixed as a subject, and liable to indictment for treason. Being thus, on the one hand, subject to the penalties resulting from his civil relation to the commonwealth, he is, on the other, entitled by natural and equal justice to the benefits of that relation.

[W. Tilghman admitted that by the law of New Jersey, Daniel Coxe was to be considered as a subject of New Jersey by force; and that the state had a right to make such a law. He had argued only upon the general ground, independent of the law of New Jersey.]

Rawle. It is admitted, then, that he could not make his election until the peace of 1783. 301*] It was the first time he *ever heard that, after an arduous conflict has successfully terminated, by means of the energy and exertions of a majority of the people, each individual of the minority had a right of election which should look back and give a new aspect to his conduct through the period of the struggle.

[W. Tilghman stated that he did not contend for such an election, but that all the citizens of the United States, after the peace of 1783, had a right of expatriation, and Daniel Coxe among the rest.]

Rawle. Let us, then, consider this supposed expatriation, this imaginary dereliction of his country, and his rights, this abjuration not only of allegiance, but capacity to inherit, which is to operate against him as a political estoppel; or, like the ancient confession of villenage, is to deprive him at once of all power to take by descent or purchase.

It is perhaps a sufficient answer to say that expatriation is a fact which ought to be found.

Our opponents have piled together a confused and shapeless mass of evidence on which this court cannot act. Since even if expatriation had been allowed by the constitution or laws of New Jersey, all the different facts put together would not amount to the technical fact of expatriation; and since if expatriation be not allowed, they are of no more importance than finding whether Mr. Coxe wore a blue coat or a brown one.

The circumstances most relied on to prove Daniel Coxe's expatriation, is his carrying on commerce as a British subject. In this respect there has been a liberal construction of the rights of citizens of the United States in the British courts, even as to their navigation act. They have, for the purposes of commerce, held that a person might be a British subject as to his duty of allegiance, and a citizen of the United States as to his commercial character. Thus in the case of *Marryat v. Wilson*, 1 Bos. and Pull. 430, 444, it was held, that "both characters may stand together;" and so in all cases, so far as there are no conflicting duties, a man may be a subject of many different governments, and may enjoy the benefits conferred upon him by all. The right of Daniel Coxe to hold land 302*] *in New Jersey does not conflict with any duty which he owes as a British subject. His becoming a subject of Great Britain, therefore, as to purposes of commerce, is not evidence that he had renounced his rights as a citizen or subject of New Jersey. Nor does it follow because he is a British subject that he is not also an American citizen. 1 Bl. Com. 369, 376. 3 Dall. 169, *Talbot v. Janson*.

What, then, is expatriation? It is said to be an operation by which a citizen is made an alien. And it is contended that although Daniel Coxe was once a citizen of New Jersey, it was against his will, and that the moment he had it in his power by the peace to throw off that character, he did it, and by becoming a subject of the King of Great Britain, he became an alien to New Jersey, and, therefore, not capable of taking lands by descent, in that state.

Many of the writers upon this subject have confounded expatriation with emigration; and hence has resulted great confusion. But the ideas are very different and distinct.

Expatriation is a matter of municipal regulation.

Emigration is of right. It cannot be restrained without injustice and even violence. Expatriation cannot be effected without public consent.

Expatriation dissolves the original obligation of the citizen.

Emigration only suspends its activity.

Expatriation incapacitates from taking lands in future.

Emigration retains that capacity.

Expatriation renders the future issue aliens. Emigration does not impair the right to be received as citizens.

Expatriation is an inconvenient and inflexible deprivation.

*Emigration destroys no rights, but [*303 facilitates the commerce and improvement of man.

Hence in no states, not depressed by the severest despotism, is emigration prevented. In very few is expatriation even known.

Of the 17 United States, one only (Virginia) has recognized or provided for it by law. In the constitutions of the other states, which have been cited, it is the right of emigration only which is protected, and not a word is said of expatriation. In the laws of Great Britain there is no such term, or idea, as expatriation. It is altogether unknown.

As soon as a man has expatriated himself, his lands would escheat, and he would be divested of all the rights of a citizen. There has been yet no case in practice where the lands of an expatriated citizen have been escheated.

It is inconsistent with the nature of expatriation, that the party be permitted to retire from the community for purposes hostile to its welfare. No citizen can expatriate himself for the purpose of committing an act which would be treason without such expatriation.

There ought also to be some municipal regulation defining the evidence and the mode, and declaring the assent of the government. 3 Dall. 133, *Talbot v. Janson*.

If Daniel Coxe had set up this defense on an indictment for treason, it would not have availed him.

If, then, his liabilities, on the one hand, and his rights on the other, remained in full force at the time of his departure; if he took with him the capacity as well as the responsibility of a citizen; are the subsequent events of his life to act retrospectively on his departure, and tear assunder the ties which bound him in 1777?

If such an effect can arise from these causes, the *quo animo*, the intention, ought to have been found, especially as it is a recognized principle that a man may owe allegiance to two countries at the same time, and, therefore, *may lawfully have the intention of [*304 owing allegiance to both Great Britain and New Jersey. The court cannot decide that it was with intent to expatriate. 7 Co. *Calvin's Case*, 27, a. and b., 2 Tucker's Blackstone, App. 53. Kirby's reports of Cases Sup. Court, Connecticut, p. 407, *Apthorp v. Backus*.

The counsel for the plaintiff in error have divided their case into three questions, accord-

ing to three periods of time, in the solution of which they have employed much ingenuity.

1. From the beginning of the revolution to the peace of 1783.

This period seems to be nearly conceded; at least it is admitted that the state had a right to compel the inhabitants to become members of the new state or society. It seems to be admitted also that there is a sufficient finding of his residence in New Jersey till 1777, to bring him within all the laws of that state. The test laws of 1778 could not have influenced his departure in 1777; nor did they give him any right to dissolve the connection; because the penalties imposed were the consequences of political offense; the punishment of treasonable flight. And to suppose that a man, by staying away to avoid the punishment of the law, had a right to dissolve the obligations of the citizen, is to lay down a principle tending to shelter every fugitive from justice.

It may be noticed that incapacity to hold lands is not among the penalties annexed to his disaffection. There are two legislative declarations; 1. By making him a citizen, and thereby giving him the capacity; 2. By imposing other penalties on the offense, but reserving this capacity.

It has been said that the object of the New Jersey laws was merely fiscal. But the citizenship of Daniel Coxe does not depend on the inquisition, but on the act of 1776; *i. e.* he would have been a citizen by virtue of that law, although no inquest had been taken against him. 305*] *It has also been said that the act of 1778 includes those who had offended against other states, and had never been inhabitants of New Jersey, and, therefore, the legislature did not mean to compel them to become citizens. The answer to this objection is found in the case of *Camp v. Lockwood*, 1 Dall. 393, in which the offense was decided to be an offense not only against the particular state, but against all the states.

2. The 2d period is from the peace to the time of the descent cast in 1802. And it is contended that in 1783 Coxe had a right to make his election and choose his country.

But this position is attempted to be supported on a false basis. No such right is mentioned in the treaty. On the contrary the 5th and 6th articles manifest a mutual understanding that the loyalists were to return home, to obtain restitution of their estates, intimating plainly that if they could obtain restitution they would be entitled to hold.

3. The provision of the treaty, "that there shall be no future confiscations," settles the point of a capacity to take at present, and not in future. It was the universal understanding that a sale after the treaty, of property before confiscated, was no breach of the treaty. How, then, can there be a future confiscation but in consequence of a future taking? And he who can take in future is not an alien.

Daniel Coxe, who ought to know the *quo animo* of all the acts charged against him, declares, by his counsel, that he never meant to give up his capacity to take and hold lands by descent or purchase; and his counsel declare that if such was his intention, he could not do it. These are two distinct propositions, both of which must be established by our opponents. They must prove not only the will but the power.

But it is said to be a hardship to deny the right of expatriation.

*The observations made upon this [*306 point apply only to emigration, and the right to emigrate is not denied.

But when a man turns his arms against his native country, and ungratefully endeavors to destroy the hand which fostered and fed him, the arm of justice, though severe, is not misdirected.

And if in the decline of life he wishes to return to the bosom of his surviving friends, and be buried in the tomb of his ancestors, is he to be received only as an alien and an outcast; as a modern citizen of the world; a detached, rotatory, irresponsible and useless being?

Inconsistency runs through the whole of the argument for the plaintiff in error. The counsel contend for the rigid doctrine, peculiar to feudal tenures, that an alien cannot hold land, and yet discard the more rational concomitant feudal principle, which has been engrafted into the common law, that *nemo potest exuere patriam.*

The authorities which have been cited do not support the principles contended for by the plaintiff's counsel.

All the American constitutions which have been referred to, speak only of emigration. Virginia alone has provided by law for the case of expatriation; but that law cannot affect lands in New Jersey.

Vattel speaks only of emigration.

Judge Wilson uses only the same expression, and gives his opinion of what the law ought to be, not what it is. It is said, too, that he decided a case in Virginia, of a claim under Lord Fairfax, upon principles contrary to those contended for by our opponents.[1] So in the case of *Apthorp v. Backus*, Kirby's Rep. 407, the *plaintiff was a British subject before [*307 the revolution, and yet recovered the land in the year 1788.[2]

1.—WASHINGTON, *J.*, said that there was an appeal in that case to the Supreme Court, which was not decided, the state of Virginia having compromised the cause.

2.—This case was decided by the Supreme Court of Connecticut, before Richard Law, Ch. J., Oliver Ellsworth, Roger Sherman, and William Pitkin, Justices, and was as follows:

An estate was mortgaged by Fitch to Stephen Apthorp, then of Bristol, in England, who died January 1st, 1778, leaving the plaintiff his only heir. It was moved in arrest of judgment, that it appears by the declaration that the plaintiff is an alien, and, therefore, cannot by law hold any real estate.

By the Court. A state may exclude aliens from acquiring property within it of any kind, as its safety or policy may direct; as England has done with regard to real property, saving, that in favor of commerce, alien merchants may hold leases of houses and stores, and may, for recovery of their debts extend lands, and hold them and upon ouster have an assize. Dyer, 2, 6. Bac. Abr. 84. But it would be against right that a division of a state or kingdom, should work a forfeiture of property previously acquired under its laws, and that by its own citizens; which is the case here.

The plaintiff's title to the land accrued while she was not an alien, nor could she be affected by the disability of an alien, but was as much a citizen of the now state of Connecticut, as any person at present within it, and her descent was cast under its laws.

Her title is also secured by the treaty of peace, which stipulates that there shall be no further forfeitures or confiscations on account of the war, up-

Whyckefort reasons upon general principles, on the subject of expatriation; but expressly recognizes the law to be otherwise in England. 308*] *In the case of *Talbot v. Janson*, the Court was of opinion that the right could not be exercised without an act of the legislature.

The case of *The Charming Betsy*, in this court at the last term, did not decide the present question. For the question now is, whether, by becoming a subject of another sovereign, he is to all intents and purposes an alien.

Wooddeson probably means only *postnati* of America, if he had any clear idea at all upon the subject.

February 18. Stockton, on the same side.

There is but a single objection to the title of the lessor of the plaintiff, which is, that Daniel Coxe, under whom he claims, was before and at the time of the descent and conveyance, an alien, and, therefore, could neither receive nor transmit any estate in the premises in question. This I shall deny, 1st. Because Daniel Coxe was born under the same legiance with the other subjects of New Jersey; 2d. Because the legislature of New Jersey, after the organization of their independent government, in the exercise of constitutional powers derived from the people, by statute declared him a subject of the new government; exacted from him the duty and submission of a subject, and punished him for a breach of his allegiance; but never deprived him of his capacity to inherit real estate; 3d. Being thus once a subject of New Jersey, by the constitution and law of that state it was not in his power to make himself an alien; and if it had been in his power he did not exercise the right.

1. Lit. s. 198, defines an alien to be "one born out of the legiance of the king," and he adds, "if he sues an action real, the tenant may say that he was born in a country out of the king's legiance." This is the universal form of pleading alienage. The defendant must show that the plaintiff was born out of the king's legiance, and where. The definition of Littleton, taken from writers still older than himself, has been adopted by Vaughan, Hale, Foster and Blackstone, indeed by all the English lawyers, and has never been questioned. The form of pleading is equally ancient, and both together, present a complete criterion of the 309*] law. That the place of *birth should determine the condition of the subject, is both reasonable and natural. It is reasonable, because he there receives the protection necessary to the preservation of life, during the helpless years of infancy; an obligation which can be conferred on him by no other country; because there it is that he is immediately invested with all the privileges derived from society and government; giving him the force of the community to protect him in his rights of personal liberty, reputation and property, and at a time when he could make no return. How reasonable is it, then, that he should owe to such a country the corresponding duty of allegiance? It is natural, because there exists in every good man, a virtuous principle of preference for that country, nay, for that spot, where he first drew his breath; where he passed his childhood; where his mind first opened to the endearing relationships of life, which nothing but the hand of death can extinguish; an *amor patriæ*, which remains in spite of rejection, persecution and punishment, and which, even amidst the conflict of the passions produced by a sense of injury, still secretly leads him to his native country as his resting place. The common law, founded in reason and nature, therefore, proclaims that no man born a subject can be an alien. But it is said that Daniel Coxe, was not, at the time of his birth, a subject of the state of New Jersey, and, therefore, may be an alien. Answer. At the time of his birth, the King of England was the common sovereign of Daniel Coxe, and the other citizens of New Jersey; and by the principles and express rules of the common law, such persons never can be aliens, though a change of sovereigns should take place, and distinct governments be formed; for as on the one hand, the duty of natural allegiance accruing at birth, adheres to him through life; so on the other, the corresponding privileges, among which is the capacity to take and hold lands, must remain, unless forfeited by crime. The very point of *Calvin's Case*, independently of the reasoning of Lord Coke, proves this. There the *antenati* of Scotland were held aliens in England, though James was sovereign of both countries, because, at the time of their birth they were aliens. So on the other hand, the *postnati* were declared subjects, and it was held that they always must be considered subjects, because they were subjects at the time of *their birth. In 7 Coke, 27, b., Lord [*310 Coke puts the very case; "Wherefore, to conclude this point, (and to exclude all that hath been or could be objected against it,) if the obedience and legiance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England as of all other nations, and is immutable, and that *postnati* and we of England are united by birthright, in obedience and legiance (which is the true cause of natural subjection) by the law of nature, it followeth, that Calvin, the plaintiff, being born under one legiance to one king cannot be an alien born."

This is not, then, to be considered as one of the extrajudicial and fanciful reasons of Lord Coke, of which so much has been said, but a consequence not only clearly flowing from undoubted principles, but adopted by ancient practice, and proved by the history and law of England. Such was the condition of those provinces of France, claimed and held by the Kings of England. These were subject to continual revolutions and change of sovereigns,

on either side. The subsequent statute of this state, declaring aliens incapable of purchasing or holding lands in this state, does not affect the plaintiff's title, otherwise than by recognizing and enforcing it, for it hath a proviso that "the act shall not be construed to work a forfeiture of any lands, which belonged to any subjects of the King of Great Britain before the late war, or to prevent proprietors of such lands from selling and disposing of the same to any inhabitant of any of the United States." It is not indeed expressly said, that the proprietors of such lands may maintain actions for the possession of them, but this is clearly implied; for lands without the possession are of no use, and whenever the law gives or admits a right, it gives or admits also everything incident thereto, as necessary to the enjoyment and exercise of that right; and besides, they cannot sell their lands till they first get possession of them; for all sales of land in this state, whereof the grantor is dispossessed, except to the person in possession, are by express statute void: so that the plaintiff is not barred of her title or right of action either at common law of by statute.

as the arms of either king prevailed; but Frenchmen, born while the Kings of England were in possession, were held not to be aliens when that possession ceased, and might hold lands in England. 7 Coke, 20 b. is express to this purpose, and in 2 Vin. 261, pl. 11, it will be seen, that this doctrine was considered as law by other judges. It has indeed been said that *Calvin's Case* is not law, and his reasoning has been stated to be servile and ridiculous. That it partakes largely of the quaint pedantry of the times, is not to be denied; but that my Lord Coke would lay down, and take such pains to prove, a false position of common law, comports not with his character, either as a lawyer or a man; and the case of the commendams is of itself enough to rescue his character from the imputation of undue servility. Besides, the determination in *Calvin's Case* has never been overruled or questioned; it is supported by the names of the venerable Fleta, Bracton and Britton. It received the sanction of Lord Chief Justice Vaughan, (Vaughan's Rep. 285,) of Lord Hale, as may be seen in his History of the Pleas of the Crown; and in 4 Term Rep. 308, the same doctrine is laid down as the modern 311*] law of Westminster Hall, by *Lord Kenyon. This doctrine that the *antenati* should be capable of inheriting is founded in justice; a right once vested ought never to be devested, unless it be for a crime. An empire is rent asunder by a revolution; the individuals of each territory may be innocent; if guilty, they can only suffer the punishment annexed by law to the crime; it was impossible for Daniel Coxe to commit a crime against New Jersey, which could destroy his inheritable blood, that being saved even on conviction of treason.

The opinion of the most celebrated jurist of our country is expressly in favor of my position. Judge Tucker, in his notes on Blackstone, not only considers the rule in *Calvin's Case* to be law, but applies it to the *antenati* Americans, who he says may hold lands in both countries. 2 Tucker's Bl. Appen. 53, note c. But it is again said by our learned adversary, that this doctrine of the common law is derogatory to the feelings and character of freemen, and altogether inconsistent with our present forms of government, and political institutions; it is, however, conceived that this doctrine contains in it no principle of the nature ascribed to it, and that its results are especially applicable to our political system. What is the injunction of the common law? not that a man shall, like the trees of our forests, be planted and affixed to the place where he was born; not that he shall be prohibited from bettering his condition elsewhere; it restrains not the right of emigration under proper restraints and limitations; on the contrary, the subjects of this law enjoy more liberty in this respect than all the rest of Europe. It only says to them, if you do emigrate, you shall still retain the privileges and be under the restraints of your natural allegiance. What can be discovered in this derogatory to a freeman? No; it should rather be considered as an invaluable privilege; the price of a reasonable and prudent restraint. In it is only heard the voice of exalted patriotism, saying to her children, go gain your support, seek your happiness in fairer fields, in a more genial clime; but remember (and it is the only restraint I place you under) raise not a parricidal hand against your native land. The results of this doctrine appear to me peculiarly applicable to our political position. We are not a confederated republic. *Our general [*312 government is composed of a number of distinct and independent states, uniting under one head by mutual consent for common benefit. But an event may happen, (which every good man should join with my Lord Coke in his devout prayer, "that God of his infinite goodness and mercy may prevent,") time may come when this bond of union may be broken, this confederacy dissolved, and these sovereignties become altogether and completely independent. In this event what security would a citizen of one state have for his lands held in another, but this much reprobated maxim of the common law? With it all would be safe; we were once fellow citizens; we owed allegiance to a common head; we never can be aliens. Without it our lands held out of the state in which we live, would be liable to escheat on the ground of alienage.

Let us not affect to be wiser than the law. Let us not, for idle theories, absurd as well as impracticable, depart from those principles which have secured to our ancestors the complete enjoyment of their liberty and property.

2. But supposing that this doctrine of the common law, that the place of birth does conclusively fix the character of a subject, should be considered as not applicable to the case of a revolution by which one part of a nation is severed from the other, becomes independent, and forms a separate government. We must then search, *ex necessitate*, for some other principle, as a substitute for the common law principle, and which shall denote who are and who are not members of the new community. Now, the natural, the only practicable substitute, is this, that those residing at the time of the revolution in the territory separating itself from the parent country, are subject to the new government, and become members of the new community, on the ground either of tacit consent evidenced by their abiding in such territory; or on the principle that every individual is bound by the act of the majority. Hence as birth at the common law denotes the subject, so residence at the time of the revolution will draw with it the same consequence. The great men who conducted the revolution in New Jersey were at no loss to discover this principle. They recognized it by their constitution and first acts of legislative power. By law they claimed all men in the situation of D. C. to be their subjects. This brings me *to the [*313 second point, which was, that D. C. could be no alien because the legislature of New Jersey proclaimed him a subject, claimed his allegiance as one, and punished him as one for a breach of it, without, however, taking from him his inheritable rights. The new constitution was adopted in New Jersey, July 2d, 1776. October 4th, Wilson, N. J. L. 4. The legislature then first convened under it, passed their treason act, in which it is declared, "that all persons abiding within the state, and deriving protection from the laws thereof, do owe allegiance to the government of this state, established under the authority of the people, and are to be deemed members thereof." Then

they go on and declare all such guilty of treason who shall adhere to the King of Great Britain, saving the corruption of blood. D. C., as the jury have found, was born in New Jersey, was living and abiding in the state at that time, and adhered to the British by joining their army more than one year afterwards.

This description of who were subjects of the state of New Jersey, was always closely pursued by the legislature, and ended in the seizing and forfeiting the estates of all those who had withdrawn within the British lines, and so could not be attainted on trial, according to the course of the common law.

Wilson N. J. L. Appen. 5, contains the next act; it is an act of free and general pardon. The former act had declared who were subjects, who could offend; this offers conditional pardon on their return to their allegiance, and forfeits the personal estate of those who did not accept proffered grace. Then follow the several acts of December 8th, 1778, Appen. 8; of April 18th, 1778, Wilson's N. J. L. 43; of 11th December, 1778, in which the same description of subjects given in the first act is confirmed; provisions made to punish them if they persist in their rebellion to the state, which ends, and in this case did end, in the entire confiscation of the real and personal estate of the offending subject. It was observed on these acts, that they appeared to be rather of a fiscal nature than any other, and were not so much designed to prescribe duties, and punish transgressions, as to bring money into the treasury. Such an object would have been unjust and pitiful, and was never contemplated at the time they were enacted. No; the patriots of that day had a 314*] more sublime object. *Their great object was independence. By these acts they meant to legitimate the revolution by the supreme power of the people. They proclaim their new and republican government. They declare whom they consider as the members composing this new community. They proceed to impose the duties arising out of their new condition, and to enforce the performance of these duties by the sanction of adequate punishment for their violation. They did not, it is true, pass attainder acts affecting the person of the offender, because such acts were deemed inconsistent with their avowed principles. Such acts go to take the life of a man without trial by jury; to convict him of personal offenses in his absence, against a maxim of the law. These obstacles did not exist in so strong a degree in proceedings *in rem*, which ended in punishment by loss of property. Fiscal considerations then had nothing more to do with this subject than they have with all other cases of crimes punished by forfeiture or pecuniary mulcts. They are but consequences of the crime, not objects of the law. The 2d section of the last act, which punishes treasonable acts between the 19th of April, 1775, when the civil war first broke out, and the 4th of October, 1776, when the treason act passed, it was said, was particularly subject to this objection; for it was urged, as this related to a period prior to the establishment of the new government, and before there was a treason act, there could be no other ground for the provision. I conceive the learned gentlemen equally mistaken in this suggestion. It is well known in New Jersey that government did not cease between these days. The people governed themselves in their primitive capacity by committees of safety in each county, and by a provincial congress. This congress did, in fact, pass an ordinance of treason soon after the war commenced, containing the same provisions with the treason act of the 4th October, 1776. This section then referred to this notorious fact, and was designed to give the sanction of the legislature to the provisions of that ordinance. And both this ordinance and this section of the act, contained in them nothing more than the principle acted on throughout the war, that Americans could at no period legally act against this country, but were bound to take its part from the first hour the sword was drawn. What, then, is the fair result of all these provisions? We see an old government dissolved and a new one created. The people at first, and their representatives afterwards, declare *by law, [*315 all men abiding within their territory subjects of the new government. They pass treason acts, define allegiance, and inforce its duties by the accustomed sanctions of the law. These laws operated on D. C. He was an abider within their territory. They claim him as a subject, and punish him for refusing to yield obedience. Shall, then, this same government, which with a voice of thunder proclaimed him a subject, and punished him as one, or shall an individual under its laws now say to him, you are an alien? Shall he be declared a subject to punish him and an alien to punish him? A subject to take all he has, and an alien to prevent his acquiring any in future? Shall he be made poor by citizenship, and be kept poor for want of it? No, I apprehend not. The government, and all claiming through its laws, are estopped to say he is an alien, and no act of his, as I shall directly show, would alter his condition. The legislature never meant to adopt such inconsistent and repugnant principles. They carried through their work correctly on their own plan. It is by pursuing now an opposite one on a scheme of private interest that the incongruity is produced. They had a right to declare the colonists members of the new government, on the clear republican principle that the minority must yield to the majority. But they had no intention of going further by illegally taking from them their birthright, their capacity to inherit lands. These laws also destroy at once the fanciful doctrine of election in case of civil wars. It may, for aught I know, be just enough to give men a free election in such cases to adhere to the old, or to join the new government. But then was the time to have acted on this magnanimous principle. The legislature adjured it; they declared by their treason act that no Jerseyman had an election to join against his country.

The learned counsel seemed to yield to the force of this conclusion, so far as respected the period from the commencement of the war to the treaty of peace; but at the era of the peace he says, Mr. C. had a right to continue a British subject, which he did, and so has become an alien. But we have shown him to have once been a subject of the state of New Jersey by their own concession; that is to say, from the commencement of the war to the treaty of 1783. This, then, opens to me the last point I propose to treat.

316*] *3d. D. C. having once been a subject of New Jersey, it was not in his power, without the concurrence of New Jersey expressed by legislative act, to become an alien. And if he possessed the power, he never exercised it.

The modern theory of expatriation has been relied on; nay, our adversaries seem to place their cause on it; a narrow point indeed whereon, in a common law court, to defend an ejectment! and what becomes of it when we reflect that the common law expressly prohibits this supposed right of expatriation, that the constitution of New Jersey expressly adopts this common law, and that the legislature have, by particular act, enacted and incorporated into their system the common law doctrine of allegiance?

1. By the common law, expatriation is not barely not permitted, but it is distinctly prohibited. The maxim of that law is *nemo potest exuere patriam*. By the common law, allegiance is perpetual. Bracton, Coke, Hale, Foster, and Blackstone consider this as a fundamental principle of that law. Mr. Swift, 1 vol. L. C. 164, very properly observes, that this is the law of such of the United States as have adopted the common law without altering this principle.

2. The 22d section of the constitution of New Jersey adopts the common law of England generally, except such parts as are inconsistent with the rights and privileges of that charter. The gentlemen have relied on this exception: and the only question must be, whether this doctrine of the common law is inconsistent with the rights and privileges of that constitution. Now I am at a loss to discover how perpetual allegiance to the government established in New Jersey under the authority of the people, can be inconsistent with the rights of that charter which created and set in motion that very government. What is the true meaning of this exception in the 22d section? what are the rights secured by that charter? The principal are, a republican form of government; legislative council and general assembly; annual election; freedom of conscience in matters of religion; trial by jury, &c. These are the rights alluded to; and it is easy to see that all those parts of the common law which grow out of the monarchy of England were inconsistent with these rights. But not so is that principle which 317*] would transfer the sacred duty of *allegiance, formerly due to the king, with equal force and effect to the new sovereign, the people themselves.

It was further stated that the preamble of the constitution asserts fundamental principles which are inconsistent with this common law notion of allegiance, such as that all power is derived from the people; that protection and allegiance are reciprocal; that when a prince violates the fundamental laws he abdicates and dissolves the government, and remits the people to their primitive rights. This is all very true; but it is equally true in England by the common law as here: it leaves the doctrine of allegiance where it was; but on great occasions transfers the duty of that allegiance from one man to another; or from one form of government to another. These principles were all recognized and acted upon in England in the revolution of 1688. But did that revolution change the doctrine of perpetual allegiance? No! it transferred it from James to William, but the law remained the same. The same turn was attempted to be given to this event in *M'Donald's Case*, Foster's C. L. 60, but it was repelled by the court, not only as unfounded in law, but even as bringing a reproach on that glorious revolution. Then not being within the exception, it stands on the broad basis of the common law, which the people of New Jersey have thought proper to adopt, and which, I trust, they will not be soon persuaded to throw away.

3. But the common law doctrine of allegiance has been expressly enacted into our code by the legislature of New Jersey. Wilson's N. J. L. 4. The treason act adopts the common law definition and division of allegiance in its very language and terms: "whereas, all persons abiding within this state, &c., do owe allegiance to the government of this state, and are to be deemed members thereof," and "all persons passing through, &c., owe temporary allegiance." Here, then, we have an exact common law description of permanent and local allegiance. Afterwards the act proceeds to define the crime of treason, in which it pursues the provisions, and uses the very words, (*Mutatis mutandis*) of the statute of Edward III. Now, what is the conclusion? The people, in their very constitution, adopt the common law; the legislature take up the common law idea and division of allegiance, and pursue even the English statute of treasons as far as it was in any manner applicable. *The common law import of the term al- [*318 legiance being settled, it follows conclusively that the words must receive the same interpretation when introduced into the statute. That common law expressions must receive the common law exposition, is too clear to admit of doubt. Hence we find that the advocates of the doctrine of expatriation have endeavored, by all means, to get rid of them. It is matter of curiosity to look into 3 Dallas, 141, to see the pains the learned gentlemen who then first broached this doctrine, took to get rid of expressions having a fixed meaning by the common law. The terms allegiance and subject were thought to contain sounds discordant to the ears of a freeman: Obedience and citizenship were to be substituted. Allegiance was feudal; it denoted only the submission of a slave to his master. It was monarchical; unworthy a republican, who ought not to owe allegiance even to the people themselves. In short, it could not exist in a free country. The term subject was also disgraceful: A subject must have a master; that master must be a tyrant, and of course the appellation was only fit for slaves. But citizen was a name worthy of a freeman, and the true name by which a republican was to be known. The gentlemen show their discretion in trying to get rid of terms of known signification and import, and substitute in their stead the most uncertain and vague. But, unfortunately for the argument in this case, the plain men who formed the constitution of New Jersey were not carried away by such refinements. They supposed (perhaps weakly) that allegiance might be due to the people as well as to the king, and that even a republican might be called, without offense, a

subject, provided his master was the law. Therefore, they adopted these terms of known signification; and these expressions must be explained according to their known and established legal import at the common law. But even if the common law and the constitution and law of New Jersey did admit this idea of expatriation, it might be safely contended that Daniel Coxe never exercised the supposed right. An act of this kind to work such important consequences should be unequivocal, and certainly intended by the person to produce the effect. If it might exist consistently with the continuance of his former connections it shall not be construed to dissolve them. Now, his removal to England and remaining there ever since, is no act of expatriation. Having traded as a British merchant is not inconsistent with 319*] our position. *It has been determined in Westminster Hall that a British subject naturalized here, is an American merchant within the treaty of 1774, and may, as such, trade to the East Indies against the charter to that company. Neither can the fact of receiving compensation from the British government for losses during the war be considered as an expatriation. That was common to all the royalists; yet those who returned have always been received as subjects on taking the oaths of allegiance. Much less can the circumstance of his calling himself a British subject alter his condition. If he had called himself an American citizen without right, it would not make him such; so if he is really a subject of New Jersey, in the contemplation of the law of the state, his calling himself a subject of Great Britain would not make him an alien to New Jersey. But Mr. Coxe was correct in calling himself so; he was born such, and is such; but the state of New Jersey, by declaring him a subject, and punishing him as such, have also taken him as their subject; and by law have only done what is commonly produced by the act of the party; that is to say, created a kind of double allegiance; a matter which happens here every day in the case of the naturalized Englishmen.

The course I have pursued relieves me from the task of following the gentlemen through the general research they have made to support the right of expatriation. If the common law prohibits it; if the people of New Jersey have adopted that common law, and the legislature enacted its provisions, it matters little what foreign jurists think of this question.

I will make but a few very general remarks.

1st. If the known maxims of the common law are to be disregarded, and titles to land tested by the reasoning of modern writers, and by general principles of abstract right, the learned counsel against us have overlooked a very important point. They should have examined their own objection and tried how that would comport with the theory of modern times. The reasons on which the disability of an alien to hold lands is founded may be truly said to be more unsatisfactory than those on which the doctrine of allegiance is founded; and the policy of the United States, with such an immense 320*] wilderness to subdue, seems to *point out the propriety of inviting foreigners, by all the inducements which a clear right to hold lands brings with it, to populate that wilderness. The reasons for the exclusion were partly feudal, and all such have ceased to exist with that system; and partly political, and those rendered by my Lord Coke are of little weight, and doubtful policy, since the extension of trade and the increase of money. But the gentlemen are reduced to the necessity again of being inconsistent; they adhere with inflexibility to one maxim to exclude our title, and repudiate another more important, clear, and settled, to effect the same purpose.

2d. If this thing called expatriation really exists as a right, it can only be founded on mutual consent. Not only the party who gives up his allegiance but the state must accede to it. This public consent can be expressed only in one way by law: hence it follows that if the right, strictly speaking, exists, it must be dormant until put in motion by law. This law will regulate the forms, settle the terms, and determine the consequences of expatriation. As it is now contended for, it is without any such restrictions. A man may shake off his allegiance one year and put it on again the next; it may go and come as often as whim and caprice shall dictate. The state of New Jersey have never recognized by law this right; much less have they regulated it: until they have, it must remain useless and inoperative. No state in the Union but Virginia has passed an act recognizing and regulating the right of expatriation.

3d and lastly. The treaties between the United States and Great Britain which have also been used against us, so far from aiding the gentlemen, are against them. That of 1783 stipulates that no future loss shall happen on account of the part taken by those in the situation of Mr. Coxe, during the war. But if his right to inherit lands is taken from him for that reason, he has sustained a future loss. The only fair and liberal construction of this treaty is, that the royalists were by it restored to all rights which they possessed before, not actually devested and gone at the time of that treaty. The treaty of 1794 recognizes the idea that the *antenati* might hold lands, and stipulates that their heirs may do the same. Both together, we apprehend, fully protect the right of Mr. Coxe. It could not be denied but that if Miss Coxe, the intestate, had been herself *a British subject, that Mr. Coxe might, [*321 within the very letter of that treaty, have claimed as her heir. It would be harsh indeed to put him in a worse condition, because she was a subject. On the whole, it is submitted that the judgment below ought to be affirmed.

Ingersoll, in reply. The doctrines advanced upon the present occasion, are, to me, novel, strange, and alarming.

That the *postnati*, against whom we have no cause of complaint, should be excluded, while the *antenati* are preferred who injured us. That the French who aided us are called aliens, while the British loyalist refugee may hold lands as a citizen, is a language I do not understand. If the law is so, it is strange, and I must abandon an idea I have always cherished, that the rules of law were founded in sound sense.

Daniel Coxe, being more than twenty-one years of age at the commencement of the revolution, adheres uniformly to the British interest in attempting to reduce the United States to submission to British claims. The attempt

failing, at the conclusion of the war, he quits this country, settles in England, claims to be a British subject, and is so acknowledged by that government from 1777 to 1805.

In 1802, a relative dies in New Jersey, to whom Daniel Coxe is next of blood, and claims to succeed by right of descent as an American citizen. The next of blood, who is a citizen of the United States, excepts to him as an alien, and claims in her own right.

I make two questions in this cause.

1. Did Daniel Coxe expatriate himself? This question is naturally subdivided into two others, viz.: Had he a right so to do? and has he exercised that right?

2. Did such expatriation incur the disability of alienage? and is he thereby prevented from taking lands by descent in the United States?

I ask, (and it is a question of magnitude,) could Daniel Coxe, and has he expatriated himself and become a subject of the King of Great Britain?

322*] *This is a new case in the history of nations, to which the little case of Calvin, the Scotchman bears no proportion.

The revolution which dismembered the mighty empire of Britain, is a subject of curious, of interesting, and, as introductory on this occasion, of profitable contemplation. Its leading principle was the reverse of what has been stated by the opposite counsel, or I am ignorant of its origin and design.

I insist that when the authority of the mother country, as it was called, was rejected, the inhabitants of the former colonies were so far in a state of nature, that each man was at liberty to choose his side; remain a subject, or become a citizen. This interval of election continued until new systems of government were formed, adopted, and organized, after which period (not previously) residence was an implied assent to share the fortunes and the destinies of the United States. In Pennsylvania the rule was practically exemplified in the memorable case of *Chapman*, the British light horseman, charged with treason. 1 Dall. 53.

When government is regularly established, a majority with propriety governs the minority; to institute it legally, individual assent is necessary, or it deserves the name of usurpation, and ought to be execrated as tyranny. 1 Wilson's Works, 316, 317.

New Jersey proceeds in a temperate, mild and correct course. The constitution of the 2d of July, 1776, offers the right of suffrage without imposing its exercise on all the inhabitants. Constitution of New Jersey, s. 2, 3, 4, 13.

In perfect conformity to the principle for which I contend, treason could not be committed, even by joining an invading army, until after the 4th of October, 1776. Wilson's New Jersey Laws, p. 4. The period is, in effect, extended by the provisions of the act of the 5th of June, 1777, offering to restore to the rights of freemen all who would return and comply with certain conditions by the 1st of August then next.

323*] *In 1777, Daniel Coxe joins the enemy as a fugitive and offender; and in August of the same year, an inquisition is held to forfeit his real estate for treason supposed to be committed about the 9th of April preceding, and judgment was rendered thereon in February, 1779.

The counsel opposed to us exultingly say, Daniel Coxe is by this means recognized as a citizen charged with the crimes incident to that character only, and entitled in return to the privilege of holding land, and cite authorities in support of the position. 1 Bl. Com. 371, 2 Bl. Com. 249.

We admit that he could take lands; so might an alien, but he could not hold in either capacity. In high treason the forfeiture of lands accrues not from the time of conviction, but from the date of the offense.

If the right of election had passed, the right of expatriation succeeded.

I am told at the commencement of the argument that I misunderstand and misapply terms, and consider as synonymous, what are entirely distinct, if not of opposite meaning, expatriation and emigration. That the last is of natural right, the former of municipal regulation. That emigration cannot be restrained, but expatriation requires the consent of the government. Emigration only suspends the activity of allegiance; expatriation dissolves it, precludes from taking lands, and renders the issue aliens.

This suggestion accords perfectly well with the views of my learned antagonist; but does he show any authority in support of his explanation? None: it is the offspring of his own creative imagination.

Is it credible that the conventions of Pennsylvania, Kentucky, and Vermont, thought it necessary to restrain their legislatures from preventing temporary absences of their citizens retaining their political connections within their respective states?

*A train of reasoning is unnecessary [*324 on this point; I find the text and the comment together. 1 Wilson's Works, 311, Tucker's Blackstone, vol. 1, part 2, App. p. 96. Has a state the right to prohibit the emigration of its members? May a citizen dissolve the connection between him and his country? Judge Tucker considers expatriation and emigration of the same import. In Judge Wilson's works the word expatriation is not used in the whole lecture. The 9th article and the 25th section of the Constitution of Pennsylvania is introduced, and the whole course of argument shows the word emigration is to be understood as co-extensive with expatriation.

Taking the word emigration, then, in its most extensive sense, is the right of expatriation, as has been represented, the mere whim of modern, fanciful, theoretical writers? I say it is as ancient as the society of man.

It is only by establishing the converse of the proposition, the common law idea that the natural born subject of one prince cannot, by swearing allegiance to another, or by any other act, discharge himself from his allegiance to the former, that the principle of emigration can be made a matter of doubt. 1 Tuck. Bl. part 2, App. p. 90. I deny that this common law principle is founded in, or consonant to, the divine law, the law of nature, the law of nations, or the constitution of the state of New Jersey. The Bible is the most venerable book of antiquity; there we find expatriation practiced, approved, and never restrained. The family

of Jacob become subjects to the Egyptian monarch. Moses abandoned Egypt, his native land, and David left Saul, his prince.

The law of nature, abstractedly considered, knows neither prince nor subject. From this source, therefore, the common law principle cannot be derived.

Particular nations have prohibited their people from migrating to another country, but the prohibition did not arise from the practice of nations towards each other. At Athens after a 325*] man examined the laws of *the republic, if he did not approve of them, he was at liberty to quit the country with his effects. By the constitution of the Roman commonwealth, no citizen could be forced to leave it, or not to leave it, when made a member of another which he preferred. Even under the emperors, as long as any remains of liberty continued, it was a rule that each one might choose the state of which he wished to be a subject or citizen. Where did the Romans get their laws? From the Grecians. Where did the Grecians get their laws? From the Eastern nations—the aborigines of the earth. The right of expatriation, therefore, as far as we can trace it, has been recognized in the most remote antiquity. Among modern nations the practice is various; the Muscovites forbid it; in Switzerland it is permitted: some princes consider their subjects as riches, as flocks and herds, and their edicts correspond to these false notions. Vattel, b. 1, c. 19, s. 225. Consult jurists, Grotius, Puffendorf, Burlamaqui, Vattel; they are of opinion, that every man has a natural right to migrate, unless restrained by laws, and that these cannot restrain the right but under special circumstances, and to a limited degree. The strong and masculine understanding of Mr. Locke revolted at the illiberal ideas of English jurisprudence in this particular; he examined the right claimed to prohibit emigration, and declares that examples of emigration are frequent in history, profane and sacred, and that it has been the practice from the beginning of the world to the time he wrote. Wyckefort has a section, the title of which is, the prince may employ foreigners in his embassies, even in their own country. Wyckefort, p. 116, 119. After a narrative in which he shows that this had been the practice of Europe, he proceeds to consider its propriety, which he infers from the right of expatriation. Mr. Rawle has read as cited, that passage, to which Mr. Tilghman did not refer, and omitted to answer what Mr. Tilghman did read.

Lastly, the Constitution of New Jersey is founded on sentiments which repel the idea of perpetual allegiance, and imply and include the right of expatriation.

Whatever diversity there may have been in 326*] the sentiments *of writers, and in the laws and practices of states on the subject of emigration in general, there never has been a doubt in this country, but that when a civil war takes place each member of the society has a right to choose his side.

The first view we have of New Jersey and Daniel Coxe, is in a state of enmity; the state treating him as a refugee; Daniel Coxe declaring himself a British subject, acting in concert with an invading army.

Trace the circumstances distinctly, and we shall find the right of election between the two governments restored to him, and that he expatriates himself with the consent of, if not propelled thereto, by the state of New Jersey.

On the 11th of December, 1778, the legislature of New Jersey passed an act whereby they disfranchise all persons who were of the character, and had pursued the conduct, of Daniel Coxe. At the treaty of peace, his treason was canceled, forgiven, buried in oblivion, or at least remembered only to prevent restitution of his forfeited estates. The disfranchising act continued in full operation unrepealed, and unaffected by the restoration of harmony between the two countries. Under these circumstances he had his choice; he might have returned to New Jersey, or to any other state. The principles of the Constitution justified him in becoming a British subject, within the rules of expatriation, as stated by the opposite counsel. That he made his choice is proved by unequivocal evidence that leaves no room for doubt or controversy as to the fact.

Mr. Rawle has himself, enumerated eight heads, under which the evidence of his expatriating himself, and becoming a British subject may be classed; 1. Joining the British army in 1777; 2. Voluntary residence with them at Philadelphia and New York; 3. Holding civil offices under the king; 4. Trading as a British merchant; 5. Holding lands as a trustee; 6. Receiving pensions and rewards as a British subject; 7. Describing himself as such; 8. Having never taken an oath of allegiance to the state of New Jersey.

*A case was cited (*Wilson v. Marryat*, [*327 1 Bos. & Pull. 430) to show that the exercise of trade as a citizen of one country is compatible with a continuance of allegiance to another. It was the case of John Collet, who was under the supposed tie not only of permanent, but perpetual allegiance from birth. But Daniel Coxe was not born in the allegiance of the state of New Jersey, nor ever voluntarily took upon himself that obligation. The principle of that decision is consonant to British ideas, but in direct hostility with those which led to the American revolution, gave birth to our constitutions, and without which our brightest patriots were rebels.

It is impossible to doubt from what appears on the record, that he is under repeated positive oaths of allegiance to the King of Great Britain. According to the sound reasoning of *Wyckefort*, these were sufficient to sever the strongest connection between the United States and a citizen, much more such a relation as was subsisting (if any) between the state of New Jersey and Daniel Coxe; involuntary, disclaimed, and inconsistent with the duties imposed upon him by his engagements to another country.

The naturalization law of Congress is full proof that in the estimation of the people of the United States, an oath of allegiance to one country is an expatriation from a former; and that whoever becomes a citizen here, ceases *ipso facto*, to be a subject elsewhere. If this is not the meaning of our law, we encourage the unhappy victims to sacrifice themselves at the shrine of perjury. Characters such as Mr. Coxe are considered by the same law as expatriated, as aliens, and being no longer citizens;

he having been attainted of treason by the state of Pennsylvania in the year 1778.

By the naturalization act of April 14th, 1802, Laws of United States, vol. 6, p. 74, 80, s. 4, attainted loyalists, and such as have been legally convicted for having joined the army of Great Britain during the late war, cannot be naturalized without the consent of the legislature of the state in which such persons were proscribed. 328*] *All the courts of the United States, therefore, could not naturalize Daniel Coxe, without the consent of the states of New Jersey and Pennsylvania, in both of which he has been proscribed.

From all these considerations, it is inferred that Daniel Coxe did expatriate himself; that he had a right so to do; that he has legally exercised that right, and has thereby become a British subject, and is not an American citizen.

Did such expatriation induce the disability of alienage, and is Daniel Coxe thereby incapacitated from taking lands in the United States by descent?

We are charged with inconsistency, that while we endeavor to exclude the liberal sentiments of the common law as applied to *antenati*, we insist on the rigid rule of the same law in preventing aliens from holding lands in the United States.

This charge will be effectually repelled by a single passage, from an authority cited by the opposite counsel for a different purpose. 1 Tucker's Bl. part 2, p. 371. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England, inconsistent perhaps with former allegiance, and productive of many other inconveniences. By the civil law a contract for land by an alien is void. The forfeiture to the prince is peculiar to England, or at least to countries where the feudal system has prevailed. 1 Bl. Com. 371, Cod. 1, 11 tit. 55.

Was it from deference to the common law, that the objections urged against the treaty of London were, that it paved the way for British influence, by enabling aliens of that country to hold lands in the United States?

If the natural and primitive allegiance may be put off without the consent or concurrent act of the prince to whom it was first due, expatriation must induce alienage.

Virginia has recognized the right and con- 329*] siders the *person who has exercised it as no longer a citizen. 1 Tuck. Bl. part 2, p. 360, 361.

If expatriation be a right when legally exercised, it must induce alienage, and the revolution is a case in point to show that a man is not obliged to continue the subject of that prince under whose dominion he was born; otherwise, contrary to a position contended for by Mr. Rawle, we must admit that America was not independent until the King of Great Britain acknowledged her independence; and that it was the consequence of, and not antecedent to, the treaty of peace.

Expatriation is substantially a putting off or change of allegiance. As to the removal from one country to another, it is a mere immaterial, accidental circumstance. It will be agreed that if it can be done in the country, it can by going out of the country.

Nations may shake off their allegiance, says Mr. Rawle, but individuals may not. Grotius said just the contrary; and surely, as Judge Tucker observes, if all might, any one might with the same reason.

Granting for a moment that the common law of England is as barbarous as the case of *M'Donald* (Foster, 59,) would induce us to suppose, how has it been translated to the United States, to be in active operation, slandering the principles of our revolution. I consider the case of *Talbot v. Janson* as establishing the proposition that expatriation was a right, the fair exercise of which produced alienage with its respective rights and disabilities. 3 Dall. 133, 152, 164.

Of Hamilton and Eden, I know nothing.

Lord Fairfax's Case is not in print, but from what fell from His Honor, Judge Washington, I presume it went upon similar grounds to that of Calvin. I throw into the opposite scale, as at least an equal weight, the decision in the case of the *Charming Betsy*, where expatriation was expressly recognized, and as operating the extinguishment of the previous character of citizen of the United States. It is in point as to both particulars.

*I conceive the general rule, at least [*330 so far as it is necessary in the instance of Daniel Coxe, is fully established, and that expatriation is a right, which, when fairly exercised, changes the allegiance; and that it has been so exercised, by which he ceased to be an American citizen, became an alien, and as such incapable of holding lands by purchase, or taking by descent, unless there be an exception out of the rule in his favor, as an *antenatus*.

The burden of the argument devolves upon our antagonists. Let them show when, and by what means, the exception in favor of the *antenatus*, derived from the principle of perpetual allegiance by birth, has been adopted among us.

Because, say the counsel for the defendant in error, the constitution of New Jersey adopted the common law, of which this is a part, therefore the rule is imperative on this occasion. What! all the common law of England? that which respects the royal prerogative, the hierarchy, the idea that allegiance is personal to the king from the subject, not duty on the part of the citizen to the state?

The common law of England, say Judge Tucker and Judge Wilson, was only so far adopted in the states, as it was proper and applicable to the situation and the circumstances of the colonies, and was different in different colonies.

The adoption by New Jersey is guardedly expressed. "The common and statute law of England, as have been heretofore practiced in this colony, not repugnant to the rights contained in this charter, shall be in force."

Two questions arise for the consideration of the opposite counsel. Was the principle for which they contend in previous practice in New Jersey? Is it not repugnant to the privileges contained in that charter?

A double task devolves on our opponents. They must show that what they ask was in practice in the *colony of New Jersey [*331 before the formation of the constitution. This is impossible; the case could not occur; it could not, in the nature of things, be in contemplation

of the convention. The expression had reference to the mere detail of municipal law. Here, then, our antagonist must fail.

Can they succeed better in the other part of the proposition? Is not a claim, founded on the idea of perpetual allegiance by birth, repugnant to the rights and privileges contained in that charter?

They say, on the contrary, that allegiance and protection are reciprocal ties, and claim, as a right and privilege, to refuse the former when the latter is withdrawn.

Three, out of seventeen states, says Mr. Rawle, have declared emigration a right not to be restrained by the legislatures. I say it is the principle of the revolution; it pervades each and every constitution, without which the whole proceeding is crime, rebellion and treason.

If the common law, introduced through the constitution, fails, what is the next prop by which it is attempted to support a claim in opposition to the language of our revolution?

We are told that the capacity of British subjects to hold lands in the United States is recognized by the treaties of 1783 and 1794, and that surely it was not meant to encourage them to purchase that we might escheat. This part of the argument is introduced by a reference to Judge Tucker for the distinction between aliens by birth and aliens by election. 1 Tuck. Bl. part 2, p. 102, s. 2. I acknowledge that Judge Tucker does state that, by the treaty of peace, the common law principle that the *antenati* of both countries were natural born to both, and, as such, capable of holding, or inheriting, seems to be revived. As far as respects authority, I oppose to Judge Tucker the Virginia assembly, who expressly declare that all persons not being citizens of the United States are aliens. 1 Tuck. Bl. part 2, p. 55. Judge Tucker founds himself, as to the common law principle, upon *Bracton and Calvin's Case*, not adverting to the difference in point of fact, that the British, who claim as in this instance, never were in allegiance to our states.

332*] *Further, he does not observe that the whole reasoning is founded upon the false hypothesis that allegiance by birth is perpetual. He acknowledges that by the declaration of independence the colonies became a separate nation from Great Britain; yet, according to the laws of England which we still retained, the natives of both countries, born before the separation, retained all the rights of birth. War makes aliens enemies. They were enemies, then aliens.

With the New Jersey convention I understand the matter differently; and that the law of England ceased until revived; and was revived only as heretofore practiced.

On this mistaken ground it is as I shall endeavor to show, that he infers that American natives were capable of inheriting lands in England, and the natives of England of inheriting lands in America.

If this doctrine is founded upon the idea of perpetual allegiance by birth, it must stand or fall with its principal.

Commentators, it is said, often find in Homer what Homer never thought. It appears to me that the same observation applies to the commentaries we have heard upon the treaties of 1783 and 1794.

Let it be recollected that Congress, on the 27th of November, 1777, earnestly recommended it to the several states to confiscate and make sale of all the real and personal estate of such of their inhabitants, and other persons, as had forfeited the same.

The legislatures did confiscate the lands of *antenati* as escheated and it was never suggested to be a violation of the common law of the land. In order, however, to vest the property in lands of an alien in the commonwealth, offices of entitling, and of instruction, were necessary in some states.

In some states acts of assembly declared that the estates of the persons proceeded against should be vested and adjudged to be in the actual possession of the commonwealth, without any other office or inquisition. In others, real property belonging to British subjects, loyalists, and others, had been only sequestered, not confiscated, *and the profits appropri- [*333 ated during the war; the estate to wait the disposal of the legislative provision on the return of peace. In some instances the lands of loyalists and others had not been actually seized and taken into the possession of the states respectively where situated, and, therefore, the forfeitures and confiscations were not considered as completed. In these several ways real property remained to loyalists and others which was considered as not yet confiscated. This is the key to unlock the secrets of the provision in the treaty.

I contend, therefore, that the 6th article of the treaty of 3d September, 1783, as far as respects property, is confined in its letter, spirit, and meaning, to the preservation of estates owned antecedently to the war, which had not been actually confiscated and seized; and to the consequences of an active part taken during that period.

This construction is perfectly warranted by the case decided in Connecticut, (Kirby's Reports,) and by the principles as laid down by that very eminent English lawyer, Wooddeson.

The distinction of *antenati* and *postnati*, the security of future acquisition, or the operation of general principles arising from political situations, not the penal consequences of an active part taken in the war, were not then in contemplation.

Twelve millions of rich aliens allowed to purchase lands in a country owned by two or three millions of people comparatively poor: would it not have been thought madness! I conceive that this clause is precisely co-extensive as to its objects in guarding against injury to the person and to the property. It preserves from injury to their property the same persons who were to be secured in their personal liberty.

In the first place, this comprehended many who were considered as citizens of the United States, but who had committed crimes against their country.

*Was the property to be restored to [*334 them at one moment, says Mr. Rawle, for the purpose of being taken from them the next? By no means. The stipulations extend to preclude any criminal proceedings for what had been done during the war. The effect of alien-

age was left to considerations of policy. Our commissioners, I trust, would not have suffered any interference by the British on that head.

This article was intended to prevent punishment, not to secure reward. If the loyalist is put upon the same footing as the ally in the war, he has no cause of complaint.

There must be no future loss; no damage by reason of the part which any have taken during the war. It is not asked. If Daniel Coxe had fought under General Washington, and at the peace expatriated himself, and become a British subject, the rule for which we contend would have been equally applicable. Many of the people came back, and were naturalized under acts of assembly, and of course hold their lands; such as Mr. Gordon, in Pennsylvania, and others.

The construction of the treaty attempted by our opponents, can only be maintained by reference to the common law doctrine, that natives of Great Britain were constructively born in America.

The 5th article assists in the construction of the 6th, and is recommendatory where the confiscation laws had been actually carried into effect. The 9th article of the treaty of the 19th November, 1794, is in perfect unison with the ideas I submitted to the consideration of the court. Different ideas had been entertained in the different states as to the policy of permitting aliens to hold lands. It was always a matter of state regulation. In Pennsylvania they might purchase; now they may take by descent.

The treaty, therefore, so far from looking to future acquisitions by purchase, is confined to those who now hold.

335*] *It is observable that Judge Tucker does not express himself decidedly. He uses the qualified and guarded expression that the treaty seems to have revived the common law principle that the *antenati* of both countries were natural born to both. He qualifies his argument still further, by saying, British subjects born since the separation are aliens; but such of them as were born before the definitive treaty of peace took place, seem to be entitled to the benefits thereof, so far as they had, or might be presumed to have, any interest in lands in the United States. All others appear to be aliens in the strictest sense of the word, except as their cases may have been remedied by the late treaty of the 19th Nov. 1794.

Daniel Coxe had no interest in lands in the United States, and could not be presumed to have, on the 3d of September, 1783.

It is curious to observe the unreasonable consequences to which this doctrine of *antenatus* leads.

If the loyalist died and left an unoffending infant, his lands *escheat*.

If he leaves an *antenatus* who had waged war against us, he succeeds to the possession.

Say with Judge Tucker that under the equity of the treaty of peace, giving it the most liberal construction, all rights of British subjects, actually vested, not devested, were protected; and that when such rights relate to lands, the persons having such right, if not then citizens, had their whole lifetime to become citizens; which, if they neglected to do, their lands at their deaths would be equally subject to escheat as those of any alien naturalized, and dying without heirs other than aliens. How is this reconcilable with his doctrine of *antenati* being entitled to purchase, take by descent, and every other mode of acquisition? Or, with his argument that the common law principle from which this doctrine of *antenati* flows, that of perpetual allegiance by birth, has never been translated as a part of the common law into the United States? How can he reconcile it to his censure *and strictures upon the determination [*336 of Judge Ellsworth in *Williams's Case*? He himself acknowledges that after the 28th of October, 1795, no British subject can purchase lands within the United States, so as to be protected by that treaty.

If once this whimsical doctrine of *antenatus* be admitted it will give rise to an infinity of perplexing questions.

An attainted loyalist, if he retains his citizenship, may return and be immediately eligible as a member of the house of representatives or the senate. After 14 years' residence, though he cannot be naturalized without the consent of the state in which he was proscribed, yet he may be President of the United States.

I infer from all these considerations that the expatriation of Daniel Coxe induced the forfeiture of alienage, and that he is thereby precluded from taking lands by descent in the United States of America.

Cur. ad. vult.

ADAMS, *qui tam v.* WOODS.

The act of 30th April, 1790, limiting prosecutions upon the penal statutes, extends as well to penalties created after as before that act, and to actions of debt as well as to informations and indictments.

THIS was a case certified from the circuit court of the United States for the Massachusetts district, in which the opinions of the judges of that court were opposed.

It was an action of debt for the penalty of 2,000 dollars, under the 2d section of the act of Congress of 22d March, 1794, "to prohibit the carrying on the slave trade from the United States to any foreign place or country." Vol. 3, p. 22.

The words of the act are, "shall forfeit and pay the sum of two thousand dollars; one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."

*The defendant pleaded, "that the [*337 cause of action, set forth in the plaintiff's writ and declaration, did not accrue within two years next before the date and issuing forth of the writ in this case against him in manner and form as the plaintiff hath declared, and this he is ready to verify. Wherefore," &c. To which plea there was a general demurrer and joinder.

The question was, whether the plea was a good bar to the action.

The plea was grounded upon the 32d section of the act of Congress of April 30, 1790, vol. 1,

p. 113, 114, which is in these words: "That no person or persons shall be prosecuted, tried or punished for treason or other capital offense aforesaid, willful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offense aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid: Provided that nothing herein contained shall extend to any person or persons fleeing from justice.

This cause was argued at February term, 1804.

Lincoln, Attorney General, for the plaintiff.

The offenses described in the act of Congress upon which the defendant relies are *mala in se.* They were crimes originally.

Informations are of two sorts: those in behalf of the United States and the informer; and those in behalf of the United States alone.

They are considered as criminal process. The act describes only such offenses as are to be prosecuted by indictment or information; for the words are, "unless the indictment or information for the same shall be found or insti- 338*] tuted," *&c. Hence it is apparent that the legislature meant to limit only prosecutions of that kind.

An action of debt *qui tam,* is a civil, and not a criminal process. The act of Congress on which the defendant relies is entitled, "An act for the punishment of certain crimes against the United States." The limitation it contains is intended to be a limitation of criminal prosecution. Lord Mansfield, in the case of *Atcheson v. Everitt,* Cowp. 391, says, "now, there is no distinction better known than the distinction between civil and criminal law; or between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguish between them. Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal cause. It is as much a civil action as an action for money had and received."

But even supposing that the act of Congress meant to include actions of debt under the terms indictment or information; yet it refers only to penal statutes, or offenses then existing, and cannot extend to offenses created by subsequent statutes. This may be inferred from the force of the terms used. "Any penal statute," must mean any existing penal statute. A similar construction is put upon the statute of 21 Jac. I. c. 4, by the judges in England. The words of that statute are "any penal statute," yet the court held that those words referred only to penal statutes then existing, and not those subsequently enacted. Cunningham's Law Dict. tit. *Limitation.* 5 Mod. 425, 1 Salk. 372, *Rex v. Gaul,* 1 Salk. 373, *Hick's Case.* If the legislature meant the act to apply to all future penalties, they would have said, any penal statute now existing or which shall hereafter be enacted.

The legislature could not suppose that the term of two years would be a proper limitation of all penal actions. In the present case it goes to a total annihilation of the penalties of the act. No vessel engaged in the slave trade can ever be subjected to condemnation; for the voyage is always circuitous, and generally takes up more *than two years to perform it. It [*339 is generally from the United States to the West Indies, from thence to Africa, thence back to the West Indies or South America, and thence home. It is scarcely possible that all this should be accomplished in two years. I have lately seen a set of papers sent from our consul in England to the Secretary of State, in which orders were given to the captain to go to the West Indies, and from thence to Africa, and to continue the trade until the vessel should be no longer fit for a voyage.

In the act of 2d March, 1799, to regulate the duties upon imports and tonnage, s. 89, vol. 4, p. 430, is the following clause: "That no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred;" which shows that the legislature did not consider the act of 1790 as applying to any offenses subsequently created; otherwise they would not have inserted a new limitation; or if they meant to extend the right of action to three years, they would have used affirmative words, and said that actions for penalties under that act might be prosecuted at any time within three years, the act of 1790 notwithstanding.

Swann, contra.

It is immaterial whether this is to be considered as a criminal or a civil process. The act of limitation is a general law applying to offenses subsequently created as well as to those already existing. The cases cited from Cunningham's Law Dict. are grounded upon the peculiar words of the statute of James, and do not apply to those of the act of Congress. There may be a little obscurity in the words of the act, but there is none as to the intention of the legislature. They meant to make a provision which should extend to all prosecutions upon penal statutes. The action *qui tam* is a common law remedy, and existed as a mode of prosecution at the time of passing the act of 1790; and although it does not expressly limit an action of debt for the penalty, yet it expressly limits all prosecution for the penalty, not the prosecution in a particular mode. The words are, "nor *shall any person be prosecuted, tried, [*340 or punished." But if the opposite construction is correct, the United States would be barred from prosecuting, but an individual would not.

The Court took time to consider; and now at this term,

February 18, 1805, MARSHALL, *Ch. J.,* delivered the opinion of the Court.

This is an action of debt brought to recover a penalty imposed by the act, entitled "An act to prohibit the carrying on the slave trade from the United States to any foreign place or country."

It was pleaded in bar of the action, that the offense was not committed within two years previous to the institution of the suit. To this plea the plaintiff demurred, and the circuit court being divided on its sufficiency, the point has been certified to this court.

In the argument, the plaintiff has rested his case on two points. He contends,

1st. That the act of Congress, pleaded by the defendant, is no bar to an action of debt.

2d. That if it be a bar, it applies only to the recovery of penalties given by acts which existed at the time of its passage.

The words of the act are, "nor shall any person be prosecuted," &c., vol. 1, p. 144. It is contended that the prosecutions limited by this law, are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt.

But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prose-
341*] cution, trial, or punishment *for the offense. It is not declared that no indictment shall be found, or information filed, for any offense not capital, or for any fine or forfeiture under any penal statute, unless the same be instituted within two years after the commission of the offense. In that case the act would be pleadable only in bar of the particular action. But it is declared, that "no person shall be prosecuted, tried, or punished;" words which show an intention, not merely to limit any particular form of action, but to limit any prosecution whatever.

It is true that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislature, those general expressions are used in a particular sense: and the argument is a strong one, which contends that the latter words describing the remedy, imply a restriction on those which precede them. Most frequently they would do so. But in the statute under consideration, a distinct member of the sentence, describing one entire class of offenses, would be rendered almost totally useless by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained:

In support of the opinion that an act of limitations to criminal prosecutions can only be used as a bar in cases declared by law to be criminal at the time the act of limitations was passed, unless there be express words extending it to crimes to be created in future, Cunningham's Law Dict. has been cited.

342*] *The case in Cunningham is reported in 1 Salk. and 5 Mod. and seems to be founded on the peculiar phraseology of the statute of the Cranch 2.

21st Jac. I., directing informations to be filed in the county in which the offenses were committed. That statute was expounded to extend only to offenses which, at the time of its passage, were punishable by law. But the words of the act of Congress plainly apply to all fines and forfeitures under any penal act, whenever that act might pass. They are the stronger because not many penal acts were at that time in the code.

In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture.

The Court is of opinion that it be certified to the circuit court for the district of Massachusetts, that the issue in law joined in this case ought to be decided in favor of the defendant.

WINCHESTER v. HACKLEY[1]

A creditor upon open account who has assigned his claim to a third person with the assent of the debtor, is still competent to maintain an action at law in his own name against the debtor for the use of the assignee; but the debtor is allowed to offset his claims against the assignee.

The defendant cannot offset a claim for bad debts made by the misconduct of the plaintiff in selling the defendant's goods as factor, the plaintiff not having guarantied those debts. But such misconduct is properly to be inquired into in a suit for that purpose.

ERROR to the circuit court for the district of Virginia.

The declaration was for money paid and advanced by the defendant in error for the use of the plaintiff in error.

Upon trial of the issue of *non assumpsit* two bills of exception were taken by the original defendant. The verdict was for plaintiff. 4,155 dollars damages.

The first bill of exceptions stated, that the plaintiff below offered in evidence sundry bills of exchange drawn *by the defendant [*343 upon the plaintiff, to an amount equal to the balance demanded by the plaintiff of the defendant. And also several accounts current between the defendant, and the mercantile firm of Richard S. Hackley & Co. of the city of New York; of which the plaintiff and Seth B. Wigginton were two; that the said bills of exchange were debited to the defendant in the said accounts, as being due from him to the said Richard S. Hackley & Co. and that the said accounts contained various other articles of debit and credit to a considerable amount, commenced on the day of , and continued till the day of , when the firm of Richard S. Hackley was changed into that of Richard S. Hackley & Co. and concluded on the day of .

1.—Present Marshall, *Ch. J.*, Cushing, Paterson, and Washington, *Justices.*

That in these accounts, the balance stated to be due from the defendant to the said Richard S. Hackley, on the day of , is transferred, with the consent of the said Richard S. Hackley, to the said Richard S. Hackley & Co., and that the account in which the said balance is so transferred to the said Richard S. Hackley & Co., and the formation of that firm, were communicated by the said Richard S. Hackley himself to the defendant, before the institution of this suit; and that the defendant thereafter made to the said Richard S. Hackley & Co. several remittances in money and commodities, towards the discharge of the said balance, and addressed to them several letters concerning the same, which remittances and letters came to the hands of the said Richard S. Hackley & Co. Whereupon the defendant moved the court to instruct the jury, that if the balance aforesaid was transferred as aforesaid to Richard S. Hackley & Co. it was not a subsisting debt from the defendant to the plaintiff alone, at the commencement of this suit. But the court (consisting of Marshall, Ch. J., and Griffin, District Judge) overruled the motion, being of opinion, that though the debt was in equity transferred to Richard S. Hackley & Co., yet the suit was maintainable for their benefit in the name of Richard S. Hackley. At the same time the defendant was permitted to give in evidence any discounts which he might claim against Richard S. Hackley & Co.

The second bill of exceptions stated, that the plaintiff, to support his action, gave in evidence 344*] sundry accounts *current between himself and the defendant, in which the plaintiff had credited the defendant, as being in the plaintiff's hands for collection, for the proceeds of a certain quantity of flour, which he had sold for the defendant, but had afterwards charged to the defendant several sums on account of the alleged insolvency of some of the purchasers of the said flour. It also appeared, that in the account current, and accounts of sales, the proceeds of sale of the said flour were stated to be outstanding, subject to collection, and the plaintiff did not undertake to guaranty the debts. Whereupon the defendant, in order to repel that evidence, offered to prove that the sums so charged to the defendant were lost by the mismanagement and misconduct of the plaintiff, in having made the sales to persons known by him to be unworthy of credit; but the court refused to permit such proof to be made to the jury in this action, being of opinion that such misconduct was properly to be inquired into in a suit for that purpose.

This case being submitted without argument, the judgment was affirmed with costs.

REILY, Appellant,
v.
LAMAR, BEALL and SMITH, Appellees.

The inhabitants of the District of Columbia, by its separation from the states of Virginia and Maryland, ceased to be citizens of those states respectively.

By the insolvent law of Maryland, of the 3d of January, 1800, the Chancellor of Maryland could not discharge a citizen of Maryland who resided in the District of Columbia at the time of its separation from Maryland, unless the person had complied with all the requisites of the insolvent law so as to entitle himself to a discharge before that separation.

Quære, whether a person who has neglected at law to plead his discharge under an insolvent act can avail himself of it in equity?

A citation is not necessary when the appeal is prayed and allowed in open court.

THIS was an appeal by Reily from a decree of the circuit court of the District of Columbia, which dismissed his bill in equity with costs.

The defendant, Beall, some time in the year 1789 or 1790 had brought suit in the name of Lamar, for the use of Beall, by Robert Smith, his attorney at law, against Reily, the appellant, upon a note for 400 dollars, and recovered judgment in the general court of Maryland.

The bill stated that during the pendency of that suit, the complainant Reily, supposing that Smith was fully authorized to receive payment of the debt in any manner he should think proper, sold him a tract of 4,600 acres of land in the state of Georgia, for the sum of 1,533 dollars, for the express purpose of discharging that debt and some others which Reily owed in Baltimore. That in settling with Smith for the purchase money of the land, the amount *of that debt was deducted and left in [*345 the hands of Smith to be paid to Beall, under a promise from Smith that he would have the entry made upon the records of the court that the debt was satisfied. And after deducting also the amount of other debts which Smith undertook to pay for Reily, Smith paid him the balance by a check on the bank, being about 17 dollars. That thus the matter rested until the year 1799 or 1800, when being called on by Beall for payment, Reily applied to Smith to know why the debt had not been paid, who replied that it had been delayed in consequence of a dispute between one John Lynn, to whom the note had been indorsed, and the said Beall, as to which of them was entitled to the money; but that it had been settled by reference that Beall should have it; and that Reily might remain easy, for he should not be called on again for payment. That Reily informed Beall that he had paid the amount to Smith, and that Beall had acknowledged to several persons that he was satisfied the fact was so, and had employed counsel to bring suit against Smith for the money. That Smith had charged Reily with the said debt in his books, and that Reily had seen the entry in Smith's own hand-writing, and prays that the book may be produced.

That after the said judgment was rendered, viz., on the 3d of January, 1800, the legislature of Maryland passed an insolvent law in favor of Reily, and others, and on the 23d of December, 1800, he conveyed all his estate to a trustee agreeably to the law, for the use of all his creditors, and that on the 4th of April, 1801, the Chancellor of Maryland granted him a certificate of discharge, (a copy of which is made part of the bill,) whereby it was adjudged and ordered that he should be discharged from all debts, covenants, contracts, promises, and agreements due from, or owing, or contracted by him, before the aforesaid 23d day of December, 1800, provided that any property which

he had acquired since the execution of the said deed, or should acquire by descent, or in his own right by bequest, devise, or in a course of distribution, should be liable for the payment of his said debts. That a writ of *scire facias* having issued some time in the year 1800, to revive the said judgment, Reily instructed his attorney at law to plead the said discharge in bar thereof, which he neglected to do, without any default on the part of Reily. That all the property he possessed was duly delivered up to 346*] the *trustee at the time of executing the deed of trust, and that all the property now in his possession was a devise, or the proceeds of a devise, to his wife. That execution having upon the *scire facias* aforesaid been awarded by the general court of Maryland, an exemplification of that judgment had been by the said Beall filed in the clerk's office of the circuit court of the District of Columbia, for the county of Alexandria, and execution issued thereon, with intent to levy the same upon the goods and effects held by Reily, in the right of his wife, to stay which, and all other proceedings at law, the bill prayed an injunction, &c.

Beall, in his answer, stated, that he had never received any part of the money either from Reily, or Smith, who, he admits, was his attorney in the suit against Reily. That Smith denied that Reily had ever paid him the money, and that Beall had no knowledge, otherwise than by the information of Reily, that the same had been so paid. But that some time after the original judgment was obtained against Reily, Smith told Beall that if he would make to him, the said Smith, a handsome discount upon the said judgment, he would pay him the money for the same, which Beall refused to do. He admits, that for some time he did believe, and had declared his belief, that Reily had paid the money to Smith, and under that impression had given instructions to an attorney to examine into the business, and bring suit against Smith, or Reily, as he should judge best; but he never positively admitted the fact to be so, nor has he intimated such an opinion since he has seen Smith's answer. He does not admit that Reily had ever regularly and legally obtained the benefit of any insolvent law of Maryland, nor that he instructed his attorney to plead his discharge, but that if he did, the attorney was able to pay any damages which Reily might sustain by his negligence. That the plea would be a good plea at law, and therefore the complainant could not resort to equity for that benefit which he had lost by his negligence. He admits that it appears by the proceedings that the deed from Reily to his trustee under the insolvent law for the benefit of his creditors was dated on the 23d of December, 1800, and his discharge on the 4th of April, 1801, during all which time Reily lived either in the city of Washington, or town of Alexandria, and contends that, as the court below had determined that the jurisdiction of Maryland and Virginia over the ceded territory 347*] *ceased on the 1st Monday of December, 1800, the legislature or Chancellor of Maryland had no power to pass such law, or give such discharge to the said Reily. He does not admit that property now held by Reily is held in right of his wife.

The answer of the defendant, Smith, admits that as attorney for Beall, he brought the suit against Reily, and that he purchased of him, as he then imagined, a certain parcel of land, consisting of 4,600 acres, represented by Reily to be in the State of Georgia, at the price of two shillings and six pence current money of Maryland per acre, amounting for the whole to the sum of 1,533 dollars and 33 cents; but denies that in making that purchase he undertook or assumed for Reily to pay the debt to Beall, and that Reily ever left in his hands any money for that purpose, and that he (Smith) ever promised to have an entry made on the records that the debt was satisfied. The answer then avers that Smith had availed himself of all the means in his power to obtain satisfactory information respecting the title, and even of the existence of the Georgia land, and that failing in all his various attempts, he has reason to believe, and does believe, that he did not acquire any title. He denies that he ever told Reily that the payment of the debt by him (Smith) had been delayed in consequence of any dispute, and that he gave Reily any ground to believe or imagine that he (Smith) intended to pay the said debt, or any part of it. That he never charged Reily in any account against him with the amount of any part of the debt, and that no part of the purchase money was ever deducted to pay the debt. It avers also that Smith, in the years 1790, 1791 and 1792, did not keep any book of money accounts whatever, except a bank book, nor any kind of book of accounts wherein such an entry could with propriety have been made, and that there never was in his possession, or kept by him, such a book of accounts as the said Reily had alleged. The answer does not state that Smith has in any manner paid Reily for the lands.

The copy of the Chancellor's certificate of discharge, referred to in Reily's bill, states the date of the deed from Reily to his trustee to be the 23d of March, 1801, and not the 23d of December, 1800, as alleged in the bill, and admitted in Beall's answer.

*The deed from Reily to Smith for [*348 the Georgia lands, and also a deed of quitclaim from Cobbs (from whom Reily purchased them) to Smith, and the surveyor's plat and certificate of survey, were produced in evidence. The depositions tended to prove that Smith had received from Georgia very favorable accounts of the Georgia land, and of the goodness of the title; and that the lands were worth a dollar per acre. That he had said, as late as June or July, 1801, that at the time of his purchase from Reily, it was understood that any debts due from Reily, which Smith should satisfy, were to be admitted as payment for the land; that believing at that time that he had made a valuable purchase, he did pay some debts and offered to pay others, if the creditors would make abatements. That by the contract he was at full liberty to settle any debt due from Reily, in the easiest and most advantageous way to himself; that he denied that he had engaged to pay any particular debt, but that he was to discharge the purchase money, by purchasing or satisfying claims against Reily, in any way he found best. That he offered to pay Beall the debt Reily owed him, if Beall would allow a handsome discount, but that Beall had refused to do so, and the conversa-

tion ceased. That he had not received any satisfactory information respecting the Georgia lands, and feared he had made an incautious purchase, and that the lands did not exist. He regretted that he had paid any thing; and said that he had offered Reily the lands again upon receiving what he had paid, which Reily declined. That he only wanted to be satisfied that there was such land as he had bought of Reily, and that he had title, and the business should be settled immediately with him; but that the business between Reily and Beall was out of the question between him and Reily.

The evidence as to Beall, only went to prove that he had several times expressed a belief that Reily had settled the debt with Smith.

At February term, 1804, a preliminary question was suggested by Mason, for the appellees, whether a citation was not necessary in cases of appeals, as well as in cases of writs of error, under the 22d section of the judiciary act of 1789, vol. 1, p. 62.

349*] *MARSHALL, *Ch. J.* The question turns upon the construction of the act of March 3d, 1803, vol. 6, p. 315. The words are, "and that such appeals shall be subject to the same rule, regulations and restrictions as are prescribed in law in case of writs of error."

E. J. Lee, for the appellant. The reason for a citation in cases of writs of error, does not apply to cases of appeal. Where the appeal is prayed and granted in the court below, the parties are bound to take notice of it.

Mason, in answer to a question from the Chief Justice, stated that he conceived that an appeal might be allowed at any time within five years, in the same manner as writs of error. The words of the last act of Congress upon the subject are peremptory, "appeals shall be subject," &c.

If there is no citation, the appeal cannot be a *supersedeas*, but perhaps the want of a citation is not sufficient ground to dismiss the appeal.

On a subsequent day in the same term, the Chief Justice stated it to be the opinion of the Court, that the appeal having been prayed, pending the court below, a citation is not necessary; and, therefore, the case is properly before the court.

February 6th, 1805. The case was now argued by E. J. Lee and C. Lee, for the appellant, and by Mason, for the appellees.[1]

E. J. Lee. If the plaintiff's attorney at law make a contract with the defendant, by which the plaintiff's demand is satisfied, it binds his client. So he may leave the matter to reference, and the client will be bound by the award. The 350*] answers of Smith and Beall *are contradicted in a material point, and the rule in equity is, that if the defendant's answer is false in a material point, it shall not be taken to be true in the residue. Mr. Smith's answer states that he has availed himself of all opportunities of ascertaining the title, nay, the existence of the land. Robert Long's deposition shows this to be incorrect.

Beall's answer states that he never did aver that Reily had paid the money to Smith. This is contradicted by Lloyd Beall's deposition.

Another ground of equity on the part of the appellant, is his discharge under the insolvent act of Maryland. He is not precluded from setting it up in equity, because his attorney neglected to plead it at law. No fraud is alleged or suggested in obtaining it; but it is stated, that the discharge was after the District of Columbia was separated from Maryland, and that upon that separation, Reily living in the city of Washington, ceased to be a citizen of Maryland; and that, as the act directs that the Chancellor shall be satisfied that the person applying to him for a discharge was, and is a citizen of Maryland, and as the legislature could not authorize the discharge of a person from his debts, who should not be at the time of the discharge a citizen of Maryland, the discharge was not valid and regular.

But the act of Maryland was passed before the change of jurisdiction, and the discharge was only a consequence of what was begun while the legislature had jurisdiction. By the act of cession by Maryland, and the act of acceptance by Congress, it is provided that the operation of the laws of the state should not cease nor be affected by the acceptance until the time fixed for the removal of the government, and until Congress should otherwise by law provide.

The time appointed for the removal of the government was the first Monday of December, 1800, but Congress did not provide by law for the government of the District of Columbia until the 27th of February, 1801. The insolvent act passed on the 3d of January, 1800. On the *15th of April, 1800, the Chancellor [*351 passed an order that Reily give notice to his creditors to appear on the 3d of November, 1800, on which day, notice having been given, the oath of an insolvent debtor was administered to Reily by the Chancellor, and a trustee appointed. On the 23d of December, 1800, Reily conveyed all his property to the trustee, who on the same day gave bond for the faithful performance of the trust, and a receipt for the effects. Thus every thing was done by Reily on his part, to entitle him to a discharge before the operation of the law of Maryland ceased. The Chancellor, therefore, having the cause before him, and having once had jurisdiction, could not be deprived of it by the separation of the territory.

If a crime had been committed within the District of Columbia before the 27th of February, 1801, it must have been punished according to the state law of that part of the district in which it was committed.

Besides it is worth consideration whether, as the debt was due to Beall, who always remained a citizen of Maryland, it might not be barred by an act of the legislature of Maryland, notwithstanding the debtor had ceased to be a citizen.

The words of the insolvent act, (November session, 1799,) c. 88, passed January 3d, 1800, § 3, are,

"§ 3. And be it enacted, That no person herein before mentioned, shall be entitled to the benefit of any of the provisions of this act, unless the Chancellor shall be satisfied, by compe-

1.—E. J. Lee, being asked by the Court for a statement of the case, agreeable to the rule of court, alleged that it was not in his power to make a statement, as it was a question as to the weight of testimony, on contradictory evidence.

MARSHALL, *Ch. J.* The court require a statement of the case, even though the question is a question of fact; at least the substance of the bill and answer, and the facts which are in contest, might be stated.

tent testimony, that he is, and at the time of passing this act was, a citizen of the United States, and of this state, and unless at the time of presenting his petition as aforesaid, he shall produce to the Chancellor the assent, in writing, of so many of his creditors as have due to them the amount of two thirds of the debts due by him at the time of the passing of this act; provided, that foreign creditors, not residing in the United States, and not having agents or attorneys residing therein duly empowered to act in their behalf, shall not be considered within the intent and meaning of this clause; and provided also, that the Chancellor may, without the as- 352*] sent of *the creditors as aforesaid, from time to time, order to be discharged from custody any of the said petitioners who may be in actual confinement, in virtue of any process issued, or that may be issued, in pursuance of any debt at this time due and owing by him, which discharge is hereby declared to be a release only of the person of such debtor, but not of his property, unless the assent in writing of two thirds in value of the creditors as aforesaid be obtained."

It was only necessary that the Chancellor should be satisfied that Reily was a citizen of Maryland at the time of passing the act, and at the time of his application to the Chancellor for its benefit; and these facts are not denied.

Mason, contra.

There are only two questions in this cause.

1. Has Reily any equity on the ground of having paid the judgment?

2. Has he any equity on the ground of being released by the act of Assembly?

1. It is admitted that he has an equity if all the facts stated in the bill are true. But the bill itself is not evidence.

The answers of Smith and Beall deny all the equitable facts, and there is no evidence to prove them.

The controversy is really between Reily and Smith, for it is not alleged that Beall has been satisfied, unless the payment to Smith is proved, and binds Beall. But as the evidence does not prove a payment to Smith, there is an end of the first point.

2. As to the discharge under the insolvent law.

It is a principle that if a man has a defense at law and waives it, he shall not avail himself of it in equity. This is a defense which pecu- 353*] liarly requires that it should have *been pleaded at law. The plea would have embraced all the facts which were necessary to show that he was regularly discharged, any of which the plaintiff might have traversed and put in issue.

The bill alleges he was regularly discharged. The answer denies it, and puts him upon the proof. How has he proved it? By the Chancellor's certificate only; and that was made on the 10th of April, 1801, when, according to the allegations in the bill, he was not a citizen of Maryland, but of the District of Columbia.

The bill states, that the property on which the *fieri facias* was levied, was a devise to his wife, or the proceeds thereof.

The answer denies it, and there is no proof.

The bill charges that he directed his attorney at law to plead the discharge. The answer denies it, and there is no proof, although the attorney himself was examined as a witness for the complainant.

Having removed from the city of Washington to Alexandria, which is subject to different laws, the discharge could not avail him there.

There is no evidence that Beall was a citizen of Maryland, and therefore the argument that the legislature of Maryland might bar him from a recovery of the debt, although Reily should not appear to be a citizen, does not apply.

CHASE, *J.* Would not the proper remedy be, by motion, to discharge the property taken on the *fieri facias*, if it appeared to be property which came to the wife by devise?

E. J. Lee. Although that might be done, yet it is not the only remedy. It might be too late on the return of the execution, when the property might be sold.

MARSHALL, *Ch. J.* Could the court have gone on to decree Smith to pay the money to Reily, and dismiss *the bill as to Beall? [*354 Was the cause in such a state that this could be done?

C. Lee and Mason admitted that they might.

CHASE, *J.* Can an attorney at law, by a contract for the purchase of land to himself, bind his client?

C. Lee, in reply. We do not contend for the principle to that extent; but if Beall assented to the payment to the attorney in that way, it would bind him in equity. So if the attorney has the money of the debtor in his hands, and upon a settlement with the debtor the attorney retains the debt of his client, and gives the debtor a check for the balance, the client is bound. If Smith did undertake to settle this debt, it binds Beall. But if not, yet Reily has a claim against Smith, and the court below ought not to have dismissed the bill as against him. There is no doubt of Reily's equity as to Smith. He does not even allege that he ever paid Reily for the lands. He has not produced the bank book, as he was required to do, which would have shown the check of 17 dollars.

As to the discharge under the insolvent act; if it was good in Maryland, it was good in every part of the United States.

That it was obtained fairly, legally, and regularly, appears from the certificate itself; which is at least prima facie evidence of those circumstances; and the contrary must be proved if alleged. 1 Dall. 229, *Millar v. Hall.* The present case is stronger than that of Millar and Hall; because here both parties were citizens of Maryland, but in that, Millar was a citizen of Pennsylvania.

There is certainly an error in the copy of the certificate of discharge filed in this case, in stating the deed of Reily to his trustee to be dated the 23d of March, instead of the 23d of December; for the certificate of the trustee, by which he acknowledges the receipt of all the effects of Reily, is dated on the 23d of December, and so is the trustee's bond.

If the deed was executed on the 23d of December, the case is clear of all doubt, for the inhabitants of that part of the District of Columbia which was ceded by Maryland, *re- [*355 mained citizens of Maryland, and subject to all her laws, until the 27th of February, 1801, when Congress first provided by law for the government of the district. Laws of United States, vol. 1, p. 132. Resolve of Maryland, 1788. Laws of Maryland, November, 1791, c. 45, § 2. Laws of United States, vol. 5, p. 268.

The words of the insolvent act are, that the Chancellor shall be satisfied that the petitioner "is and was," at the time of passing the act, a citizen of the state of Maryland. If the Chancellor is satisfied that he was, at the time of passing the act, and is, at the time the petition is presented to him, a citizen of Maryland, it is sufficient. But it is not necessary in this case to confine the time to the presenting the petition; we may admit the proper time to be the date of the deed to his trustee. The discharge has relation to that time. So in the case of bankrupts, the certificate relates to the time of doing the act of bankruptcy; although the granting of it may be deferred for a long time. The insolvent law of Maryland is to be considered as a bankrupt law. So says Judge M'Kean, in the case of Millar and Hall.

The 4th article of the constitution of the United States declares, that "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state." And "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Reily being, for aught that appears to the contrary, a natural born citizen of Maryland, could not be deprived of his right of citizenship by the transfer of jurisdiction. He might cease to be an inhabitant, but could not cease to be a citizen.

The situation of Reily is unhappy indeed, if he is not protected by his discharge. He cannot recall the deed which he made of all his effects to the use of his creditors. His property is gone. And if the insolvent laws of the several states are not to be respected, perpetual imprisonment may be the consequence.

The court below ought to have continued the injunction as to all the property of Reily, except such as came to him in his own right by 356*] devise, bequest, or in the course of *distribution. But if Reily has paid Smith, and that payment can be applied to Beall, then the injunction ought to be general and perpetual. At any rate, a general dissolution of the injunction was erroneous.

Mason, contra. If Reily has been discharged under the insolvent act. and has transferred all his estate and effects to his trustee, the court below could not have decreed Smith to pay the money to Reily. The right of action was not in him, but in the trustee.

The insolvent law in the present case is a special law for the benefit of certain persons by name, and Reily must show that he has complied with all the requisites of the act in as full a manner as if he had pleaded at law.

There is no clause in the act making the Chancellor's certificate prima facie evidence of a compliance with all those requisites, and there is no such rule of the common law. It is only made prima facie evidence to authorize a discharge from arrest.

The laws of Maryland cannot apply. The opposite counsel take that for granted, which is the point in dispute.

There is no mistake in the certificate respecting the date of the deed, but if there is, there is no evidence before the court by which it can be rectified.

MARSHALL, *Ch. J.*, delivered the opinion of the Court, to the following effect:

In this case the court has attentively considered the record, proceedings, and evidence. The only equity of the complainant's bill as to Lamar & Beall, arises out of the transactions between him and the defendant, Smith, and the Court is of opinion that that equity is not supported; and that the material allegations of the bill as to the defendant, Smith, and which are denied by his answer, are also unsupported by the evidence. Nor are the allegations of the complainant, respecting his certificate of discharge, sufficiently proved.

By the separation of the District of Columbia from *the state of Maryland, the com- [*357 plainant ceased to be a citizen of that state, his residence being in the city of Washington at the time of that separation.

As the complainant was entitled to a discharge, upon executing the deed of assignment of all his effects to the trustee appointed by the chancellor, his certificate would relate back to the date of the deed. It has been said that the true date of that deed was the 23d of December, 1800, and that the certificate of the Chancellor, which states the date to be the 23d day of March, 1801, is incorrect.

But the certificate of the Chancellor is the only evidence before the court as to that subject, and we must take it to be true. It is, therefore, not material to inquire whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th of February, 1801, or on the first Monday of December, 1800, as it is not contended that they were under the jurisdiction of Maryland so late as the 23d of March, 1801.

The complainant, therefore, not being a citizen of Maryland at the time of executing the deed, did not bring himself within the provisions of the insolvent law, under which he claims relief.

I was inclined at first to think that an account might have been directed between the complainant and the defendant, Smith, but the Court is of opinion, that if he has any remedy against Smith, it is at law and not in equity. The bill must be dismissed with costs, but without prejudice.

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*THE UNITED STATES [*358
v.
FISHER *et al.*, Assignees of BLIGHT, a Bankrupt.[1]

In all cases of insolvency or bankruptcy of a debtor of the United States they are entitled to priority of payment out of his effects.

ERROR from the circuit court for the district of Pennsylvania.

The action was instituted to try two questions, all the necessary facts being conceded to bring the law before the court. The questions were,

1. Whether an attachment laid by the United States, on property of the bankrupt in the hands of the collector of Newport, in Rhode

1.—Present, Marshall, *Ch. J.*, Cushing, Paterson, Washington, and Johnson, *Justices.*

NOTE.—*Priority of state or United States in payment from assets of a debtor*—see note, 29 L. R. A. 226.

Island, after the commission of bankruptcy had issued, is available against the assignees?

2. Whether the United States are entitled to be first paid and satisfied, in preference to the private creditors, a debt due to the United States by Peter Blight, as indorser of a foreign bill of exchange, out of the estate of the bankrupt in the hands of his assignees?

The opinion of the court below was in favor of the defendants upon both points, and a bill of exceptions was taken by the United States.

Dallas, (Attorney of the United States for the district of Pennsylvania,) for the plaintiffs in error.

1. As to the particular right of the United States under the attachment. The title of the assignees is good against all who are bound by the bankrupt act. But we say the United States are not bound by that act. This exemption is not claimed as matter of prerogative, as in England, but by reason of an express legislative exception.

By the 62d sect. of the Bankrupt Law of 4th April, 1800, vol. 5, p. 82, it is enacted, "that nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law 359*] heretofore *passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States, or to any of them."

Congress had a right to declare that the act should not affect a public debt. Have they done it? The words contemplate, 1. The right of preference existing by prior laws; 2. The general right to, or security for, any money due to the United States. The effect of this section is, that the bankrupt act shall in no manner affect the right of the United States to recover any money due to them. To say, then, that the commission of bankruptcy should prevent the United States from attaching the effects of the bankrupt, is in direct repugnance to the section. This exception in favor of the United States, was not necessary to prevent the certificate from being a bar to their claim, nor to protect a lien actually existing; as a mortgage, &c., because the United States not being named in the body of the act are not bound by it. Thus in England, upon the same principle, the king is not barred by the certificate. Such were also the decisions upon the Pennsylvania bankrupt law in the courts of that state, by which it was uniformly adjudged that the state was not bound. A mortgage, or other specific lien, was sufficient to protect itself. The section, therefore, could have no use but that of declaring expressly that so far as relates to the debt due to the United States, the right, the security and the remedy should all remain unimpaired by anything contained in that law. This principle was decided by the circuit court in the case of *The United States v. King*, Wallace's Reports, p. 13, in which the court held, that in the case of a legal bankruptcy, the right of the United States remained unimpaired. As far as the claim of the United States was concerned, the assignment under the commission of bankruptcy did not transfer the property. If the claim of the United States was by matter of record the assignees were bound to take notice of it, and if the effects came to their hands, they held in trust for the United States until the claim was discharged; so if the claim was by matter *in pais*, if the assignees had notice they were bound by it, and could not distribute until the claim was satisfied.

*The whole title of the assignees [*360 depends upon the statute; if, then, the assignment under the statute is set up to prevent the United States from getting the money, it is in direct violation of the 62d section.

2. As to the general right of the United States to priority of payment in all cases.

The United States are bound to maintain the public credit, and to pay all their debts, as well those due before, as since the present constitution. They must have all necessary powers incident to that duty; among these is the authority to purchase bills, and to enter into negotiations for making remittances to foreign countries. They are not bound to freight a ship with specie.

Every fiscal system ought to have two objects; certainty in the collection of the revenue and fidelity in its expenditure. Hence the necessity of priority in collecting the public debts; of surety for the conduct of public officers; and of a guard against the failure of the public debtors.

With this view it is enacted by the act of July 11, 1798, s. 12, vol. 4, p. 196, that the supervisors, inspectors and collectors, should give bond with surety for the faithful performance of their duty. And by the 15th section of the same act, the amount of all debts due to the United States by any supervisor, or other officer of the revenue, is declared to be a lien upon his lands and those of his surety, from the time when a suit shall be instituted for the recovery of the same.

The debtors of the United States may be arranged in three classes.

1. Debtors on credit for public dues.
2. On receipt of public money.
3. On purchasers or contracts.

1. Debtors on credit for public dues, were, 1. For import duties; 2. For internal taxes.

*By the act of 31st July, 1789, s. [*361 21, (vol. 1, Child's edition, p. 47,) it is provided that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond" (*i. e.* for payment of duties) "shall be first satisfied." The act of August 4, 1790, s. 45, (same book, p. 221,) has the same provision.

By the act of 2d of May, 1792, s. 18, (vol. 2, Child's edition, p. 78,) in cases of insolvency the surety who pays the debt due to the United States, on any bond given for duties on goods imported, shall have the same priority of payment out of the effects of the insolvent, as the United States would have had by virtue of the 44th (45th) section of the act of 4th of August, 1790. And it is further declared "that the cases of insolvency in the said 44th (45th) section mentioned, shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor shall have been at-

tached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

Thus, as early as 1792, the priority in the case of bonds given for duties on goods imported was complete. The only addition afterwards made was by the 65th section of the act of March 2d, 1799, vol. 4, p. 386, which makes executors and administrators personally liable if they pay away the assets without first satisfying the debt due to the United States.

2. As to debtors for internal taxes.

The duties on distilled spirits are to be secured by bond. March 3, 1791, vol. 1, p. 311, s. 17. But this act gave no priority on such bonds.

The duties on snuff and sugar were also to be secured by bond. June 5, 1794, vol. 3, p. 98, s. 11, but no priority is given by this act.

362*] *It is difficult to conceive why the United States should have made this distinction between debts due for duties on goods imported, and on spirits distilled, &c. There certainly was no reason for it. The legislature saw the defect, and in 1797, passed the act upon which the present question depends, and which gives the United States a priority of payment in all cases whatsoever.

The 5th sec. of the act of 3d of March, 1797, vol. 3, p. 423, is that on which we rely. It is, in these words: "And be it further enacted, that where any revenue officer or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

Before this act was passed, the only preference existing was in the case of a custom-house bond. The cases not provided for, were; 1. Revenue officers; 2. Accountable agents; 3. Debts on bond, or contract.

The act of 1797 embraces them all. It includes all persons who should thereafter become indebted to the United States, by bond, or otherwise, and who should become insolvent.

Peter Blight, after the date of the act, did become indebted to the United States otherwise than by bond, and has become insolvent; he is, therefore, within the plain and express words of the act. No language can make the case clearer. There is nothing doubtful in the words themselves, nothing ambiguous, nothing to be explained, and, therefore, no room for construction. But the gentlemen have chosen to resort to other parts of the act, and even to other acts, 363*] not to explain what was *ambiguous, but to render ambiguous what was plain; not to remove, but to create a doubt; not to illustrate what was obscure, but to darken what was clear.

The title of the act has led to the whole opposition in this case. It is, "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money."

It is true that it only professes to relate to the settlement of accounts, and conveys no idea of priority. But then it speaks of receivers of public money, not revenue officers and accountable agents only, not those who receive it by collection any more than those who receive it by contract.

The first section relates exclusively to revenue officers, and accountable agents, but every other section takes a larger scope.

If the body of the act is to be the slave of the title, how are we to account for the general provisions it contains. But the case comes within the very words of the title. Who are receivers of public money? We say a person who indorses and sells a bill of exchange to the United States is a receiver of public money. He is accountable for it upon a contingency. If the bill is not duly honored, he contracts to refund the money. Hence, then, our opponents are obliged to restrict even the title itself. If Mr. Blight had received the money to carry to Holland, he certainly would have been a receiver of public money. But he has received it here under an engagement to pay it there. What is the difference?

The account has been settled with the treasury, and the balance ascertained, in which account he has been charged with the public money.

The act of September 2, 1789, s. 3 and 5 (vol. 1, p. 37,) provides for the settlement of all accounts and the recovery of all debts. The act of March 3, 1795, (vol. 3, p. 225,) obliges all accountable agents to render and settle their accounts at the treasury.

*The act of 1797, vol. 3, p. 421, pro- [*364 vides for the recovery of the debt by suit; after final settlement of the accounts of a receiver of public money. Having in the four first sections expounded the provisions of the law respecting the pre-existing cases of adjusted accounts, the subsequent sections take a larger range, and provide for new cases.

The first section applies exclusively to receivers of public money and accountable agents.

The second speaks of delinquency, and is thereby connected with the first. It also makes copies of bonds or other papers relating to the settlement of any account between the United States and an individual, as good evidence as the original. Here the phraseology is altered. The subject is enlarged and by no means limited by the title. The word delinquent is dropped, and the expression is general, any account between the United States and an individual. The suit directed to be brought in the first section is always founded on the account settled, whatever may have been the original cause of action; whether a bond, note, covenant, contract, or open account.

The third section, by the words "as aforesaid," refers to such suit upon the adjustment of the account, and admits the defendant to set up equitable credits which had been submitted to the accounting officers of the treasury, and rejected previous to the commencement of the suit. But no new voucher is to be admitted.

In the fourth section the word of reference is omitted. The subject of suits in general between the United States and individuals is taken

up. The word delinquents is not used. It would have been improper. It is not a term applicable to mere debtors, but to defaulters, persons who have misapplied public money.

The words of the fifth section are general, and there is nothing either in the title or preceding sections which can restrict them. It is not like some of the former sections, restricted to adjusted accounts, nor to accountable agents, nor to collectors of public money, nor to persons who receive the public money to distribute. And 365*] *yet we find that when the legislature meant to restrict the subject of legislation, restrictive words were not wanting. By not using words of restriction in the fifth section, after having used them in the preceding sections, they have shown a manifest intention of making a general provision upon the subject of priority in all cases. The sixth section is also general in its terms. It embraces all writs of execution upon any judgment obtained for the use of the United States.

The seventh section saves all the remedies which the United States before had for the recovery of debts.

The general right of priority is recognized by subsequent statutes. Thus in the act for the relief of persons imprisoned for debts due to the United States, June 6, 1798, vol. 4, p. 121, the provision is general, "that any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, may apply," &c., and the Secretary of the Treasury, being satisfied that such debtor is unable to pay the debt, and that he has not concealed or made any conveyance of his estate in trust for himself, or with an intent "to defraud the United States, or deprive them of their legal priority," &c. may order him to be discharged from custody. From the force of these expressions, as applied to the subject matter, it is evident that a general priority was contemplated. So in the 62d s. of the Bankrupt Law of April 4, 1800, vol. 5, p. 82, the words, "the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed."

There is no priority given in case of bonds with pecuniary penalty, other than custom-house bonds, unless it be given by the act of 1797; yet by the act of March, 1799, s. 65, vol. 4, p. 386, if the surety in any bond with penalty shall pay the debt, he shall enjoy the like priority and preference as are reserved and secured to the United States.

The title of a law is no part of the law. In England it is prefixed by the clerk, and is never passed upon by parliament. In Congress it 366*] is never read but once. Jefferson's *Manual, p. —; 6 Bac. Abr. Gwillim, 369; Barrington on Statutes, 449; Willes's Reports, 394, *Coleman v. Cook;* Cowp. 232, *Mace v. Cadell;* 2 Str. 1211, *Swaine v. De Mattos;* 3 Wilson, 271; Cowp. 540, *Pattison v. Bankes;* Doug. 166, *Cox v. Liotard.*

The title of the act of 2d March, 1799, vol. 4, p. 279, is, "An act to regulate the collection of duties on imports and tonnage;" yet the 62d s. p. 383, prescribes the form of bonds to be taken to the United States in all cases. And the 65th s. p. 386, directs bail to be taken in all cases of pecuniary penalties.

No argument, therefore, can be drawn from the title.

As to the argument *ab inconvenienti.*

It amounts merely to this, that one merchant cannot know when he is safe in trusting his neighbor, because he does not know what bills he has indorsed to the United States, or what bills with his indorsements may get into their hands. The same objection may be made as to sureties in custom-house bonds, and receivers of public money; cases in which the priority is acknowledged. The act has done no more than the debtor himself has a right to do. Independent of the bankrupt law, a debtor may convey all his property to one of his creditors, in exclusion of all the rest, and the conveyance will be good. So a foreign attachment may come and sweep away the whole estate.

But if the words of the law are clear and positive, it cannot be altered by the consideration of its inconvenience.

That would be a subject for legislative, not judicial inquiry.

Harper, contra.

The ground of prerogative seems to be abandoned. The few observations I shall make will be confined to the case of an indorser of a bill of exchange which gets into the hands of the United States.

*The argument is rested on statutory [*367 provisions only. It is contended that the priority extends to all debtors. On the other side it is confined to fiscal debts, of which there are only two kinds; bonds for duties, and debts due from accountable agents.

The general words of the act extend to all cases; but we contend that those general words are restricted by the spirit of the act, and by the intention of the legislature.

The general observations which have been made tending to show that it would have been prudent in Congress to extend the priority to all cases, do not show that they have done it.

But it is said that the 62d section of the bankrupt law restricts the general operation of the act, so that none of the provisions shall affect the right of the United States. This is admitted. Then we are brought back to the question, what rights had the United States before that act? If they had no priority before, that act did not give it to them. It is admitted that a voluntary assignment before the act, and since its repeal, would deprive the other creditors of their right to the property. If, then, the United States are to be considered as a common, and not as a privileged creditor the voluntary assignments made by Blight before the bankrupt law would bar the United States as well as any other creditor.

The bankrupt act neither gives nor takes away the right of priority; so that the question again returns, what was their former right?

The words, "or other person," and "or otherwise," in the fifth section of the act of 1797, it is said, give this clause a general operation in all cases. The word "hereafter" has also furnished an argument for the plaintiffs in error. It is said that the priority was to apply instanter to the case of a revenue officer, but in other cases it was to apply only to such debts as should be thereafter contracted. But there is no such distinction. The printer has committed an

error in placing a comma after the words "revenue officer," whereas the words "hereafter becoming indebted," apply as well to "revenue officer" as to "other person."

368*] *We admit that neither a title nor preamble can control the express words of the enacting clauses; but if these are ambiguous, you may resort to the title or preamble to elucidate them.

It is said that Blight was a receiver of public money, and therefore within the title of the act. But that appellation is not more applicable to him than it would be to a man who receives payment for timber furnished for the use of the United States. No account against him can be opened in the books of the treasury. He merely sold the bill and received payment. He received it as his own money, not that of the United States. And although he might, by matter *ex post facto*, become indebted, yet when he received it, he did not receive it as public money for which he was to account. The right of action of the United States did not accrue upon his receipt of the money, but upon the breach of his contract. The indorser of a bill engages that it shall be duly honored. When the bill was dishonored, and not before, the claim of the United States accrued. When he received the money, it depended upon a contingency whether he should ever become indebted to the United States: and if they should not take all the steps of due diligence, notice, &c., he never would be indebted.

It is said that the evil to be remedied by the act of 1797 was, that the collectors of the internal revenue were not subject to the priority. The case of the collectors of the external revenue had been provided for before. We admit the rule that every part of the act is to have effect, but it does not require that the words should be extended to an indorser of a bill of exchange. There are other persons upon whom the whole effect of the section may operate. There are accountable agents, that is, agents who receive the public money to distribute. These are indebted to the United States "otherwise" than by bond. These are the other persons than revenue officers, to whom the act alludes. Those two classes of persons, revenue officers and accountable agents, are sufficient to satisfy all the expressions of the section.

Innumerable inconveniences and embarrassments will follow a further extension of the words; and if there is no necessity of extending

369*] them further, those inconveniences *will furnish a sufficient ground to suppose that the legislature did not mean so to extend them.

When a man gives a bond for duties, or a revenue officer for the faithful discharge of his office, the bond is of record; all the world has notice. A public agent also is charged of record on the books of the treasury. His neighbors who deal with him are aware of his situation; they know the extent of his responsibility, and can exercise their judgment in trusting him.

But in the case of an indorser of a bill of exchange no one can have notice. A man may have indorsed a hundred bills, and he may not himself know how many of them have been purchased by the United States. His creditors trust him without notice; they believe that if any accident should happen to him, they will share an equal fate with his other creditors. If they had known as in the case of a collector, that the United States might come in and seize the whole of his effects, they would not have given him credit. Such a construction ought to be supported by the strongest reasons.

The distinction between revenue officers and other persons, runs through the whole act; and you may as well extend the 2d section to all cases as the 5th, and say that every debtor of the United States shall be at the mercy of the officers of the treasury department. But the 2d section is evidently restricted, and we have as good a right to restrict the 5th by connecting it with the 2d, as they would have to extend the 2d by relation to the 5th.

The words "as aforesaid," in the 2d section, restrict its operation to certain fiscal debts, and show the subject matter of the act to be debts, which, in the usual course, are to be adjusted at the treasury.

The 6th section is relied on to show that the title is not to control the enacting clauses. But this is because an entirely new subject matter is introduced, and by no possibility can its words be satisfied by restricting them to the cases mentioned in the other sections.

The provision of the act of 1799, vol. 4, p. 386, s. 65, which makes executors and administrators liable if they *pay away the assets with- [*370 out first satisfying the debt due to the United States, applies exclusively to custom-house bonds. This may be just, because the executor can always go to the records and know whether his testator was so indebted. But this furnishes no ground to suppose that Congress meant to apply the same provision to the executor of an indorser of a bill, who could not be supposed to know that his testator was so indebted, and who may have paid away the assets without such knowledge.[1]

Ingersoll, on the same side.

A claim of preference, which in monarchies is boldly avowed by the name of prerogative, presents itself in republics under the milder and more insinuating appellation of privilege.

The preference insisted upon for the United States in the present instance, exceeds that which is considered as incident to the supremacy of any king, emperor, or other sovereign in Europe, under similar circumstances.

The United States, by their agent, (but who did not declare himself to be such,) purchased a bill of exchange, which was returned protested for non-payment. In doing this they acted the merchant, and ought to be content with preserving a consistency of character. The drawer and indorser became bankrupt; voluntary and provisional, and absolute assignments were made. No public property is specifically identified and traced to the hands of the defendant's assignor. The debtors were not revenue officers, agents of the United States, either general or special; nor did they receive public money to be accountable, nor even know that the purchase was for the use of the United States. They not only were not themselves agents, but they did not know that they were dealing with an agent of the United States. Subsequent to those assignments the United

1.—Mr. Harper apologized here for closing his argument; being engaged as one of the counsel upon the impeachment then pending before the Senate of the United States.

States attached the property assigned, as belonging to Peter Blight, the assignor.

371*] *We contend,

1. That the laws of the United States do not give the preference claimed.

2. That the attachment, having issued and been laid subsequent to the assignment under the commission of bankruptcy, is an immaterial incident which cannot affect the general principle.

3. That if the act of Congress gives the preference to the extent claimed, it is unconstitutional, and not a law.

1st. Does the law of the United States give the preference claimed, on general ground, considered abstractly from the proceedings by attachment?

Particular and secret liens, indiscreetly multiplied, occasion doubtful titles; render an intercourse in business dangerous, and destroy credit, the life of commerce. The claim of priority, as now urged, is accompanied with all the mischief and inconvenience, if it does not fall under the express denomination of a secret lien. For a literal construction of the law it is scarcely possible that any man will contend. The counsel for the United States shrink from the conclusion to which such an interpretation would necessarily lead. Property, real or personal, would not be a means of obtaining credit. No lender could secure himself by mortgage, pledge, or otherwise, against loss by the insolvency of the borrower. The unfortunate incident, to guard against the consequences of which the security was taken, would itself cause the disappointment and loss.

The argument of the opposite counsel recoils upon themselves. Although they disavow the interference with specific liens, yet they must take the principle altogether; and if it lead to these absurd results, it must be unsound in its source.

Their qualified position, however, authorizes the conclusion that there are supposable cases, in which the United States will not be entitled 372*] to priority on the insolvency of *their debtors, and repels conclusively an adherence to the letter of the law.

If, instead of confining ourselves to particular expressions, we consider the mischief and the remedy, and take the general scope and design of the act into view, we may with confidence anticipate the conclusion.

Every statute consists of the letter and the spirit; or, in the quaint but strong language of ancient law writers, of the shell and the kernel; and, by comparing the different parts with each other, from the title to the last sentence, it is found to be its own best expositor. 4 Inst. 424. I am authorized by one of the greatest lawyers that ever lived, to say that general words in statutes have at all times, from a variety of considerations, received a particular and restricted interpretation. 4 Inst. 330, 334, 335.

The key to unlock the secrets of the law, we admit, is not so much the title (although it is one of many considerations to be taken into view) as the motive, the cause, the principle, that induced the legislature to pass the act. The counsel for the United States has stated this motive to be to put the internal revenue upon the same footing as the import duties; and to that proposition we accede. Let the law cease where the reason ceases, and we are safe.

It may be useful to consider the prerogative of the kings of England in this particular, at the least liberal period of its juridical history, when unreasonable preferences of the sovereign over the subject fill and deform its every page. By the statute of 33 H. VIII. c. 39, s. 74, "his debt shall, in suing out execution, be preferred to that of every other creditor who hath not obtained judgment before the king commenced his suit." 3 Bl. Com. 420. This only makes the commencement of the king's suit equivalent to a judgment in favor of a subject.

"The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting his debt." 3 Bl. Com. 420. This relates to lands only. The personal estate, at least, escapes the royal grasp. *Even [*373 there, the distinction for which we contend has always been observed. The preference in favor of the king is principally confined to cases where public moneys have been received by an accountable officer to public use. It does not extend to transactions of a common nature.

By the statute of 13 Elizabeth, c. 4, the lands and tenements, goods and chattels, of tellers, receivers, collectors, &c., and other officers of the revenue, are made liable to the payment of their debts.

These are the models which the act of Congress was intended to imitate. The lands of such revenue officers are liable to process under the king's judgment, even in the hands of a bona fide purchaser; though the debt due to the king was contracted by the vendor many years after the alienation. 3 Bl. Com. 420. Here the distinction is still kept up between revenue officers and others.

If goods are taken on a *fi. fa.* against the king's debtor, and before they are sold an *extent* come at the king's suit, tested after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent, but the execution upon the *fi. fa.* shall be completed. 4 T. R. 402, *Rorke v. Dayrell.*

Even Queen Elizabeth, with all the supremacy of absolute sway, did not carry her prerogative claims to the extent now urged for a federative republic, and representative democracy.

With the several exceptions already stated, and which are confined principally to revenue officers, the King of England has no priority in the recovery of his debts over the meanest peasant of his dominions.

When we advert to the title of the act, we find in its pointed expressions, a direct contradiction by the legislature itself to the present claim of the United States. The words are, "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money," not between the United States and individuals indebted by bond, contract or otherwise. It is substantially in imitation of the English statutes, respecting *tellers, collectors and receivers, who are [*374 answerable in the receipt of the exchequer.

The act is "more effectually" to provide, &c., alluding to a former provision upon the same subject. That former provision is contained in the act of March 3d, 1795, which, with a title less restricted than that of 1797, is confined in

its enacting part to persons who have received moneys for which they are accountable to the United States.

We do not contend that the title can control the plain words of the enacting clause; but where a construction of an enacting clause would lead to unjust, oppressive, and iniquitous consequences, which will be avoided by a construction consistent with the title, a strong argument arises in favor of the latter interpretation.

When, in the act of 1795, we find the legislature confining itself throughout to provisions for the settlement of the accounts of accountable receivers of public money; and when, in that of 1797, they declare that their object is to do the same thing more effectually, we naturally infer that their views are confined to persons of the same description.

We are told by the counsel for the United States, that acts *in pari materia* are to be taken together. We adopt the same rule; and, by comparing the two acts together, section by section, the inference will be, that both are confined to revenue officers and accountable agents.

The first section of the former law is confined to notifying the accountable officer to render his accounts to the auditor of the treasury; and, in default thereof, the comptroller is authorized to order suit. By the first section of the act of 1797, it is made the duty of the comptroller to institute such suits against delinquent revenue officers, and other persons accountable for public money. The delinquent is to forfeit his commissions, and pay six per cent. interest from the time of receiving the money.

No person was to be sued under this act, who was not entitled to commissions for receiving [*375] and paying away money; *because in all cases of delinquency such commissions were to be forfeited.

The whole act is employed in stating who shall be sued, who shall sue them, when the cause shall be tried, the evidence to be received on the trial, the mode of defense, the judgment, and execution.

Congress had been in the habit of preserving a priority in a limited way, and in certain cases. It was tracing the public money specifically in the character of the receiver.

The act of July 31, 1789, confined the priority to custom-house bonds. That of 4th August, 1790, on more full consideration, limited it in the same manner. That of 2d May, 1792, which places the surety on the same footing with the United States, shows the same restricted construction. The present act comes next in order of time. Its title and its first section are confined in the same manner. It does not, of itself, authorize the settlement or adjustment of any accounts; it only determines what proceedings may be had on such settlements and adjustments as are made under the act of 3d March, 1795, which does not authorize the settlement or adjustment of any accounts, but those of persons who have received public money, for which they are accountable to the United States.

An alternative here presents itself. Either the officers of the treasury department had a right to settle definitively and exclusively the demand of the plaintiffs for this bill of exchange, or, the second section is restricted in its operation to revenue officers and accountable agents.

We are told that the first part of the second section is so restricted, but that the second part of it includes all debtors to the United States.

In the first part, which we agree is restricted, a transcript from the treasury books is made evidence. The second part is merely supplementary to the first, providing that copies of any papers connected with the settlement of any account, authenticated in a prescribed form, shall be as good evidence as the originals. Of course, as to those persons against whom the originals are not evidence under the first part of the section, the copies are not evidence under the second.

*The very words of the clause, as well as the general scope and design of the act, preclude any further extension of the provision. [*376]

The legislature evidently consider it as implied that the provisions will be understood in a restricted sense, although they use general expressions, without a relative term in the whole sentence. The term individuals, in the 2d sections, must, for the reasons just stated, mean officers and agents who have received public money to be accountable. If, then, the legislature, in that section, leave general words to be restricted in construction by the subject matter, without relative words, it will be strange if they are not understood as intending to do the same when they use general expressions in the subsequent sections.

My argument is, that general expressions in every subsequent section are to be understood in a sense limited by the views of the legislature, as explained in the first clause.

I contend that all persons comprised in any part of the act, are included in the first section; because all persons to whom the act refers were to be sued upon default. If, then, I ascertain who were to be sued upon default, I show the extent of the act as to the persons against whom it was to operate.

No persons were to be sued but receivers of public money; for in every instance the defendant was to forfeit his commissions, and pay interest from the time he received the money until repaid into the treasury.

Such a construction is warranted by authorities, American as well as British. 1 Bl. Com. 60, 61, 4 Tuck. Bl. 372, 373, 374, n. 4. The law of Virginia of December 15, 1796, usually termed the Penitentiary Act, (Randolph's Abridgment, p. 359,) in the first section, enacts, that "no crime whatsoever, committed by any free person against this commonwealth, (except murder of the first degree,) shall be punished with death." In all the subsequent sections, the word free is omitted, and no word of reference used so as to connect them with the first section, and yet it has been uniformally held, that all *the provisions of that law relate to free persons only; that the subsequent sections, although the words are general, shall be restricted by the first, and by the general intention of the legislature indicated in that section. [*377]

The 3d section of the act of 1797, by using the words "as aforesaid," expressly refers to the description of debtors in the 1st section.

The 4th section shows that the legislature

meant to leave the general expression, "individuals," to be limited by the subject matter. It is still speaking of the suits mentioned in the 1st section, and yet it used a general expression. It provides in terms, that in suits between the United States and individauls, no claim for a credit shall be admitted upon trial, but such as shall have been presented to the officers of the treasury and by them disallowed. If Peter Blight had paid a part of this debt, and a suit had been brought against him, is any man so extravagant as to contend that he could not prove that partial payment, without showing that he had accounted at the treasury department?

Those officers had no power to call him to an account with them; no right to allow or disallow his credits. Such a law would have been unconstitutional. It would deprive him of his right of trial by jury without his consent. The agents who receive money to be accountable may, perhaps, be considered as having named the accounting officers as their referees, and to have assented to that mode of settlement when they received the money.

We have shown that the present case is not within the four first sections of the act, and we contend that as the legislature have in those sections relied on the subject matter to give a proper restriction to the general expressions therein contained, we are justified in saying, that they meant that the general expressions in the subsequent section should also be limited within the same bounds.

It is remarkable that the 5th section begins with the words of the 1st, as if it was intended to be an exact copy, in respect to the description of persons. By inadvertence, as it often happens, the relative word "such," or the additional words "accountable for public money," 378*] are *omitted; or the legislature thought them unnecessary, as the subject matter was in itself sufficient to qualify the generality of the terms.

If this section was intended to be general, why this useless profusion of words? Why specify revenue officers? Why say by bond? Why drop the general word "individuals," used in the 4th section? Why not say any person becoming indebted to the United States?

It begins as if Congress meant to make a specific description of persons, as in the first section. Why this sudden change of the subject of legislation? Why use words of description which can only tend to mislead?

How strange and improbable is it, that Congress should give the United States a preference so much exceeding the royal prerogative of England.

Unless such a construction be absolutely necessary, the inconveniences attending it will undoubtedly prevent its adoption. Besides the destruction of private credit and the ruin of individuals, it would repeal all the state laws of distribution of intestate estates; it would prostrate all state priority, which in those cases has been long established. It would produce a collision between the prerogative of the states and of the United States. Suppose the treasurer of a state should become indebted to the United States, the latter would take his whole property in opposition to any law of the state which had passed, to secure herself against the default of her officers.

2d. The attachment having issued subsequent to the assignment under the commission of bankruptcy, leaves the question to be decided on the general principle.

The statutory is always accompanied by a personal assignment that transfers the property. The King of England, although not within the provisions of the bankrupt law of that country, is barred by the actual assignment.

There was not at that time any property of Peter Blight to be attached, and if the United States are entitled, it must be under some of the acts which give them *a priority. [*379 It cannot be under the bankrupt law, unless they had some right prior to the assignment. The attachment gave them no right because it was subsequent.

3d. If the act is to have the extended construction contended for on the part of the United States, and the 5th section is to be considered as including every debtor to the United States, and if the settlement of the account at the treasury is to be conclusive, the act is unconstitutional and void.

If liens general or specific, if judgments and mortgages are to be set aside by the prerogative of the United States, it will be to impair the obligation of contracts by an *ex post facto* law.

Under what clause of the constitution is such a power given to Congress? Is it under the general power to make all laws necessary and proper for carrying into execution the particular powers specified? If so, where is the necessity, or where the propriety, of such a provision, and to the exercise of what other power is it necessary?

But it is in direct violation of the constitution, inasmuch as it deprives the debtor of his trial by jury, without his consent.

JOHNSON, *J.* Do you admit the law respecting the final adjustment of accounts at the treasury to be constitutional as to revenue officers?

Ingersoll. We neither admit nor deny it as to them; but we deny the power of Congress to give the United States a preference in all cases of persons who may become indebted to them in every possible manner.

PATERSON, *J.* Do you contend that by the 5th section the priority of the United States will avoid even a mortgage to an individual?

Ingersoll. I say that the opposite construction leads to that.

Lewis, on the same side,

*In addition to the arguments urged [*380 by Harper and Ingersoll, contended, that the act of 1797 was repealed by that of March 2d, 1799, inasmuch as the former was within the purview of the latter, the 65th section of which took up the case of priority, and made a different provision on the subject; and the 112th section of which expressly repeals all former laws which came within the purview of that act. Every thing is within the purview which is within the same evil, and which comprehends the same subject.

C. Lee, on the same side,

Contended, that the priority of the United States is confined to debts of record, or for which suit is brought, and that it attaches only from the time of the commencement of the suit.

That the act of 1797 is explained by the act of 11th July, 1798, vol. 4, p. 198, which creates a lien upon the lands of revenue officers from the time of the suit brought. If the United States had a general lien by the former law, whether suit was brought or not, why did the legislature in a subsequent law create the special lien, and limit its commencement to the time of instituting the suit, and confine it to revenue officers?

The prerogative of the United States cannot be construed to exceed that of the King of England. He is bound by an actual assignment, because the property is thereby transferred. The title of the subject, if prior and complete, shall be preferred to that of the king. Parker, 126, *The King v. Cotton.*

PATERSON, *J.* Do you consider the doctrine of prerogative as extended to this country? Are the United States not bound by a law unless named in it?

Lee. It has been so contended by some persons in this country. I believe it has been so decided in Pennsylvania, under the insolvent act of the United States. Judge Peters made some such report to Congress, who passed a law specially respecting the debtors of the United States.

381*] *Dallas, in reply.

The questions to be decided are,

1. What has Congress done?

2. Had Congress a right to do it?

The ground now taken is essentially different from that relied upon in the circuit court.

Each of the four gentlemen opposed to me has taken a different position.

The first admits the intent of the law to be to place the internal revenue on the same footing with the external.

The second admits not only the officers of the internal revenue to be included in the law, but also accountable agents.

The third declares the law to be unconstitutional, and also to be repealed by the act of 1797.

The fourth admits that the law extends to all debts, but says the priority does not attach until suit brought.

All have conceded that the case was within the words of the act. What do we claim?

1st. Negatively, we do not contend that the priority attaches with the creation of the debt, or with the acceptance of the office, nor while the debtor remains master of his own property.

Nor that it extends to purchasers for valuable consideration, or to a mortgagee or pawnee before insolvency; nor to a purchaser from the assignees; nor that it will be valid against a creditor of more merit or vigilance.

2d. Affirmatively, we claim an exemption from the operation of the bankrupt law, as to our right, our remedy, and our security.

382*] *We claim a preference in all cases of actual, notorious insolvency, or bankruptcy, whether the debtor be alive or dead.

We claim a preference when the property has passed out of the debtor, and he has by his own act attempted to give a preference to others.

We claim it also where the law assumes the disposal of his property, and directs a distribution among his creditors.

We say that the priority attaches from the moment the insolvency is testified by any overt act. Independent of the bankrupt law, a debtor had a right to give a preference. At the moment of Blight's voluntary assignment, (whatever may have been its ultimate fate, or legal invalidity on account of fraud,) his property was liable to the claim of the United States. This voluntary assignment was after the act of 1797, and before the existence of the bankrupt law.

Does the act of 1797 bear a resemblance to royal prerogative?

At common law the king can take the body, lands and goods of his debtor, in execution at the same time. His execution is preferred if his suit was commenced before a judgment in favor of a subject, although his judgment be subsequent.

The lands of his debtor are bound from the date of the debt, and as to the officers mentioned in 13 Eliz. c. 4, their lands are bound from the time of their entering into office. And all this, whether the debtor remains solvent or not. He has also a priority in all cases of legal distribution. 2 Bl. Com. 511.

The act of 1797 has done nothing more than the greater part, if not all the states have done. They have long claimed the priority in case of distribution of the estates of their deceased debtors. And what reason can be given for a distinction between the dead and the living *insolvent. The laws have even ex- [*383 tended the priority to an executor who has a right to retain for his own claims against all other private creditors.

Such a right was necessary to protect the United States from fraud. They could not exercise the same degree of vigilance as individuals. Their debtors were making voluntary assignments to elude the demands of the United States. The several states had their insolvent laws, their attachment laws, and their state priorities. Without such a power the United States would stand no chance in the general scramble.

Was it not politic, was it not necessary, that the United States should guard against those evils?

Against the plain words of the act what is opposed?

1. The inconvenience and impolicy of the provision.

2. Its unconstitutionality.

1. The inconvenience or impolicy of a law are not arguments to a judicial tribunal, if the words of the law are plain and express.

Such arguments must be reserved for legislative consideration.

But the inconvenience is the same in the case of a priority in the distribution of the estate of a deceased, as of a living debtor.

If it be allowed in the one case, why not in the other?

The creditor knows not how soon his debtor may die, and he knows that if he dies insolvent, the United States, or the individual state, may sweep the whole.

It is said that the act of 1797 is repealed by that of 1799, the former being within the purview of the latter.

*But this is not the case. The 5th *384 section of the act of 1797 is not within the purview of the act of 1799. The subjects are different. The act of 1799 speaks only of custom-house bonds. But when it provides that the surety shall have the same priority as the

United States, it implies that there are other cases of priority already existing, but it neither gives nor takes away such priority.

2. As to the question of constitutionality.

The constitution is the supreme law of the land, and not only this court, but every court in the union is bound to decide the question of constitutionality.

They are bound to decide an act to be unconstitutional, if the case is clear of doubt; but not on the ground of inconvenience, inexpediency, or impolicy. It must be a case in which the act and the constitution are in plain conflict with each other. If the question be doubtful, the court will presume that the legislature has not exceeded its powers. 3 Dall. 173, 175, *Hylton v. United States.*

Congress have duties and powers expressly given, and a right to make all laws necessary to enable them to perform those duties, and to exercise those powers. They have a power to borrow money, and it is their duty to provide for its payment. For this purpose they must raise a revenue, and, to protect that revenue from frauds, a power is necessary to claim a priority of payment.

There is no case under the act of 1797 in which the trial by jury is excluded. It is true, that no credits are to be admitted on the trial (except under particular circumstances) but such as have been submitted to the accounting officers of the treasury, and by them disallowed in whole or in part. But this does not abridge the power of the jury. It is only establishing an inferior tribunal, and saying that no new evidence shall be admitted on the appeal, unless in the excepted cases.

All claims against the United States, whether urged as independent claims, or by way of off-
385*] set, must pass the *ordeal of the accounting officers of the treasury. If they reject them there is an appeal, except in the case of one class of debtors. The decision of the comptroller is final and conclusive only as to the credits claimed by "a person who has received moneys for which" (that is for the expenditure of which) "he is accountable to the United States," and this not by the act of 1797, but by that of 1795. Vol. 3, p. 225.

MARSHALL, *Ch. J.*, delivered the opinion of the Court. The question in this case is, whether the United States, as holders of a protested bill of exchange, which has been negotiated in the ordinary course of trade, are entitled to be preferred to the general creditors, where the debtor becomes bankrupt?

The claim to this preference is founded on the 5th section of the act, entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money." Vol. 3, p. 423. The section is in these words: "And be it further enacted, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

That these words, taken in their natural and usual sense, would embrace the case before the court, seems not to be controverted. "Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise," is a description of persons, which, if neither explained nor restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted.

*But other parts of the act involve [*386
this question in much embarrassment.

It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.

On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.

As the enacting clause in this case would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference, to show an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended with great ingenuity, that every part of it demonstrates the legislative mind to have been directed towards a class of debtors, entirely different from those who become so by drawing or indorsing bills, in the ordinary course of business.

The first part which has been resorted to is the title.

On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.

The title of the act is unquestionably limited to "receivers *of public money;" a term [*387
which undoubtedly excludes the defendants in the present case.

The counsel for the defendants have also completely succeeded in demonstrating, that the four first sections of this act relate only to particular classes of debtors, among whom, the drawer and indorser of a protested bill of exchange would not be comprehended. Wherever general words have been used in these sections, they are restrained by the subject to which they relate, and by other words frequently in the

same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense. Hence it has been argued with great strength of reasoning, that the same restricted interpretation ought to be given to the fifth section likewise.

If the same reason for that interpretation exists; if the words of the act generally, or the particular provisions of this section, afford the same reason for limiting its operation which is afforded with respect to those which precede it, then its operation must be limited to the same objects.

The 5th section relates entirely to the priority claimed by the United States in the payment of debts.

On the phraseology of this act it has been observed, that there is a circuity of expression, which would not have been used if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying "any revenue officer, or other person hereafter becoming indebted to the United States," the natural mode of expressing such an intent would have been, "any person indebted to the United States;" and hence it has been inferred that debtors of a particular description only were in the mind of the legislature.

It is true the mode of expression which has been suggested, is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly expressed.

388*] *As a branch of this argument, it has also been said that the description commences with the very words which are used in the beginning of the first section; and from that circumstance it has been inferred that the same class of cases was still in view. The commencing words of each section are, "any revenue officer, or other person." But the argument drawn from this source, if the subject be pursued further, seems to operate against the defendants. In the first section the words are, "Any revenue officer, or other person accountable for public money." With this expression completely in view, and having used it in part, the description would probably have been adopted throughout, had it been the intention of the legislature to describe the same class of debtors. But it is immediately dropped, and more comprehensive words are employed. For persons "accountable for public money," persons "hereafter becoming indebted to the United States, by bond or otherwise," are substituted. This change of language strongly implies an intent to change the object of legislation.

But the great effort on the part of the defendants is to connect the fifth with the four preceding sections; and to prove that as the general words in those sections are restricted to debtors of a particular description, the general words of the 5th section ought also to be restricted to debtors of the same description. On this point lies the stress of the cause.

In the analysis of the foregoing parts of the act, the counsel for the defendants have shown that the general terms which have been used are uniformly connected with other words in the same section, and frequently in the same sentence, which necessarily restrict them. They have also shown that the provisions of those parts of the act are of such a nature that the words, taking the natural import of the whole sentence together, plainly form provisions only adapted to a class of cases which those words describe if used in a limited sense.

It may be added that the four first sections of the act are connected with each other, and plainly contain provisions on the same subject. They all relate to the *mode of proceed- [*389 ing on suits instituted in courts, and each section regulates a particular branch of that proceeding. Where the class of suits is described in the first section, it is natural to suppose that the subsequent regulations respecting suits apply to those which have been described.

The first section directs that suits shall be instituted against revenue officers, and other persons accountable for public money, and imposes a penalty on delinquents, where a suit shall be commenced and prosecuted to judgment.

The second section directs that certain testimony shall be admitted at the trial of the cause.

The third section prescribes the condition under which a continuance may be granted; and

The fourth section respects the testimony which may be produced by the defendant. These are all parts of the same subject; and there is strong reason, independent of the language of the act, to suppose that the provisions respecting them were designed to be co-extensive with each other.

But the fifth section is totally unconnected with those which precede it. Regulations of a suit in court no longer employ the mind of the legislature. The preference of the United States to other creditors becomes the subject of legislation; and as this subject is unconnected with that which had been disposed of in the foregoing sections, so is the language employed upon it without reference to that which had been previously used. If this language was ambiguous, all the means recommended by the counsel for the defendants would be resorted to in order to remove the ambiguity. But it appears, to the majority of the court, to be too explicit to require the application of those principles which are useful in doubtful cases.

The mischiefs to result from the construction on which the United States insist, have been stated as strong motives for overruling that construction. That the consequences *are [*390 to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon

them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.

Of the latter description of inconveniences are those occasioned by the act in question. It is for the legislature to appreciate them. They are not of such magnitude as to induce an opinion that the legislature could not intend to expose the citizens of the United States to them, when words are used which manifest that intent.

On this subject it is to be remarked, that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living; though it takes effect generally if he be dead.[1]

Passing from a consideration of the act itself, and the consequences which flow from it, the counsel on each side have sought to strengthen their construction by other acts *in pari ma-* [*391*] *teria.* *The act of the 3d of March, 1797, has been supposed to be a continuation of legislative proceeding on the subject, which was commenced on the third of March, 1795, (vol. 3, p. 225), by the act "For the more effectual recovery of debts due from individuals to the United States," which relates exclusively to the receivers of public money.

Admitting the opinion, that the act of 1797 was particularly designed to supply the defects of that of 1795, to be correct, it does not seem to follow that a substantive and independent section, having no connection with the provisions made in 1795, should be restricted by it.

The act of 1795 contains nothing relative to the priority of the United States, and, therefore, will not explain the 5th section of the act of 1797, which relates exclusively to that subject. But the act of 1797, neither in its title nor its enacting clauses, contains any words of reference to the act of 1795. The words which are supposed to imply this reference are, "to provide more effectually." But these words have relation to the existing state of the law, on all the subjects to which the act of 1797 relates, not to those alone which are comprehended in the act of 1795. The title of the act of 1795 is also, "for the more effectual recovery of debts," and, consequently, refers to certain preexisting laws. The act of 1797, therefore, may be supposed to have in view the act of 1795, when providing for the objects contemplated in that act; but must be supposed to have other acts in view, when providing for objects not contemplated in that act.

As, therefore, the act of 1795 contains nothing respecting the priority of the United States, but is limited to provisions respecting suits in court, the act of 1797 may be considered in connection with that act, while on the subject of suits in court; but when on the subject of preference, must be considered in connection with acts which relate to the preference of the United States.

The first act on this subject passed on the 31st of July, 1789, s. 21, and gave the United States a preference only in the case of bonds for duties.

*On the 4th of August, 1790, vol. 1, p. [*392 221, an act was passed on the same subject with that of 1789, which repeals all former acts, and re-enacts, in substance, the 21st section, relative to the priority of the United States.

On the 2d of May, 1792, vol. 2, p. 78, the priority previously given to the United States is transferred to the sureties on duty bonds, who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed, or absent debtor.

Such was the title of the United States to a preference in the payment of debts previous to the passage of the act of 1797. It was limited to bonds for the payment of duties on imported goods, and on the tonnage of vessels. An internal revenue had been established, and extensive transactions had taken place; in the course of which, many persons had necessarily become indebted to the United States. But no attempt to give them a preference in the collection of such debts had been made.

This subject is taken up in the 5th section of the act of 1797. The term "revenue officer," which is used in that act, would certainly comprehend any persons employed in the collection of the internal revenue; yet it may be well doubted whether those persons are contemplated in the foregoing sections of the act. They relate to a suit in court, and are perhaps restricted to those receivers of public money who have accounts on the books of the treasury. The head of the department in each state most probably accounts with the treasurer, and the subcollectors account with him.

If this be correct, a class of debtors would be introduced into the 5th section by the term "revenue officer," who are indeed within the title, but not within the preceding enacting clauses of the law.

But passing over this term, the succeeding words seem, to the majority of the court, certainly to produce this effect. They are, "or other person hereafter becoming indebted to the United States, by bond or otherwise." If this section was designed to place *the col- [*393 lection of the internal revenue on the same footing of security with the external revenue, as has been argued by one of the counsel for the defendants, a design so reasonable that it would naturally be attributed to the legislature, then the debtors for excise duties would be comprehended within it; yet those debtors cannot be brought within the title, or the previous enacting clauses of the bill.

The 5th section, then, would introduce a new class of debtors, and if it does so in any case, the act furnishes no principle which shall restrain the words of that section to every case to which they apply.

Three acts of Congress have passed, subsequent to that under particular consideration, which have been supposed to bear upon the case.

1.—The *Ch. J.* in delivering the opinion, observed as follows: "I only say for myself, as the point has not been submitted to the court, that it does not appear to me to create a *devastavit* in the administration of effects, and would require notice in order to bind the executor, or administrator, or assignee.

The first passed on the 11th of July, 1798, and is entitled "An act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to insure more effectually the settlement of their accounts." The 13th section of this act (vol. 4, p. 196) refers expressly to the provisions of the act of March, 1797, on the subject of suits to be instituted on the bonds given by the officers collecting the internal revenue, and shows conclusively that in the opinion of the legislature the four first sections of that act did not extend to the case of those officers; consequently, if the 5th section extends to them, it introduces a class of debtors distinct from those contemplated in the clauses which respect suits in court. The 15th section of this act takes up the subject which is supposed to be contemplated by the 5th section of the act of 1797, and declares the debt due from these revenue officers to the United States to be a lien on their real estates, and on the real estates of their sureties, from the institution of suit thereon. It can scarcely be supposed that the legislature would have given a lien on the real estate without providing for a preference out of the personal estate, especially where there was no real estate, unless that preference was understood to be secured by a previous law.

The same observation applies to a subsequent act of the same session for laying a direct tax. 394*] A lien is reserved *on the real estate of the collector, without mentioning any claim to preference out of his personal estate.

The last law which contains any provision on the subject of preference passed on the 2d of March, 1799. The 65th section of that act has been considered as repealing the 5th section of the act of 1797, or of manifesting the limited sense in which it is to be understood.

It must be admitted that this section involves the subject in additional perplexity; but it is the opinion of the Court, that on fair construction, it can apply only to bonds taken for those duties on imports and tonnage, which are the subject of the act.

From the first law passed on this subject, every act respecting the collection of those duties, had contained a section giving a preference to the United States, in case of the insolvency of the collectors of them.

The act of 1797, if construed as the United States would construe it, would extend to those collectors if there was no other provision in any other act giving a priority to the United States in these cases. As there was such a previous act, it might be supposed that its repeal by a subsequent law would create a doubt whether the act of 1797 would comprehend the case, and, therefore, from abundant caution, it might be deemed necessary still to retain the section in the new act respecting those duties. The general repealing clause of the act of 1799 cannot be construed to repeal the act of 1797, unless it provides for the cases to which that act extends.

It has also been argued that the bankrupt law itself affords grounds for the opinion that the United States do not claim a general preference. (Vol. 5, p. 82.) The words of the 62d section of that law apply to debts generally as secured by prior acts. But as that section was not upon the subject of preference, but was merely designed to retain the right of the United States in their existing situation, whatever that situation might be, the question may well be supposed not to have been investigated at that time, and the expressions of the section were probably not considered with a view to any influence they might have on those rights.

*After maturely considering this [*395 doubtful statute, and comparing it with other acts *in pari materia*, it is the opinion of the majority of the court, that the preference given to the United States by the 5th section is not confined to revenue officers and persons accountable for public money, but extends to debtors generally.

Supposing this distinction not to exist, it is contended that this priority of the United States cannot take effect in any case where suit has not been instituted; and in support of this opinion several decisions of the English judges with respect to the prerogative of the crown have been quoted.

To this argument the express words of the act of Congress seem to be opposed. The legislature has declared the time when this priority shall have its commencement; and the court think those words conclusive on the point. The cases certainly show that a bona fide alienation of property before the right of priority attaches will be good, but that does not affect the present case. From the decisions on this subject a very ingenious argument was drawn by the counsel who made this point. The bankrupt law, he says, does not bind the king because he is not named in it; yet it has been adjudged that the effects of a bankrupt are placed beyond the reach of the king by the assignment made under that law, unless they shall have been previously bound. He argues, that according to the understanding of the legislature, as proved by their acts relative to insolvent debtors, and according to the decisions in some of the inferior courts, the bankrupt law would not bind the United States although the 62d section had not been inserted. That section, therefore, is only an expression of what would be law without it, and, consequently, is an immaterial section; as the king, though not bound by the bankrupt law, is bound by the assignment made under it; so, he contended, that the United States, though not bound by the law, are bound by the assignment.

But the assignment is made under and by the direction of the law; and a proviso that nothing contained in the law shall affect the right of preference claimed by the United States, is equivalent to a proviso that the assignment shall not affect the right of preference claimed by the United States.

*If the act has attempted to give the [*396 United States a preference in the case before the court, it remains to inquire whether the constitution obstructs its operation.

To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument.

In the case at bar, the preference claimed by the United States is not prohibited; but it has

been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.

In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

This claim of priority on the part of the 397*] United States *will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.

As the opinion given in the court below was, that the plaintiffs did not maintain their action on the whole testimony exhibited, it is necessary to examine that testimony.

It appears that the plaintiffs have proceeded on the transcripts from the books of the treasury, under the idea that this suit is maintainable under the act of 1797. The Court does not mean to sanction that opinion; but, as no objection was taken to the testimony, it is understood to have been admitted. It is also understood that there is no question to be made respecting notice; but that the existence of the debt is admitted, and the right of the United States to priority of payment is the only real point in the cause.

The majority of this court is of opinion that the United States are entitled to that priority, and, therefore, the judgment of the circuit court is to be reversed, and the cause to be remanded for further proceedings.

Judgment reversed.

WASHINGTON, *J.* Although I take no part in the decision of this cause, I feel myself justified by the importance of the question in declaring the reasons which induced the circuit court of Pennsylvania to pronounce the opinion which is to be re-examined here.

In any instance where I am so unfortunate as to differ with this court, I cannot fail to doubt the correctness of my own opinion. But 398*] if I cannot feel convinced of the *error, I owe it in some measure to myself, and to those who may be injured by the expense and delay to which they have been exposed, to show at least that the opinion was not hastily or inconsiderately given.

The question is, have the United States a right in all cases whatever to claim a preference of other creditors in the payment of debts? At the circuit court the counsel for the United States disclaimed all idea of founding this right upon prerogative principles, and yet, if I am not greatly mistaken, the doctrine contended for places this right upon ground at least as broad as would have been asserted in an English court.

The whole question must turn upon the construction of acts of Congress, and particularly that of the 3d of March, 1797. The title of the law is "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money."

The first section describes more specially the persons who are the objects of the law; points out the particular officer whose duty it shall be to institute suits against those public delinquents thus marked out; declares the rate of interest to be recovered upon balances due to the United States, and imposes a forfeiture of commissions on the delinquent.

The 2d section defines the kind of evidence to be admitted on the part of the United States, in the trial of suits in all cases of delinquency.

The 3d section gives to the United States in such actions a preference of all other suitors in court, by directing the trial of such causes to take place at the return term upon motion, unless the defendant will make oath that he is entitled to credits which have been submitted to the consideration of the accounting officers of the treasury, and rejected.

The 4th section takes up the case of the defendant, and declares under what circumstances he shall be entitled to the benefit of offsets.

*The 5th section brings us to an im-[*399 portant part of the trial, and furnishes a rule to govern the court in the judgment it is to render, in cases where the claim of the United States might, by reason of the insolvency of the debtor, go unsatisfied, unless preferred to that of a private citizen.

The 6th section is general in its terms, and relates to executions where the defendant or his property is to be found in any district other than that in which the judgment was rendered.

This is a concise view of the different parts of this act, and I shall now examine more particularly the expressions of the 5th section, taken in connection with those which precede it.

The words are, "that where any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, the debt due to the United States shall be first satisfied," &c.

It is conceded that the words "or other person" are broad enough to comprehend every possible case of debts due to the United States, and therefore a literal interpretation is contended for by those who advocate the interest of the United States. On the other side, a limitation of those expressions is said to be more con-

sonant with the obvious meaning of the legislature, which contemplates those debtors only who are accountable for public money.

Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction. But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature.

400*] *If a section be introduced which is a stranger to, and unconnected with, the purview of the act, it must nevertheless take effect according to its obvious meaning, independent of all influence from other parts of the law. Nay, if it be a part of the same subject, and either enlarges or restrains the expressions used in other parts of the same act, it must be interpreted according to the import of the words used, if nothing can be gathered from such other parts of the law to change the meaning. But if in this latter case, general words are used which import more than seems to have been within the purview of the law, or of the other parts of the law, and those expressions can be restrained by others used in the same law, or in any other upon the same subject, they ought in my opinion to be restrained.

So if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done.

These rules are not merely artificial; they are as clearly founded in plain sense, as they are certainly warranted by the principles of the common law.

The subject intended to be legislated upon is sometimes stated in a preamble, sometimes in the title to the law, and is sometimes, I admit, misstated, or not fully stated. The preamble of an act of parliament is said to be a key to the knowledge of it, and to open the intent of the law-makers; and so I say as to the title of a law of Congress, which being the deliberate act of those who make the law, is not less to be respected as an expression of their intention, than if it preceded the enacting clause in the form of a preamble. But neither the title or preamble can be resorted to for the purpose of controlling the enacting clauses, except in cases of ambiguity, or where general expressions are used inconsistent or unconnected with the scope and purview of the whole law.

They are to be deemed true, unless contradicted by the enacting clauses, and it is fair in the cases I have stated to argue from them.

401*] *The object of this law, then, as declared by the title, is to provide for the effectual settlement of debts due to the United States, from receivers of public money. To effect this, suits are directed, the species of evidence to support the claim on the part of the plaintiff is pointed out, and a speedy trial provided; on the part of the defendant, a limited right to oppose the claim by offsets is provided, and the claim of the United States is to have a preference of other creditors, where the debtor is unable to satisfy the whole. Here, then, is one entire connected subject, the different provisions of the law constituting the links of the same chain, the members of the same body. It will not, I presume, be denied, that the three first sections of the law apply to those only who are declared by the title to be the objects of its provisions. The 4th section is the first which uses general expressions, without a reference to those who had before been spoken of; and yet I think it will hardly be contended that this section is not closely and intimately connected with the same subject. When we come to the 5th section the reference to the three first sections is again resumed, with the addition of the words "or any other person." So that instead of the words "revenue officers, or other persons accountable for public money," used in the first section, this section uses the words "revenue officers, or other persons indebted to the United States."

Now it is obvious that these expressions may have precisely the same meaning, so as to comprehend the same persons, although the latter may be construed to include persons not within the meaning of the first section. For persons accountable for public money are also other persons than revenue officers indebted to the United States; and the latter may, by a construction conformable to the other parts of the law, mean persons accountable for public money; and by an extended construction, they may comprehend others, who in no sense of the expressions used, can be said to be accountable for public money.

It is, then, to be inquired, is the Court bound by any known rules of law to give to the words thus used in the 5th section a meaning extensive enough to comprehend persons never contemplated by the title of the law, and most *sedulously excluded by the three first [*402 sections? Does justice to the public, or convenience to individuals demand it? Is such a construction necessary in order to give effect to any one expression used by the legislature?

Shall we violate the manifest intention of the legislature, if we stop short of the point to which we are invited to go in the construction of this section?

To all these questions I think myself warranted in answering in the negative.

As to the first. Do the principles of equity, or of strict justice, discriminate between individuals standing *in equali jure* and claiming debts of equal dignity?

The nature of the debt may well warrant a discrimination; but not so, if the privilege be merely of a personal nature. The sovereign may, in the exercise of his powers, secure to himself this exclusive privilege of being preferred to the citizens, but this is no evidence that the claim is sanctioned by the principles of immutable justice. If this right is asserted, individuals must submit; but I do not find it in my conscience to go further in advancement of the claim, than the words of the law fairly interpreted, in relation to the whole law, compel me. But I do not thing that Congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a different intent; and, secondly, because it would not only be productive of the most cruel injustice to indi-

viduals, but would tend to destroy, more than any other act I can imagine, all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man cannot guard himself. As to public officers, and receivers of public money of all descriptions, they are, or may be known as such; and any person dealing with them, does it at the peril of being postponed to any debts his debtor may owe to the United States, should he become unfortunate. He acts with his eyes open, and has it in his power to calculate the risk he is willing to run.

But if this preference exists in every possible case of contracts between the United States and 403*] an individual, *there is no means by which any man can be apprised of his danger in dealing with the same person.

2. Is this broad construction necessary in order to give effect to the expressions of the law? I have endeavored to show that all accountable agents are other persons than revenue officers indebted to the United States. The words, then, "other persons," are satisfied by comprehending all those persons to whom the first section extends.

3. Is this construction rendered necessary to fulfill the manifest intent of the legislature? So far from it, that to my mind, it is in direct opposition to an intention plainly expressed by all the other parts of the law. To prove this, I again refer to the title of the law; to the three first sections, which are in strict conformity with it, and that too, by express words; and to the fourth section, which is so plainly a part of the same subject, that it cannot be construed to go farther than those which precede it. Is the fifth section a stranger to the others, unnaturally placed there without having a connection with the other sections?

If this be the case, I have already admitted rules of construction strong enough to condemn the opinion I hold. But let us examine this point.

The object of the four first sections is to enforce by suit, where necessary, the payment of debts due to the United States from a particular class of debtors. It points out the officer who is to order the suit, declares at what term the cause shall be tried, lays down rules of evidence to be regarded in support of the action, extends to the defendant the benefit of making offsets under certain qualifications; and then most naturally, as I conceive, comes the fifth section relating to the judgment which the court is to render in case a contest should ensue between the United States and individual creditors on account of inability in the debtor to satisfy the whole. What if an individual creditor should attach the property of the debtor before the United States had taken steps to recover their debt? Or if the debtor should assign away 404*] his property, or it should be claimed *by assignees under a commission of bankruptcy; or the defendant, being an executor, should plead fully administered, except so much as would be sufficient to satisfy judgments, bond debts, or other debts superior in dignity to that of the United States? This section establishes a plain rule by which the court must proceed in rendering its judgment whenever those cases occur. What would have signified all the other provisions of the law, unless a rule of decision had been prescribed in cases where otherwise the United States might never obtain the fruit of those steps which their officers were pursuing?

Can a section in a law which professes to afford a remedy in a particular case by process of law, be said not to belong to the law, when it leads to the point of a judgment, which is the consummation of the proceedings in the case? I think not; and, therefore, I cannot acquiesce in the opinion that the 5th section is unconnected with the other parts of the law.

I have before observed that the 4th section is the first which uses general expressions, without reference to those which had before been particularly mentioned; but that when we come to the 5th section, the reference is again taken up, with the addition of those words which produce the difficulty of the case.

Now I ask, in the first place, what necessity was there for departing from the mode of expression used in the 4th section, which, for the first time, is general, without particular reference to any of the persons before described? Would it not have been as well in the 5th as in the 4th section, to say "that where any individual becoming indebted to the United States shall become insolvent," &c.? What reason can be assigned for the specification of revenue officers, one class of persons mentioned expressly in the 1st section, intended in the 2d and 3d by plain words of reference, and clearly meant in the 4th, when it must be admitted that the words used in the 4th sections, or the words "other persons," in the 5th, would have comprehended revenue officers if they were broad enough to include every description of persons indebted to the United States? *Unless they are [*405 construed to limit and restrain the generality of the words "other persons," they are absolutely without any use or meaning whatever. If the preceding sections had applied only to revenue officers, then from necessity we must have construed the words "other persons" as broad as their natural import would warrant, because otherwise they would have been nugatory, and we would have found no rule in the law itself, by which to limit the generality of the expression.

But when the law professes in its title to relate to all accountable agents besides revenue officers, and the first section specifies, amongst these agents, "revenue officers," we have a rule by which to restrain the sweeping expressions in the 5th section, viz., "or other person accountable, or indebted as aforesaid." This construction renders the law uniform throughout, and consistent with what it professes in every other section.

2. In confirmation of this construction, the 62d section of the bankrupt law does, in my opinion, deserve attention. If the United States were, at the time that law passed, entitled to a preference in every possible case, by virtue of the general expressions in the law I have just been considering, what necessity was there for limiting the saving of the right of preference to debts due to the United States, "as secured or provided by any law heretofore passed." This mode of expression leads me to conclude that the legislature supposed there were some cases where this preference had not been provided

for by law. If not, it would certainly have been sufficient to declare, that the bankrupt law should not extend to, or affect, the right of preference to prior satisfaction of debts due the United States.

406*] *THE UNITED STATES
v.
SCHOONER SALLY, OF NORFOLK.

The question of forfeiture of a vessel under the act of Congress against the slave trade, is of admiralty and maritime jurisdiction.

THIS was a libel in the district court of the United States, for Maryland district, against the schooner Sally, of Norfolk, and cargo, Elias De Butts, claimant, seized by the collector of the port of Nottingham, as forfeited under the act of Congress prohibiting the slave trade. Vol. 3, p. 22, March 22, 1794.

In the district court the vessel and cargo were acquitted on merits, which decree was, on appeal, affirmed in the circuit court; whereupon the United States sued out the present writ of error.

The error assigned was, that the cause was of common law, and not of admiralty and maritime jurisdiction.

But the Court, upon the authority of the case of the *United States v. La Vengeance*, 3 Dallas, 297, without argument, affirmed the decree.

BAILIFF *v.* TIPPING.

Quære, whether the courts of the United States have jurisdiction in cases between aliens?
A citation must accompany the writ of error.

THE only question in this case would have been whether one alien could sue another alien in the courts of the United States. The circuit court for the Kentucky district was of opinion that they had no jurisdiction in such a case.

But the writ of error was dismissed for want of a citation.

See *ante*, p. 263, the opinion of the Court in the case of *Mason v. Ship Blaireau*.

407*] *TELFAIR *et al.*, Executors of RAE and SOMMERVILLE,
v.
STEAD'S EXECUTORS.

The lands of a deceased debtor, in Georgia, are liable in equity for the payment of his debts without making the heir a party to the suit.

THIS was a writ of error to reverse a decree in chancery of the circuit court for the district of Georgia, rendered in favor of the defendants in error.

The bill alleges that John Rae and John Sommerville, as copartners in merchandise, were, on the first day of January, 1775, indebted to Stead, a British creditor, in the sum of 3,864*l.* sterling, on account.

That Rae and Sommerville, in their lifetime, made a division of their supposed profits in trade, and drew out considerable proportions of the partnership funds, which they ought not to have done before payment of their debts, and that each invested part of those funds in purchase of lands and negroes as their own separate property.

That Rae died in 1772, or 1773, intestate, and that Sommerville, the surviving partner, died in 1773, having made Edward Telfair his executor, and having a large real and personal estate.

That the said John Sommerville, Samuel Elbert and Robert Rae, administered upon the estate of John Rae. That a considerable part of his personal estate was purchased with moneys improperly drawn out of the joint funds. That he left personal estate to the amount of 9,014*l.* 5*s.* sterling, which came to their hands. That the said administrators of Rae are all dead. That Telfair, as executor of Sommerville, who was administrator of Rae, became possessed of a considerable part of his estate, part of which had been purchased with the joint funds. That on the death of Robert Rae, his wife Rebecca, now wife of Samuel Hammond, claiming as executrix of Robert Rae, became possessed of a considerable part of the estate of John Rae, senior, which had been purchased with the joint funds. That on the death of Samuel Elbert, the last surviving administrator of Robert Rae, Elbert's executors, viz., Elizabeth Elbert, William Stephens, and Joseph Habersham, also became possessed of part of the estate of John Rae, senior, which had been purchased with the joint funds.

That Habersham, as legatee of Jane Sommerville, daughter *of John Rae, senior, be- [*408 came possessed of a large personal estate liable to the claims of the complainants.

That administration *de bonis non* of the estate of John Rae, senior, was (after the death of Sommerville, Robert Rae and Elbert) granted to John Cobbison and Ann his wife, and a part of the estate of the said John Rae, senior, (purchased with the joint funds,) came to their hands.

That James Rae, deceased, as legatee of Jane Sommerville, became also possessed of an estate liable to the claim of the complainants, which has come to the hands of his administrators, Cobbison and wife.

The complainants charge that the defendants have wasted or misapplied the property which was liable to their claim, and seek a discovery against each of the defendants, of assets and funds, but do not ask for any specific relief.

The answer of Cobbison and wife admits that they are in possession of 600 acres of land, part of the estate of John Rae, senior, "but whether it was purchased with moneys drawn from the funds of Rae and Sommerville is a fact which has not come to their knowledge."

They also admit personal estate to the value of 348*l.* 2*s.* 4*d.*

Hammond and wife, Habersham and Stephens, demurred to the bill.

1st. Because the complainants state themselves to be executors, but do not show where the will was proved, nor whether letters testamentary were ever granted, nor whether they have taken upon themselves the execution of the will.

2d. That the bill contains no matter of equity.

The same defendants also pleaded in bar a recovery at law, in the year 1775, by Stead in his lifetime, against Telfair, executor of Sommerville, surviving partner of Rae & Sommerville, for the same debt for which the complainants are now seeking relief upon the original assumpsit, which is merged in the judgment.

Habersham and Stephens deny all knowledge of ever having had in their hands any part of the estate of John Rae, senior, under Elbert's 409*] will; but Stephens states, that *in the lifetime of Mrs. Elbert she delivered to him, as an attorney at law, a bond of Rae, Whitefield & Rae, to John Rae, senior, for 1,637*l.* 0*s.* 4*d.*, which bond he is ready to deliver up to any person entitled to receive it.

Rebecca Hammond admits that her former husband, Robert Rae, as devisee of Jane Sommerville, came to the possession of two tracts of land, a family of negroes, called Boston's family, and some plate, but does not admit that they were part of the property of John Rae, or came from the funds of Rae & Sommerville. She states that one of the tracts of land, viz., Rae's Hall, has been sold for taxes.

Joseph Habersham admits that in right of his wife, a legatee of James Sommerville, he received negroes, valued at 300*l.* which had once belonged to John Rae, senior.

Telfair demurred to so much of the bill as seeks a discovery from him of the amount due to the complainant's testator from the estate of John Sommerville, or from Rae & Sommerville, or either of them, at the time of their deaths, or to compel the payment thereof from this defendant for want of equity, there being an adequate remedy at law; and answered as to the residue of the bill.

His answer states that before the war he had fully administered on the estate of John Sommerville, in his own right, and as surviving partner of Rae & Sommerville, as far as had come to his hands; and had returned an account of his administration on oath to the satisfaction of his creditors.

He does not admit that any division of profits was made by Rae & Sommerville in their lifetime, nor that they drew out any of the joint funds and invested them in lands, &c., as their, or either of their, separate property.

He admits that there are several real estates, and that he received assets to a considerable amount, a part of which were sold for paper money which perished on his hands; and the books and papers of Rae & Sommerville, and his own accounts of payments and receipts, &c., were lost or destroyed by the British while in possession of Georgia. He claims also a right to retain for debts due to himself.

410*] *On the 30th of April, 1794, the demurrers were, on argument, overruled by Judges Iredell and Pendleton.

To the plea in bar of Hammond and wife, Habersham and Stephens, the complainants, replied that there was no such record, the issue upon which being joined, was adjudged for the complainants on the 15th of November, 1794, by the Judges Wilson and Pendleton.

At the same term auditors were appointed to ascertain the sum due to the complainants, but their report appears to have been set aside, and the clerk was directed to ascertain the balance, and an issue was directed to ascertain the damages, upon the verdict for which the following decree was made by Judge Blair, on the 5th of May, 1795.

"The bill and answers in this cause being read and heard, it is ordered and decreed by the Court as follows:

"That the sum of 3,634*l.* 14*s.* 7*d.* sterling, together with the interest accrued thereon at the rate of 5 per cent. per annum from the 1st of January, 1774, to this day, deducting interest from the 19th of April, 1775, to the 3d of September, 1783, be paid to the complainants, together with 5 per centum on the amount of the said principal and interest, as a compensation for the expenses of remitting the said amount to Great Britain where it was contracted to be paid; and that the partnership property, admitted by the defendants to be in their hands, be in the first instance applied towards the discharge of the complainants' demand. And that the several tracts and lots of land belonging to John Rae, or John Sommerville, deceased, referred to in the answers of the several defendants, (and the title deeds whereof admitted to be in their possession,) be sold by the marshal of this court on the first Monday of January next for cash, giving two months' notice of such sale in the gazettes of Savannah and Augusta; and the net proceeds of such sale be appropriated towards the payment and satisfaction of this decree. And that the title deeds, in the hands of the several defendants of such lands, be delivered over into the hands of the clerk of this court in three months after notice given to the defendants for that purpose."

*Sundry sales having been made under this decree, and the clerk having reported the balance remaining due on the 4th of January, 1796, to be 11,196 dollars and 77½ cents. [*411

The following decree was made on the 15th of November, 1796, by Judge Paterson:

"It appearing from the report of the clerk that on the 4th of January, 1796, 11,196 dollars and 77½ cents remained due to the complainants, upon motion of Mr. Gibbons, solicitor for the complainants, and by consent of Mr. Telfair, executor of Sommerville, it is further ordered and decreed, that in regard to the defendant Edward Telfair, the executor of John Sommerville who was the surviving partner of John Rae, that the copartnership property, if any, which now is in the hands and possession of the said Edward, as executor as aforesaid, be sold by the marshal of this court, he giving sixty days' notice in the public gazettes of such sale. And the judgments, bonds, notes, and other evidences of debts due the said copartnership be delivered over to his attorney or solicitor under a general assignment by deed in order to sue the same, if the assets acknowledged or proven to be in the hands of the defendants should not be sufficient to discharge the amount

of the said decree. That after payment and satisfaction of a prior judgment obtained by Matthew Clarke, in the county of Richmond, against the said Edward Telfair, executor of the said John Sommerville, for the sum of 826*l.* 10*s.* with interest from the 17th of March, 1794, the balance of the property of the said John Sommerville, if any, in the hands of the said Edward Telfair, executor as last aforesaid, agreeably to his answer, be sold as first aforesaid. And the bonds, notes, and other evidences of debts remaining in this defendant's hands be delivered over and assigned as aforesaid, subject to the further order of this court, after deducting all lawful commissions and paying costs and charges for administering and conducting the business of the said estate, and that the said Edward Telfair be discharged from the same on complying with this order.

"It is further ordered, that the bond admitted by William Stephens, one of the defendants, to be in his hands, given by Rae, Whitefield & Rae, to John Rae, senior, dated the 1st of June, **412*]** 1782, conditioned for the *payment of 1,637*l.* 0*s.* 4*d.*, with lawful interest from the date, be delivered over to the complainants, or their agents, to be sued for and recovered, and that the sum so recovered be applied to the extinguishment of the complainants' demand.

"It is further decreed, that the following negroes, that is to say, Boston, Jenny, Phillis, Boy Boston, Molly, Peter, Sally, and Ned, charged to be in the hands of the defendants, Samuel and Rebecca Hammond, and not denied by the said defendants, be sold at public sale by the marshal of this court, first giving sixty days' notice thereof, and that the proceeds be applied to the discharge of the complainants' debt.

"It is further ordered and decreed, that the following negroes, Cuffey, Bet with her issue and children, Nelly, Peter, Nancy, Toney, Mary, Jenny, Sucky and Doll, admitted by the defendant, Joseph Habersham, to be in his hands, be sold by the marshal in manner aforesaid, and the net proceeds be applied to the payment of the complainants' demand."

On the 2d of May, 1797, before Judge Chase, leave was given to the complainants to add Elizabeth Course, executrix of Daniel Course, deceased, as a defendant to the bill.

On the 17th of November, 1797, Judge Wilson decreed a number of tracts of land belonging to the estate of John Rae, senior, to be sold.

On the 2d of May, 1799, ELLSWORTH, *Ch. J.*, on the circuit made the following decree, viz.:

"This cause came on to be heard on a decree made at November term, 1796, by which it is ascertained and stated, that on the 4th of January, 1796, the sum of 11,196 dollars and 77½ cents remained due to the complainants; and upon a supplemental bill against Elizabeth Course, which charges that a certain tract of land containing 450 acres, on Savannah river, known by the name of Rae's Hall, is a part of the estate of John Rae, senior, deceased, and subject to the complainant's decree, and upon the answer of the said Elizabeth Course, by which it is ascertained that the said defendant **413*]** claims the said tract of *land under a deed of conveyance executed by Francis Courvoisie, tax collector of Chatham county, to Daniel Course, deceased, late husband of the said defendant, bearing date the fifth of May, 1792, for the consideration of 128*l.* 19*s.* 4*d.* sterling. And the cause being heard; and argued by counsel, on the said decree and the said bill and answer, together with the proofs and exhibits produced by the parties respectively.

"Whereupon it is ordered, adjudged and decreed, that the said pretended conveyance be set aside and held as void; and that the said tract of land and premises be sold at public auction, by the marshal, first giving forty days' notice in one of the Savannah newspapers of the time and place of such sale. And it is further ordered, adjudged and decreed, that the following negroes in the possession of William Stephens and Joseph Habersham, executors of Samuel Elbert, to wit, Young Sambo, Billy, Chance, Oronoko, Fanny, Diana, and Nero, be sold by the marshal at public auction, giving forty days' notice of the time and place of sale as aforesaid.

"And it is further ordered, that the marshal shall pay to the complainants, or their solicitor, the proceeds of such sales above ordered and decreed, towards satisfaction of the balance due to the complainants on this day, being 9,157 dollars and 90 cents."

On the 28th of April, 1800, Judge Moore made the following decree:

"This cause came on to be heard on the bill, answers and replications, and on decree made in this cause in the term of April, 1799; and it appearing by the answer of Ann Cobbison, one of the defendants, that she hath assets in her hands amounting to the sum of 348*l.* 2*s.* 4*d.* equal in value to 1,491 dollars and 90 cents.

"Whereupon it is ordered, adjudged and decreed, that the said Ann Cobbison do, within ninety days, pay over to the complainants, or their solicitor, the said sum of 1,491 dollars and 90 cents."

From these decrees the defendants appealed, and assigned for error.

*1st. That there was not sufficient [***414** equity in the bill.

2d. That the decree of the 5th of May, 1795, is vague and uncertain as to the amount directed to be paid by the defendants, it being expressed in pounds, shillings and pence, which are of no fixed value, whereas it ought to have been in dollars and parts of dollars.

3d. That the sum decreed to be paid ought to have been apportioned among the several defendants, (they not being the original debtors,) in proportion to the amount of assets by them severally acknowledged, or proved to be in their hands respectively.

4th. That a court of chancery has no power to order the sale of real estate, especially as the heirs at law are not parties to the suit; and inasmuch as the title to the real estate was not the subject matter of the bill and proceedings.

5th. That the decree does not state to whom (whether to Rae or Sommerville) the lands belonged which were ordered to be sold.

6th. That the private property of the partners was decreed to be sold before it was ascertained whether the joint property (which had before been decreed to be sold) was not sufficient to satisfy the claim, or how far it would go towards satisfaction.

7th. That the decree of 15th November, 1796,

is founded only on the consent of one of the defendants, and yet materially affects some of the other defendants.

8th. That it directs the sale and application of individual funds while it shows the existence of large copartnership funds not previously applied by the complainants to the extinguishment of their demands, as directed by the decree of 5th May, 1795.

9th. That it orders the sale of negroes not specifically claimed by the complainants, and especially the negroes inferred to be in the then possession of Samuel and Rebecca Hammond, although not by them, or either of them, admitted so to be.

415*] *10th. The decree of the 17th of November, 1797, is liable to the objections stated in the 4th error.

11th. That the said decrees are not personal against each defendant, and apportioned according to the different amounts of assets in the hands of each.

12th. The decree of 28th of April, 1800, is erroneous in ordering Ann Cobbison to pay the full amount of assets admitted by her, while a feme covert, to be in her, or her then husband's hands, without her being called on, since becoming sole, to show whether her husband left the said assets or any, and what part thereof.

13th. The decrees are against the real and personal estate, and not personally against the defendants, or either of them.

14th. That by the decree of May, 1799, certain negroes are said to be in the hands of Habersham and Stephens, executors of Elbert, whereas it was denied that the said negroes were in their possession, but in the possession of the children of Elbert, in right of their mother, or otherwise, which negroes, by the said decree, are ordered to be sold, without proof of their being in the possession of Habersham and Stephens, and without the said children (many of whom are under age) being made parties.

This cause was argued in this court at February term, 1803, by Key, for the original complainants, no counsel appearing on the other side.

By the decisions of the courts of Georgia, on the statute of 5 Geo. II. making lands liable to a *fieri facias*, it is not necessary that the heirs should be made parties. The lands are assets until all the debts are paid.

The executor of an administrator is not, as such, liable to a suit on account of the original intestate; but is liable in equity for the property of the original intestate which has come to his hands.

The record contains a special demurrer to the bill, which was very properly overruled.

The causes for demurrer were,

416*] *1st. That it did not appear in the bill by whom, or where the letters testamentary were granted.

2d. That there was a complete remedy at law.

As to the first, it was not necessary for the complainants to make profert of their letters testamentary. It was sufficient for them to state that they were executors. At law the defendants might crave oyer; but in equity they must petition that the will and letters testamentary may be produced. It is no cause of demurrer that they are not set forth in the bill.

As to the second cause of demurrer, a court of equity will sustain a bill against executors because they are considered as trustees for the creditors and representatives of the deceased, and are liable to account, especially where they are executors of several copartners; and because the court may compel an equitable distribution.

There are fourteen errors assigned in the record.

1st. That there is no equity in the bill.

This has been considered and answered.

2d. That the decree, being in pounds, shillings and pence, is vague and uncertain.

The relative value of dollars to the currency of Georgia is well known, and if the decree can be rendered certain it is sufficient.

3d. The decree ought to be proportioned to the assets.

This is done by applying the decree to the assets themselves.

The object of the bill was not to enforce a responsibility further than assets should appear; it was not against the persons, but the property, that the bill sought relief; its object was to follow the assets. It does not appear that the whole assets were sufficient to satisfy the claim, and, therefore, there was no necessity to apportion the decree to the assets in the hands of each defendant.

*4th. The heirs at law were not made [*417 parties.

By the practice and law of Georgia, the lands are assets, and therefore the executor is the representative of the testator as to lands as well as to the personal estate until the debts are paid, and is the proper person to defend them against the claims of creditors.

5th. The decree does not state whether the lands belonged to the estate of Rae, or of Sommerville.

The answer to this is that the fact is not so.

6th. That the private property was decreed to be sold, before it was ascertained that the joint property was not sufficient.

The answer to this is, that it did not appear that the joint funds were sufficient. And it is to be presumed that they were not, until the contrary appears. No error is to be presumed until it is shown.

7th. That the decree is founded on the consent of Telfair alone, but affects some of the other defendants.

The decree is founded on the consent of Telfair so far only as respects him. It was not necessary for the court to insert in the decree, the grounds on which it was founded so far as it affected the other defendants. If the court had sufficient grounds to justify the decree against the others, it is enough. The objection is, that the court did not state the grounds, not that they did not exist.

8th. This objection is the same as the 6th, only applying it to another decree; and is liable to the same answer.

9th. That the negroes, ordered to be sold, were not specifically claimed by the complainants.

It is true that the complainants did not specifically claim those negroes; but they were seeking for assets generally, and the defendant admitted that the negroes came to her hands as executrix of Robert Rae. The court, having

adjudged them to be liable to the complainants' demand, decreed them to be sold. Whether 418*] they were then in her actual *possession or not, was immaterial; they had been traced to her hands, and she must account for them.

10th. This objection is the same as the 4th, and liable to the same answer.

11th. This is the same as the 3d.

12th. That the defendant became sole since her answer and before the decree.

Neither the complainants nor the court were bound to take notice of that fact until it was shown. If the assets did not remain in her hands after the death of her husband, it was for her to show it. The court was not bound to make the inquiry.

13th. The decrees are not against the defendants personally.

This is no error. The complainants were following the property of their debtor, not the persons of his representatives.

14th. The answer to this objection is, that the facts do not appear in the record to be as alleged in this exception.

On a subsequent day the court expressed a doubt whether the heirs ought not to have been made parties to the bill, and continued the cause to ascertain what construction the courts of Georgia had given to the statute of 5 Geo. II.

MARSHALL, *Ch. J.* The only doubt which the court had, was whether, by the laws of Georgia, the land could be made liable unless the heir was a party to the suit.

We have received information as to the construction given by the courts of Georgia, to the statute of 5 Geo. II. making lands in the colonies liable for debts, and are satisfied that they are considered as chargeable without making the heir a party.

Decrees affirmed.

419*] *GRAVES AND BARNEWALL
v.
BOSTON MARINE INSURANCE COMPANY.[1]

A policy in the name of one joint owner, "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner.

The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported by a special contract relating to the interest of an individual.

The evidence of the knowledge of the underwriters, of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention.

THIS was an appeal from the circuit court for the district of Massachusetts, on a decree in chancery dismissing the plaintiffs' bill; the object of which was to charge the defendants upon a policy of insurance, and to obtain relief against a mistake alleged to have been made by inserting only the name of Graves in the policy, whereas the interest of both Graves & Barnewall was intended to have been insured.

The bill stated that Graves and Barnewall were equally and jointly interested in the ship Northern Liberties and her cargo; and that various sums of money were by each of the partners, and at different places, procured to be insured upon the ship and cargo, from New York to Teneriffe, as well as from thence to La Vera Cruz, but in every instance for their joint and equal benefit. That among other applications for insurance thereon, Graves, on the 24th of April, 1800, wrote to Messrs. E. Sigourney & Sons, of Boston, inquiring of them at what rate of premium insurance could be there obtained upon that risk, and therein describing himself as one of the parties interested in the property to be insured. Upon receiving their answer, he wrote again on the 5th of May, 1800, saying, "Your office ask too high a premium for the risk I was inquiring after; the vessel cannot be out of time as she sailed from hence for Teneriffe in February, where we have not learned that she had arrived; less so that she had sailed; but as it is my principle to run no risks where I can help it, I have prevailed upon my copartner to anticipate her arrival and sailing again to Vera Cruz. To give you a perfect idea of the nature of the risk to be insured you will find a copy on the other side of the application to our offices, who took a good deal at seventeen and a half per cent.; we may be induced to give one or two per cent. more to complete the business, and wish you to say whether it could not be effected with you at seventeen and a half per cent, or near that; if so, and we have not insured elsewhere before a return of your answer, I may likely give you an order to effect twenty or twenty-five thousand dollars."

*The copy of the application annexed[*420 to the letter stated, that "on the 20th of February last, the ship Northern Liberties sailed from this for Teneriffe, commanded by Frederick King, a man of courage and good conduct; she mounted sixteen six pounders, and had a crew of thirty in number. No vessel could have been more completely fitted, is copper sheathed, and by the report of the pilot who carried her out to sea, sails remarkably fast. Upon this vessel's cargo we want insurance at and from Teneriffe to La Vera Cruz. The ship and cargo really and truly belonged to American citizens." That the said letter and copy of the application were, by E. Sigourney & Sons, as agents of the complainants, laid before the President and Directors of the Boston Marine Insurance Company, who thereupon offered to become insurers upon the property therein mentioned at a certain rate of premium then mentioned to the said E. Sigourney & Sons, which they communicated to Graves, who, by letter of 15th May, 1800, with the concurrence of Barnewall, directed insurance to be made upon the cargo, to the amount of 16,000 dollars upon the best terms, within certain limits, which could be obtained. Whereupon, and in pursuance of such directions, E. Sigourney & Sons did cause such insurance to be made; and among others, the Boston Marine Insurance Company did, by policy of insurance, dated June 14, 1800, become assurers in the sum of 10,000 dollars upon the cargo of the said ship, for the voyage mentioned in the said letter.

That previous to the date of the said policy,

1.—Present, Marshall, *Ch. J.*, Paterson, Washington, Cushing, and Johnson, *Justices*.

an alteration was made by the company in the common form of marine policies used in this country, by which alteration the ordinary clause importing the insurance to be made as well for the benefit of the persons named in the policy, as for the benefit of all concerned, was omitted, and that such altered form was used by the company, in making the insurance for the complainants; and that neither the complainants, nor their agents, the said E. Sigourney & Sons, had any notice or knowledge of such alteration.

That the said letter of Graves, and the copy of the application, where shown to the president and directors of the company, as the order for the said insurance, and were received and acted upon by them as the basis upon which such insurance was made. And that it was well un-421*] derstood, *as well on the part of the said president and directors of the said company, as also on the part of the complainants, and their said agents, E. Sigourney & Sons, that the property intended to be insured by the said policy was the joint property of a certain company or copartnership, of which Graves was a member, and not his separate or individual property; and that the object and intent of the said insurance was to cover the interest of the concerned therein in general, and not his particular and separate interest. But that owing to ignorance on the part of the complainants, and of their agents, of such alteration or omission in the form of the printed policies used by the said company, and to inadvertence and mistake on the part of the company, or their president, or secretary, in filling up the same, the name of Graves only was inserted.

That in the prosecution of the voyage insured, the ship and cargo were totally lost by the perils of the sea.

The answer of the company, by their president, under the corporate seal, admitted the execution of the policy, and that Graves had some interest in the property insured, but they did not know to what amount; that upon due proof of loss they were bound, and are ready, to pay him the amount of loss which he had sustained. It admits that E. Sigourney, in the beginning of May, applied for insurance, but denies that either of the letters of the 24th of April, or 5th of May, was shown to him, or left with the president or secretary of the company, or any other person, for their use. It admits that the copy of the application to the New York offices was left with the president, but avers that the premium required was higher than E. Sigourney & Sons would give, and that no bargain or contract was at that time made, but the application was withdrawn. That no insurance was made by them in pursuance of the letter of the 15th of May, or any other letter from Graves, and no further application was made until the 14th of June, when Andrew Sigourney applied for the insurance of 10,000 dollars on the cargo of the ship Northern Liberties; whereupon the policy was made for and on account of John Boonen Graves, and for account of no other person whatsoever. It denies that before or at the time of making and subscribing the policy, it was mentioned by the said Sigourney & Sons, or either of them, or known, or understood, or suspected, by the defendants, that the property 422*] *proposed to be insured was the joint property of Graves and Barnewall, or of any company or copartnership of which Graves was a member, or that it was the object and intent of the said insurance to cover the interest of the concerned therein in general, but only the separate and particular interest of Graves.

It denies all mistake or misunderstanding in inserting the name of Graves alone; but insists that his name alone was inserted, because the interest of no other person was intended to be insured.

It avers that after the policy was prepared and filled up, it was delivered to Andrew Sigourney, of the house of E. Sigourney & Sons, and by him read and approved, and that he thereupon gave his promissory note for the premium.

It denies that any alteration or omission in the form of policies had been made or adopted by the president and directors subsequent to the form first adopted, and agreed upon by them after their incorporation, and avers that the form in the present case is the same which was then adopted, and which was settled by the president and directors upon mature advice and deliberation, and with the express intent that the president and directors might know the nature, character, quality, and condition of every person whose interest they might insure, and to protect themselves from all responsibility and hazard on account of the interest of any person or persons not named in the policy; and that the said printed form had been openly and continually used by the company, of which all persons procuring insurance to be done at their office had notice; and that a like form had been used at the other offices in Boston, for more than a year before the 14th June, 1800.

The deposition of Elisha Sigourney stated, that about the 12th of May, 1800, he showed Graves's letter of 5th May, to a person writing as clerk in the office of the defendants, and left it with him until the next morning, when the clerk informed him the terms on which the president and directors would insure.

That at the time of effecting the insurance, he did not know that the form adopted by that insurance company *differed from the [*423 usual form; but supposed the interest of all concerned was insured.

The deposition of Andrew Sigourney stated, that on the 14th of June, when he made application for insurance, he showed to Mr. May, the secretary of the company, only the instructions on the back of the letter of the 5th of May, and a memorandum to insert the words "as property may appear." That he did not read any but the written part of the policy before he took it from the office. That at the time of making the application, he did not mention the name of any person as interested in that insurance, except the name of John Boonen Graves. He only showed the instructions.

That he knew by the letter of Graves that he had partners, but he did not know the name of any of them; he supposed that the policy covered the interest of all concerned, and had no notice of any variation from the customary form of policies.

The deposition of Mr. May, the secretary of the company, stated, that the only paper which A. Sigourney showed him on the 14th of June,

when he applied for insurance, was a copy of a proposal made to some other offices for insurance on the same risk; and that he did not leave it, but only showed it to the deponent. That he, the secretary, filled the policy; and understood the insurance was for Graves, and for no one else, as the policy purports. That he is not sensible of any error in the filling it; that he filled it as he understood the intention of the parties in the contract. That A. Sigourney read it over deliberately before he gave the premium note; and after reading it went away. He afterwards returned, and requested the secretary to add to it the words "as property may appear," which, by permission of the president, were interlined.

That the first policy written by the company was dated the 3d of April, 1799. That the president and directors had made no alteration in the printed form of policies from their first commencing business until the 14th of June, 1800.

On the 9th of May, E. Sigourney & Sons, in answer to Graves's letter of the 5th, say that the gentlemen will not insure under 20 per cent. premium.

424*] *On the 15th of May, Graves, in answer. requested insurance to be made "for 21,000 dollars on the ship, valued at that sum; and 16,000 dollars on the cargo, as interest shall appear. The latter completes the sum intended to insure on the cargo. Your policy, therefore, being the last dated, it is understood that short interest (if any should appear) is to be settled with your underwriters."

On the 3d of June, E. Sigourney & Sons write to Graves that "5,000 dollars is done on your policy on the cargo. It goes on very heavily."

Graves, in answer, on the 10th of June, says "with much reluctance do I learn the little progress you have made in insuring the cargo. I hope by offering 2 1-2 per cent. more, you may induce the companies, or solid individuals, to fill up the remainder. At any rate, it will not answer my purpose to have the risk unaccomplished; you, therefore, on receiving these presents, will please to ascertain whether there is a prospect of succeeding. If not, give me immediate notice in order to propose it elsewhere."

The material words of the policy are, "This policy of assurance witnesseth, that the president and directors of the Boston Marine Insurance Company do, by these presents, cause John Boonen Graves to be assured, lost or not lost, ten thousand dollars on property on board the ship Northern Liberties, as property may appear, at and from Teneriffe to Vera Cruz."

"And it is hereby agreed, that if the assured shall have made any other assurance upon the property aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the property at risk. And the said insurance company shall return the premium (excepting half per cent.) upon so much of the sum by them assured, as they shall be exonerated from by such prior assurance. And in case of any assurance upon said property subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein assured, without right to claim contribution from such subsequent *assurers, [*425 and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made."

It was fully proved that Graves & Barnewall were jointly and equally interested in the ship and cargo. And the representation to the New York offices stated that fact. Four other policies, upon the same ship and cargo, and for the same voyage, were exhibited by the complainants, all of which had the usual clause, "as well in his own name, as for and in the name and names of every other person or persons to whom the same doth, may, or shall appertain, in part or in whole." Three of them were in the name of Graves, and one in the name of Barnewall.

There was full proof of a total loss of ship and cargo.

A suit at law had been brought by Graves and Barnewall, upon the present policy, in which judgment was rendered against them, which judgment was affirmed in this court at December term, 1801.

This cause was argued at February term, 1804, by Stockton, of New Jersey, and Martin, of Maryland, for the appellants, and by Harper, of Maryland, and Key, of the District of Columbia, for the appellees; and at this term by Stockton, for the appellants, and Harper and Ingersoll, of Pennsylvania, for the appellees.

Stockton, for the appellants, made three points:

1. That Graves is to be considered either as a joint partner, having sufficient interest in the whole property to charge the defendants to the amount of their subscription: or, 1st. As insuring in his own right as far as his interest extended; and, 2d. As trustee for his partner for the residue of the interest: and that it is competent for him to charge the defendants on this policy to the amount of his own interest, and also to the amount of the interest of him for whom he was agent or trustee.

2. That at the time this policy was effected, it was the intention of both parties to insure the entire interest *of both Graves and [*426 Barnewall; and if such is not the literal construction of the policy, the words whereby the policy is confined to the interest of Graves shall be considered as having been inserted by mistake.

3. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other as will prove the defendants to have acted *mala fide;* and they are chargeable on that ground.

1. That the entire property of Graves and Barnewall is covered by the policy.

1. Because each has an insurable interest in the whole; and, 2. Because Graves had power to act for himself, and as agent for Barnewall.[1]

1. It is not necessary that the names of all

1.—Ingersoll referred to Emerigon, as an authority that in such a policy as this, neither the joint property of both, nor the share of either in the joint property, is insured; but that it covers only the separate property of Graves. But the book was not produced.

concerned should be inserted in the policy: and such was the law in England until the year 1785, when the statute of 25 Geo. III. was enacted, which rendered it necessary to insert the names of every person interested; but this was repealed by the statute of 28 Geo. III. which only makes it necessary to insert the name of one of the parties insured, or his agent.

Nor is it necessary that the insured should have the absolute ownership of the thing. A mortgagor and mortgagee may both insure. Seamen on board the king's ships may insure their prize money. A general property is one thing, an insurable interest another. 1 Marshall, 212, 213, 214.

A joint partner has an insurable interest in the whole mass of partnership property. He has a general right and authority over the whole, whether the partnership be general or special. They are jointly seized *per mi et per tout*. The joint effects and duties survive. The executor of a deceased partner has only a right to compel the survivor to account, and to 427*] recover the balance. *Each has a power singly to dispose of the whole partnership effects. Cowp. 445, 448, *Fox v. Hanbury*.

The case of *Page* and *Fry*, 2 B. & P. 240, is in point. There the averment was, that Hyde & Hobbs were interested in the cargo insured to the amount of all the money insured thereon; and although it was proved that other persons had an undivided share of the cargo, yet it was held that the averment was supported. Lord Eldon, Ch. J., was of opinion that the plaintiff had a sufficient interest throughout the entirety of the cargo; and Heath, J., said he did not see why a joint tenant, or tenant in common, has not such an interest in the entirety as will enable him to insure.

A French author is referred to, but the book has not been produced that we might see the contents, the limitation annexed to the opinion, and its bearing upon the present case. Perhaps it may be explained in 1 Marshall, 212. At the time of Emerigon it was the custom to execute blank policies. If the insured chose to insert only the name of one of the persons interested, perhaps it might be considered as estopping him from saying that others were concerned.

A policy is a contract of indemnity. It is not to enable the insured to make gain, but to avoid loss. One partner is not only formally, but substantially, owner of the whole, especially as to strangers. If it be said that he cannot be damnified in the whole, we answer that one partner has only a right to the balance of account. Suppose Graves had advanced the whole outfit, the whole joint effects are his security, and he will be entitled to hold if Barnewall should become insolvent. A creditor partner has a specific lien on the whole. The loss of Graves, therefore, might extend to the whole amount insured. 1 Vez. 242; *West v. Skip;* 2 Ld. Raym. 871, *Jackey v. Butler;* Cowp. 449, *Fox v. Hanbury*.

Suppose the interest of both to be 10,000 dollars. The defendants say that Graves has only the benefit of his share, say 5,000 dollars. But Graves and Barnewall were to share in all cases. 5,000 are lost, so that in fact Graves would be insured only 2,500 dollars.

428*] *There is no case where a joint partner has been held to be insured for his share only.

How can the contract be limited to half the amount stipulated?

If it should be said that the other partner might have insured elsewhere, the answer is, that it would only be the common case of a double insurance, and so a contribution.

But, 2d. Graves might insure personally for his own share, and as agent for Barnewall as to his share.

A general agent may insure without orders. 1 Marshall, 218.

It is not necessary that it should appear on the face of the policy that the principal was interested; but the policy may be in the name of the agent, and the interest of the principal may be averred and proved; even under the statute of 28 Geo. III. 1 Marshall, 219.

One partner is a general agent for the whole. Especially in a court of equity, where one person may be considered as trustee for another, if the justice of the case requires it.

2. There is sufficient evidence to prove that it was the intent of both parties that the joint interest of Graves and Barnewall should be insured, and if the policy is not so expressed, it is a mistake, and ought to be so construed.

The form of the policy was framed in old times. It is imperfect and incoherent. It is not a specialty, and is always construed according to the intention of the parties.

The joint property is proved, and therefore it is natural to suppose that it was intended by Graves as a joint insurance. The conduct of Graves and Barnewall also proves such to be the intent on their part. There were four other policies, in all of which their joint interest is *insured. The letter of the 5th of May,[*429 and the representation annexed, show a plurality of owners.

The words "as interest may appear" were inserted by desire of E. Sigourney, the agent of Graves. For what reason? It was not necessary for Graves to insert them to oblige himself to prove his interest. They are part of the usual clause which had been omitted in this policy, and by which the benefit of the insurance is usually extended to all concerned.

The insertion of those words shows the intention of Graves to insure for those in whom the interest should appear to be.

This intent was known to the underwriters. The letter of the 5th of May was left a whole day in the office.

If they did know it, they must either be presumed to have assented to that intention, or are chargeable with fraud in not explaining themselves.

It was not important to them who were the owners. It was sufficient to them to have a warranty that the property was neutral. Whether it belonged to one or to twenty persons was not of the least importance. They were willing to insure 10,000 dollars upon that risk, and all that they could require was, that property to that amount should be actually exposed to the risk.

There is a variance between the representation made to the New York offices and that made to the Boston office. In the former the property is said to belong to Graves & Barnewall; in the latter, to citizens of the United

States. If any argument should be attempted from this circumstance, the answer is, that at New York Graves and Barnewall were known to be citizens of the United States. At Boston they were not. The risk or contract was not in the least varied. If the assured had intended to impose names upon the underwriters, they would have used that of Barnewall and not Graves. The former was well known in Boston as a man of great respectability of character, and as president of an insurance company in New York. The latter was scarcely known at all, being a naturalized Dutch merchant.

430*] *If, then, it was the intention of both parties to insure the joint interest of Graves & Barnewall; or, which amounts to the same thing, if such was the intent of one of the parties, and that intent was known to the other, who did not object, nor explain himself, then it is but the common case of a mistake in using inapt words to express the meaning of the parties, which is one of the most usual grounds of equitable jurisdiction. 3 Atk. 388, *Joynes v. Statham;* 2 Atk. 203, *Langley v. Brown;* 2 Atk. 31, *Simpson v. Vaughan;* 1 Vezey, 456, *Baker v. Paine;* 1 Atk. 545, *Motteux v. London Assurance Company.*

It is objected that no application was made to rectify this mistake until the loss had happened. The answer is, that Graves did not know of the mistake. The policy remained in the hands of Sigourney, who swears he did not know it; and the loss happened before the premium note became due.

3. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other, as will show that the defendants have acted *mala fide;* and they are chargeable on that ground.

To maintain this ground, we rely on the following facts which appear in evidence.

1. The knowledge the defendants had of the intention of Graves to insure the joint interest of Graves & Barnewall.

The company's departing from the common form of policies which cover the real interest of all concerned, without having intimated this circumstance to the plaintiffs' agent; and without giving any public notice, but keeping it secret even from their own stockholders.

This notice of our intentions, and of the mistake we labored under, and their silence; this deviation from the accustomed forms of business, without notice or explanation, though they saw the complainants acting under a delusion, is such a notice of our understanding of

431*] *the business, and such a concealment of theirs, as will amount to fraud in point of law.

What ought to have been their conduct, knowing our intentions and their own? They should have said, you speak of your copartner; name him. You mean to cover the whole; disclose who are the owners. We have departed from the accustomed form of policies, and the interest of no person will be covered whose name is not inserted in the policy; but all was silence.

When an insuring company depart from the accustomed form, and the principles universally adopted in this business, they should give notice. Otherwise every man has a right to deal with them on the presumption that they do business in the same manner as others, and in the old and established forms. And when they see that he is evidently acting upon this principle, it is due to good faith to apprise him of his mistake. To withhold information, to suffer him to proceed in his mistake, and pay his money under delusion, when a word would have saved him, has every ingredient of deceit. It is *suppressio veri;* it is by silence and concealment to draw a man to conclude an agreement contrary to his intent.

They who demand good faith should practice it. He who exacts equity should do it. The underwriter demands and receives it at the peril of the premium. The insured shall enforce it against him by obliging him to execute the contract as he had a right to understand it. Each ought to know all. 2 Strange, 1183, *Seaman v. Fonereau;* Park, 200, 201; 2 Vern. 554, *Ibbettson v. Rhodes;* Park, 208, 213; 1 East, 335, *Maanss v. Henderson;* 3 Burr. 1905, *Carter v. Boehm.*

If an explanation had taken place it would have made no alteration of the risk or the premium; for Barnewall is also an American citizen. If they had disclosed their secret regulations and intentions, it would but have added a name to the policy. What, then, is it but treasuring up an unimportant circumstance till the event happens, taking the premium, and yet defeating the very contract of which it was the price. 1 Marshall, 216.

*It is, therefore, contended, that if the [*432 intention of both parties has not been fully proved, the defendants are chargeable on the ground of fraud. This gives the court full jurisdiction; and this court will enforce the contract against them, as it ought to have been fulfilled. It will consider Graves as acting for both, and the restriction as happening by mistake or fraud.

Harper, contra, considered, 1st. The law upon which the plaintiffs rely.

2d. The equity of the case.

1. As to the law. It is *res judicata.* This very case has been decided at law.

MARSHALL, *Ch. J.* The case at law was decided on a defect in the declaration.

Harper. That gives them no equity. They were bound to make out their case at law. They ought to have made a good declaration.

Why is this court applied to? To cure some defect or mistake in the policy. But for this there was a remedy at law. A court of law will construe the policy according to the intent.

If they are not estopped from proceeding at law by the judgment at law, let them begin again. But if they are barred by the judgment at law, and this is a question to which a court of law is competent, they have no remedy in equity.

But let us consider the law which has been urged. A partner has a right to use the partnership name for joint purposes; but he cannot bind the firm in his own name. He cannot in his own name transfer the joint property. His interest is different from his power. If he make a will, nothing but his share of the joint property passes. He may in his own name insure his individual share of the joint property. Perhaps his partners do not choose to insure

their interest. Shall he in his own name bind them to pay the premium? Individual partners often underwrite upon the risks of their own house.

433*] *There is good reason why the names of all the owners ought to be known to the underwriters. If a man has been detected in a covered trade, the risk is greater than if he had always been known to carry on a fair trade. One of the secret partners may perhaps be a subject of a belligerent power.

This is not a case of general partnership. It is a particular adventure. It is not such a partnership as is mentioned in the books. One joint tenant, or tenant in common, cannot dispose of the interest of the co-tenant. There are joint tenants of ships as well as of land. In a particular transaction of this kind, one cannot sell the whole ship. As agent he could not do it without a special power. One partner cannot, as agent, without a special power, sign any paper to bind his copartner, nor can he contract as agent. He can only use the name of the firm.

The words "as interest shall appear," are said to be tantamount to the whole omitted clause.

But they only make the difference between an open and a valued policy. The statute of 25 Geo. III. says, the names of all concerned shall be inserted in the policy, and yet, after that statute, the words "as interest shall appear," were still used.

2d. As to the equity of the case.

We admit that a policy is a contract of indemnity, and that what the parties meant at the time ought to be carried into effect; and that *suppressio veri* will avoid it. All this results from the nature of contracts, which requires the assent of two minds.

We admit also that it may have been the intent of Graves to insure the joint interest of Graves & Barnewall. But was that intent known to us? *Hic labor; hoc opus.*

It is true that they acted as joint owners to each other, and to their agent; and in some cases they made insurances jointly, but not in this case.

434*] *Why is there a variance between the representation made to the New York offices, and that made to the Boston office? Why is the name of Barnewall omitted in the latter? Why in the letter of the 5th of May is it not said who were meant by the expressions "we," "partners," "citizens of the United States?"

The letter of the 5th of May is only an application to know the premium, not a request to make insurance. It states his maximum, and, therefore, it is not probable that Sigourney would make it known. He is probably mistaken in his deposition. He might, and probably did, give a copy of the representation. But the original representation is on the back of the same leaf on which the letter of the 5th of May was written.

The letter of the 15th of May requests Sigourney to have insurance made on 21,000 dollars, as interest shall appear. This shows that he did not mean absolutely to insure and pay the premium for 21,000 dollars, but only so much thereof as his uncovered interest should amount to. This explains also the meaning of the words "I request," &c.

As to the alteration of the form of the policy. The answer states that they never had used any other. Sigourney ought to have read it before he agreed to it. It was his own folly that he did not. It was not, therefore, *suppressio veri.*

Ingersoll, on the same side.

If there was a mistake on the side of the insured, yet the written policy is superior to parol testimony. If the knowledge of that intent cannot be brought home to the insurers, the parol testimony is of no avail. Here is a written instrument, and if it is not in itself doubtful, you cannot resort to parol testimony. You cannot resort to extraneous circumstances to create a doubt, when the instrument itself is clear and explicit. All persons have a right to make such contracts as they please; and they will be bound by them, unless they are contrary to law; or unless fraud can be shown.

*If double insurance is made, the insured may resort to either policy. The forms of policies, as to the necessity of naming all the persons concerned, and as to double insurance, are often varied. [*435

Here Graves agrees that if double insurance should have been made before, he will resort to this policy for so much only as shall remain uncovered by other policies; and it is to be "as interest shall appear." It contains also several other special agreements.

From the time of the incorporation of the Boston Marine Insurance Company, by the form of policies which they adopted, they declared to the world the terms of their contract. They say, we will not insure the interest of persons not named; we will not contribute with prior underwriters on the same risk; we will be answerable only for so much as shall be uncovered by preceding policies.

By the terms of this policy the interest of Graves only is insured. By accepting the policy he agreed to it, and is bound as if he had signed it.

The policy is also altered from the old form in other respects. It relinquishes the right of contribution in case of subsequent double insurance. Graves would have held them to this stipulation; and if they were bound by the alterations, he must be bound by them too.

The number of this policy is 649; in so many instances, therefore, they had declared to the world their terms of insurance.

If the policy does cover Barnewall, the remedy of the plaintiffs is at law. If it does not, then Barnewall is excluded, unless they can show a different intent of the parties.

1. On general principles does insurance by one partner, in his own name only, cover the joint interest of both?

2. If not, do the particular circumstances of this case form an exception to the general rule?

*1. One part owner cannot insure the share of the other part owner without special authority. If not concerned in the sale of the cargo, they are not joint partners, but joint owners. Burr. 2729. One joint partner can insure only his share. The others may choose to insure elsewhere. The insurance company had a right to say they would not insure a person not named. [*436

If by law the insurance by one covers both, there is no remedy in equity.

2d. The whole extent of Elisha Sigourney's

powers by the letter of the 5th of May, was to inquire the rate of the premium. He never made any application for insurance. The only application for insurance was made by Andrew Sigourney on the 14th of June, (not grounded on the letter of the 5th of May,) and after insurance had been made at other offices. The insurance was made on a copy of instructions for insurance at other offices which contained the name of no person to be insured but Graves. This is a sealed instrument, and yet it is attempted to set it aside on the ground of mistake, in the omission of a name, when the only name given by the plaintiffs' agent was inserted. It appears by May's deposition, that Andrew Sigourney read the policy deliberately before he gave the premium note. But if he did not read it, it was his own neglect. He says he did read the written part. But the name of Graves was written, and he must have seen that his name alone was inserted.

The case of *Page v. Fry*, 2 Bos. & Pull. 240, was a valid policy. It was, therefore, sufficient if any interest appeared. The only object was to show it not to be a wagering policy. The legal property was in the plaintiffs, and it appeared that the house of Hacks had only a beneficial interest, so that the averment in the declaration was not falsified by the evidence.

The only effect of the words "as interest may appear," was to make it an open policy. They do not refer to the persons concerned who are not named. The meaning is, that the underwriters will insure the whole interest which Graves shall prove he had at risk, provided it did not exceed 10,000 dollars.

437*] *If they could be construed to mean the interest of all persons concerned, whether named or not, they would open the door to all the frauds intended to be guarded against by the terms of the policy.

The case cited from Park, 3, does not show the power of a court to modify a policy, according to the recollection of witnesses as to what passed six weeks before the policy was agreed upon. On the contrary, Lord Hardwicke, in Park, 2, says, that to show that a policy, which is a contract in writing, has been framed contrary to the intent and real agreement, requires the "strongest proof possible."

Stockton, in reply.

We admit that if we have a clear remedy at law, we have none in equity. But this objection does not apply to our second point, which considers Graves as a trustee or agent for his partner.

It is said that in the case of joint tenants there is a difference between their power and their interest. But joint tenants are seized *per my et per tout*. The interest of each extends over the whole, and in chattels the power is equally extensive.

A distinction is also taken between joint partners and joint owners. But there is no difference. As far as the partnership extends, it is governed by all the principles of a general partnership.

Each part owner is possessed *per my et per tout*. Watson, 78.

The presumption, however, is, that Graves & Barnewall were general joint partners. There is no evidence to the contrary.

It is in evidence that in many cases respecting this ship and cargo, Graves acted for Barnewall as well as for himself, and that Barnewall assented to such acts, and never questioned the authority.

*It seems to be admitted that it was [*438 the intention of Graves to insure for his partner as well as for himself. And we say that the evidence is strong that his intention was known to the underwriters.

The question of fraud depends upon their knowledge of our intention, and not informing us of the alteration in their policy.

The general practice of that office was not in itself notice; and there is no evidence of actual notice.[1]

MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The points made by the plaintiffs in this case, are,

1st. That the policy does really insure their joint property on board the ship Northern Liberties, so far as the same was at the time uncovered by prior assurances.

2d. That if the property be not insured at law, yet it was intended to be insured, and this court will relieve against the mistake in the agreement.

1st. That the policy does really insure the joint property of Graves & Barnewall.

The words are "the President and Directors of the Boston Marine Insurance Company, do by these presents cause John Boonen Graves to be assured 10,000 dollars, on property on board the ship Northern Liberties, as property may appear."

These words, it is contended by the counsel for the plaintiffs, insure the joint property of Graves & Barnewall, so as to cover the interest of each.

The operation of the words themselves, taken in their ordinary sense, would certainly not extend beyond the interest held by Graves in the cargo. The words "as property *may [*439 appear," seem to restrict the general terms of the policy to the interest of the person named in it. Admitting this to be true, it is still contended that the interest of each partner in the whole partnership stock is an insurable interest; and as it was obviously the intention of Graves to insure for his partner as well as for himself, the policy ought to receive a construction which will effect this intent. The reasoning in support of the power of each partner to insure the joint property is certainly strong and well founded. But the doubt in this case is not whether Graves could have insured the interest of his partner, but whether he has insured it.

It is true that Barnewall need not have been named in the policy; but the contract ought to have been so expressed (since it is an open policy) as to show that the interest of some other person than Graves was secured, if such was to be the effect of the instrument.

It is a good general principle that written agreements ought to be expounded by themselves. But if the same words are to be considered as insuring the interest of Graves only,

1.—This case was argued at February term, 1804, by Stockton and Martin, for the plaintiffs in error, and by Harper and Key, for the defendants; but as the arguments did not essentially vary from those urged at the present term, it has been thought unnecessary to report them.

or the interest of Graves & Barnewall, according to extrinsic circumstances, the certainty expected from a written agreement will be very much impaired.

The interest of Barnewall, therefore, cannot be considered as insured by this policy, under the power of one partner to insure the share of his copartner. If it is insured, it must be as the interest of Graves.

Several cases have been stated in which Graves might sustain a loss by the loss of Barnewall's part of the cargo, and, therefore, it has been contended, that he may be indemnified against that risk, in a policy professing to cover only his own interest.

The case put is, that Graves might have paid for the whole cargo, and have retained a lien upon it for his reimbursement. But in that case his interest would not be the result of his character as a partner, but would be in the nature of a mortgage. The question would not be generally, whether the interest of a copartner may be said to comprehend all the partnership effects, but whether a mortgagee, or other person having a lien upon property, may be said to have an interest in the whole of it. As a 440*] claim so *founded would rest, not on the general principles of partnership, but on the particular circumstances of the case, those circumstances ought to be made out, in order to entitle the plaintiffs to avail themselves of the argument. Not being made out, they do not belong to the case.

If a suit at law had been brought on this policy, it would only have been brought in the name of Graves, and he must have averred property on board the vessel. He could only have been entitled to recover to the amount of property uninsured. Would it have been sufficient under such an averment to have shown that the interest of his partners and himself amounted to the sum he claimed, or if he had averred property in himself and another to the amount of 10,000 dollars, would such an averment have entitled him to a judgment for the whole sum? In ordinary transactions the plaintiff would certainly fail in an attempt founded on similar principles.

A policy, though construed liberally, is still a special contract, and under no rule for proceedings on a special contract, could the interest of a copartnership be given in evidence on an averment of individual interest, or an averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual.

But it is contended that an insurable interest is distinct from interest in the ordinary acceptation of the word; and several cases have been cited in support of this doctrine. Those cases generally appear to be answered by a distinction taken by the defendants' counsel between the interest and the power of a copartner. But the case of *Page v. Fry*, reported in 2 Bos. & Pull. 240, certainly countenances the doctrine maintained by the plaintiffs, and ought to be particularly considered. But before that case is adverted to, it may be proper to mention what appeared to be the opinion of Judge Buller, in the case of *Perchard v. Whitmore*, reported in the same book, in page 155. In that case it appears to have been considered as a clear principle, that if in an action on a policy, and on an averment of interest in the plaintiffs, it should appear that the plaintiffs and another were interested, the action would not be maintainable. That opinion would apply to the case at bar; but as the question *was [*441 not directly decided, and was the opinion of a single judge, it may be supposed to yield to the case of *Page v. Fry*, where it is said, that question came directly before the court.

The case of *Page v. Fry* was an action brought by an agent on a policy signed by himself, and in the declaration he averred an interest in the whole cargo insured in Messrs. Hyde and Hobbs. It appeared in evidence, that after the purchase of the cargo, and before the insurance was made, a house by the name of Hacks had taken an interest in it, and for this variance between the averment and the proof, the defendants moved for a nonsuit.

It is worthy of remark that no doubt was entertained of the right of the plaintiffs to recover the whole sum, had the declaration stated the truth of the case. And that the counsel in support of the action did not allege that the interest of Hacks was insured as the interest of Hyde and Hobbs, or that on an averment of a particular interest a joint interest might be given in evidence; but, that the averment was immaterial under the acts of parliament, and being alleged under a *scilicet* would not vitiate. The invoices having been made out in the name of Hyde and Hobbs, who paid for the cargo, he also contended that the prima facie right was in them, and that Hacks had only an equitable interest.

The argument goes upon the admission that the variance, under the circumstances which attend the case at bar, would be fatal.

The same remark applies to the argument in support of the nonsuit.

This deserves consideration, since it certainly warrants an opinion that previous to that case the law was generally understood to require that the averment of interest in an action on a policy should be supported by testimony corresponding with that interest, according to the general acceptation of the term.

Lord Eldon certainly states his opinion in favor of the action to be founded on the interest of the plaintiffs in the entirety of the cargo. But in examining that opinion *it does [*442 not appear to be supported by the authorities he cites, and the words he uses in the conclusion would seem to imply that, contrary to his reasoning, he paid some respect to the circumstances under which Hacks had become concerned. "I think," says his lordship, "the plaintiff had a sufficient interest in the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part." The word "beneficial" seems to imply something distinct from a legal interest, and to correspond with the terms equitable interest, which had been used by the plaintiffs' counsel. The opinions of justices Heath and Chambre seem to be founded on this being a valued policy, and on the plaintiff's having such an interest as would entitle him to insure under the act of parliament, and that the substance of the averment was nothing more than that the plaintiffs had an interest in the cargo which would satisfy the act. The opinion of Judge Rooke is accompanied with no explanation whatever.

This case, even was the decision an authority, is too imperfectly reported to be permitted to overthrow a system which was previously established.

It is the opinion of the court, that, on the legal construction of this policy, John Boonen Graves is insured to the extent of his own interest in the cargo, but that the interest of his copartner is not insured.

Were it otherwise, the remedy would be complete at law, and of consequence the plaintiffs could not maintain their bill in a court of equity.

2d. It remains to inquire whether, under the circumstances of the case, a court of equity will relieve the plaintiffs against the mistake alleged to exist in the contract, and extend the insurance to the whole partnership interest.

That Graves intended to insure the whole is proved in a manner which is perfectly satisfactory.

That the company believed themselves to be insuring the property of Graves only is probable. Certainly such is the evidence in the cause. There is no ground for imputing to the company a knowledge that the policy did not correspond with the intentions of the insured. 443*] *If, then, the relief which they ask should be granted to the plaintiffs, it must be on the principle that the information laid before the insurance company was sufficient to apprise them of the fact, and to require that, on the principles of good faith, they should suggest to the agent of the plaintiffs the departure of their policy from the ancient form.

This information is in writing, and is contained in the letter of the 5th of May, and in the representation of the risk which accompanied it.

The letter must be considered as having been seen by the officers of the company; but as it was shown not for the purpose of commencing a contract, but of inquiring into the terms on which a contract might probably be made, it is reasonable to suppose that the nature of the risk was the only subject of consideration, and that the question whether the property belonged to one or more persons never occurred. A month elapsed before a second application was made, and as the description of the risk was again laid before the president, it could not be required from him to retain in his mind a circumstance casually suggested in a letter seen so long before, to which circumstance there was nothing to direct his particular attention.

It is, then, on the representation of the risk, and on the verbal communications of Andrew Sigourney, that the case must depend.

The representation contains an averment that "the ship and cargo really and truly belong to citizens of the United States." But as only a small part of the cargo was insured by the Boston company, this averment contains no information that any other than John Boonen Graves was interested in the particular policy then to be entered into.

In the letter there is another expression which has been much relied on. It is, "on this vessel's cargo we want insurance." This expression has been considered as sufficiently indicating that the application was made in behalf of more than one person; and this expression has produced the principal difficulty of the case; *but [*444 on reflection it has been thought too ambiguous to authorize a change in the legal import of a written contract.

The description obviously relates to the whole cargo; but the application for insurance was only for a part of it. If that application was made in the name of Graves only, it was no unreasonable supposition that the other parties concerned might be separately insured, and that the policy then required was designed to cover Graves only. That the application was so made must be inferred from the circumstance that the policy was so framed at a time when there could be no motive for varying it from the insurance applied for; and that Sigourney does not allege himself to have made any communications to the president indicating a wish to insure others than Graves.

These grounds are too equivocal to warrant the court in varying a written contract in a case attended with the circumstances which appear in the present.

The policy was in the possession of the agent for the plaintiffs, and ought to have been understood by him before it was executed; he retained it in his possession for several months before a mistake was alleged. Under such circumstances, the information given to the insurance company ought to be very clear to justify a court of equity in conforming the policy to the intention of one of the parties, which was not communicated to the other till the loss had happened.

Under the circumstances of the case, a court of equity cannot relieve against the mistake which has been committed; and as the remedy of the plaintiff, Graves, on the policy, to the extent of his interest, is complete at law, the decree of the circuit court dismissing the bill must be affirmed.

Judgment affirmed.

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*HEPBURN AND DUNDAS [*445
v.
ELLZEY.[1]

A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia, in the circuit court for the Virginia district. A citizen of the District of Columbia is not a citizen of a state, within the meaning of the constitution.

THIS was a question certified from the circuit court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed. (See Laws of U. S. vol. 6, p. 89, s. 6.)

The certificate sets forth that "in this cause it occurred as a question whether Hepburn & Dundas, the plaintiffs in this cause, who are citizens and residents of the District of Columbia, and are so stated in the pleadings, can maintain an action in this court against the defendant, who is a citizen and inhabitant of the commonwealth of Virginia, and is also stated so to be in the pleadings, or whether, for want of jurisdiction, the said suit ought not to be dismissed."

1.—Present, Marshall, *Ch. J.*, Cushing, Paterson, Chase, and Washington, *Justices.*

E. J. Lee, for the plaintiffs. This question arises under the 2d section of the 3d article of the constitution of the United States, which defines the jurisdiction of the courts of the United States.

The particular words of the section which apply to the question are those declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different states."

If such words are used in the constitution as, according to their literal meaning, will give jurisdiction to the court, it is all that is necessary to be established.

It is essential, in determining this question, to ascertain the import of the term "states," which in itself is a vague expression. It will sometimes mean an extent of country within certain limits, within which the authority of the neighboring country cannot be lawfully exercised. It sometimes means the government which is established in separate parts of a territory occupied by a political society. It may also be said to be a society by which a multitude of 446*] people unite together under *the dependence of a superior power for protection. 2 Burlamaqui, 21. And sometimes it means a multitude of people united by a communion of interest and by common laws. This is the definition given by Cicero.

Either of the above definitions will bring the district within the meaning of the constitution. It is certainly such an extent of country as excludes from within its limits the force and operation of the laws of the governments which adjoin it. There exists within it a political society with a government over it. That government, for all general concerns of the society, is the Congress and President of the United States. And as to its local concerns, there are subordinate authorities acting under the superintendence of the national government. This political society is dependent upon the superior power of the United States.

It is not essential to the formation of a state that the members of it should have the power in all cases of electing their own officers; but it is sufficient that there are certain rules laid down either by themselves, or those by whom they have submitted to be governed, for their conduct.

The people of the district are governed by a power to which they have freely submitted. They do not possess in as great degree the rights of sovereignty, as those people who inhabit the states. And if the free exercise of all the rights of sovereignty uncontrolled by any other power, is essential in the formation of a state, none of those sections of the country which form the United States are entitled strictly to the appelation of a "state;" for there are certain rights of sovereignty which they cannot exercise in their state capacity, such as regulating commerce, making peace and war, &c.

The term "states," as used in the constitution, may, according to the subject matter, be understood in either of the above senses. It has been understood by a majority of the judges of this court in the case of *Chisholm's Executors v. The State of Georgia*, 2 Dall. 457, to mean the government.

447*] *The idea, that those territories which are under the exclusive government of the United States are to be considered in some respects as included in the term "states," as used in the constitution, is supported by the acts of Congress.

In the 2d paragraph of the 2d section of the 4th article of the constitution, it is declared, that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It is also declared in the same article of the constitution, that "no person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Congress, in prescribing the mode of executing the powers contained in these clauses of the constitution, passed a law dated February 12, 1793, c. 7, s. 1, vol. 2, p. 165, which declares, "that whenever the executive authority of any state in the union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled," and shall produce such evidence of the fact as is prescribed by the act, the person so escaping shall be surrendered, &c. A similar provision, with respect to persons held to labor or service under the laws of the states or territories, is contained in the same act of Congress.

If these territories are not, as to some purposes, included in the term "states," used in the above clauses of the constitution, Congress could not constitutionally pass a law making it the duty of the executive of a state to comply with such a requisition of the executive of one of those territories. If they are thus included, why may they not also be included in that part of the constitution which uses the same term, "states," in defining the jurisdiction *of [*448 the courts? The citizens of the territories are subject to the same evil, if they are obliged to resort to the state courts, which was intended to be remedied by that clause of the constitution which authorizes citizens of different states to resort to the federal courts. And if being within the same evil authorized Congress to give a latitude to the term "states," in one part of the constitution, the same reason will authorize the same constitution of the same term in another part.

The words of the constitution only authorize such a requisition to be made by the executive of a state, upon the executive of another state. It must, therefore, be acknowledged either that the territories are included in the term states, or that the act of Congress is unconstitutional. As a further proof of the same construction of the word state, Congress, by the 6th section of the act supplementary to the act concerning the District of Columbia, have enacted that in all cases where the constitution or laws of the United States provide that criminals and fugitives from justice, or persons held to labor in any state, escaping into another state, shall be delivered up, the chief justice of the said district shall be, and he is hereby required to cause

to be apprehended and delivered up such criminal, &c., who shall be found within the district. Independent of these considerations, it seems to be agreeable to the first principles of government, that all persons who are under the peculiar and exclusive government and protection of a particular power, have, as it were, a natural claim upon that power for protection and redress of wrongs. And that the courts of the United States are the most proper tribunals to which the people of the District of Columbia can apply for redress in all cases where the aggressor can be found within the jurisdiction of those courts. It seems to be a denial of that protection which the United States are bound to afford to those who reside under their exclusive jurisdiction, to say that because you may sue your debtor in a foreign tribunal, (if I may use the expression,) therefore, you shall not resort to our own courts, although your debtor may be found within our jurisdiction. The framers of the constitution could never have supposed it necessary to declare in express terms that the courts of the United States should have power to hear and decide on the complaints of one of the citizens of those districts that were under the exclusive government and care of the 449*] *United States, to whom alone allegiance was due. They could not have intended to deny to that part of the citizens of the United States who inhabit the territories, the privileges which were granted to citizens of particular states, and even to foreigners; especially the right of resorting to an impartial tribunal of justice. When they permitted aliens to resort either to the state or to the federal courts, they could not mean to confine one of their own exclusive citizens to a remedy in the state courts alone. It would be strange that those citizens who owe no allegiance but to the United States, should be debarred from going into the courts of the United States for redress, when that privilege is granted to others in like circumstances, who owe allegiance to a foreign or to a state government.

C. Lee, contra. This is a new question, which has arisen in consequence of the cession of the District of Columbia, by the states of Virginia and Maryland, to the United States.

The words of the constitution do not take in the case, and the act of Congress is also too narrow.

The constitution is a limited grant of power. Nothing is to be presumed but what is expressed.

It is contended that a citizen of the District of Columbia is a citizen of a state. It is said that he is a citizen of the United States, and not being a citizen of the same state with the defendant, he must be a citizen of a different state. But there may be a citizen of the United States who is not a citizen of any one of the states. The expression "a citizen of a state," has a constitutional meaning. The states are not absolutely sovereigns, but (if I may use the expression) they are *demi-sovereigns*. The word state has a meaning peculiar to the United States. It means a certain political society forming a constituent part of the union. There can be no state unless it be entitled to a representation in the senate. It must have its separate executive, legislative and judicial powers. The term may also comprehend a number of other ideas.

Even if the constitution of the United States authorizes a more enlarged jurisdiction than the judiciary act of 1789 *has given, yet the [*450 court can take no jurisdiction which is not given by the act. I, therefore, call for the law which gives a jurisdiction in this case.

The jurisdiction given to the federal courts in cases between citizens of different states, was, at the time of the adoption of the constitution, supposed to be of very little importance to the people. See the debates in the Virginia Convention, pp. 109, 122, 128.

In no case from any one of the territories has this court ever considered itself as having jurisdiction; and in that of *Clarke v. Bazadone*, (*ante*, vol. 1, p. 212,) the writ of error was quashed because the act of Congress had not given this court appellate jurisdiction in cases from the territories.

This is not a case between citizens of different states, within the meaning of the constitution. And in the case of *Bingham v. Cabot*, 3 Dall. 382, it was decided by this court that the courts of the United States were courts of limited jurisdiction, and that it must appear upon the record that the parties were citizens of different states in order to support the jurisdiction.

E. J. Lee, in reply. A law was not necessary to give the federal courts that jurisdiction which is provided for by the constitution. It was only necessary to limit the amount of the claims which should come before the different inferior courts.

If a demand should be made by the executive power of the District of Columbia, upon the executive of a state to deliver up a fugitive from justice, the constitution would apply, and oblige the state executive to respect the demand.

If the term state is to have the limited construction contended for by the opposite counsel, the citizens of Columbia will be deprived of the general rights of citizens of the United States. They will be in a worse condition that aliens.

By the 4th article of the constitution of the United States, sec. 1, "Full faith and credit shall be given, in *each state, to the [*451 public acts, records and judicial proceedings of every other state." If the District of Columbia is not to be considered as a state for this purpose, there is no obligation upon the states to give faith or credit to the records or judicial proceedings of this district. But Congress, in carrying into effect this provision of the constitution, by the act of March 27th, 1804, (vol. 7, p. 152,) has expressly declared that it "shall apply as well to the public acts," &c., "of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts," &c., "of the several states," thereby giving another clear legislative construction to the word states, conformable to that for which we contend.

Again, by the 9th sec. of the 1st art. of the constitution of the United States, "No tax or duty shall be laid on articles exported from any state." Can Congress lay a tax or duty on articles exported from the District of Columbia, without a violation of the constitution?

By the same sect. "no preference shall be given by any regulation of commerce or revenue

to the ports of one state over those of another." Can Congress constitutionally give a preference to the ports of the District of Columbia over those of any of the states?

The same section says, "Nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." Can vessels sailing to or from the District of Columbia be obliged to enter, clear or pay duties in Maryland or Virginia? Yet all this may be done if the rigid construction contended for, be given to the word state.

It is true that the citizens of Columbia are not entitled to the elective franchise in as full a manner as the citizens of states. They have no vote in the choice of president, vice-president, senators and representatives in Congress. But in this they are not singular. More than seven-eighths of the free white inhabitants of Virginia are in the same situation. Of the white population of Virginia, one-half are females; half of the males probably are under age; and not more than one-half of the residue are freeholders, and entitled to vote at elections. The same case happened in some degree in all the 452*] states. A great majority *are not entitled to vote. But in every other respect the citizens of Columbia are entitled to all the privileges and immunities of citizens of the United States.

MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia.

This depends on the act of Congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, "a state" according to the definitions of writers on general law.

This is true. But as the act of Congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the states contemplated in the constitution.

The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative.

The senate of the United States shall be composed of two senators from each state.

Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word state is used in the constitution as designating a member of the union, and excludes *from the term [*453 the signification attached to it by writers on the law of nations. When the same term which has been use plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the constitution have been cited by the plaintiffs to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The opinion to be certified to the circuit court is, that that court has no jurisdiction in the case.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers Edition, or **Law. Ed.** for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and Distarct Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citations of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers Reports Annotated. and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,
So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text-books.

EDITOR.

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II CRANCH.

2 Cr. 9, 2 L. 191, WOOD v. WAGNON.

Jurisdiction of United States courts.— Where jurisdiction depends upon diverse citizenship of parties, an averment that one party is "of the State of Georgia," is insufficient, p. 9.

The following citations approve and apply this proposition: Brown v. Keene, 8 Pet. 116, 8 L. 887, holding insufficient an averment that defendant is resident of Louisiana, having fixed and permanent residence in St. Charles Parish; McNutt v. Bland, 2 How. 21, 11 L. 164, where fact that parties are citizens of same State held not to oust jurisdiction, provided party for whose use suit is brought is citizen of another State; dissenting opinion, Marshall v. B. & O. R. R. Co., 16 How. 340, 14 L. 964, majority holding sufficient, averment that "defendants are a body corporate, created by the legislature of Maryland;" Dred Scott v. Sandford, 19 How. 473, 15 L. 728. holding free negro not to be a citizen within meaning of Constitution; Grace v. Insurance Co., 109 U. S. 285, 27 L. 935, 3 S. Ct. 211, holding insufficient, averment that plaintiffs "are of the county of Kings and State of New York;" Brown v. Noyes, 2 Wood. & M. 79, F. C. 2,023, where court held to have prima facie jurisdiction if parties are alleged to be citizens of different States; Parkhurst v. Kinsman, 3 Wood. & M. 174, F. C. 10,761, holding averment that party is "commorant" in a State, insufficient; Allen v. Blunt, 1 Blatchf. 485, F. C. 215, where jurisdiction of court depended upon service of subpœna in district, and jurisdiction denied, such service not appearing affirmatively on the record; Sherman v. Windsor, etc., Co., 19 Blatchf. 315, 11 Fed. Rep. 852; Prentiss v. Barton's Exr., 1 Brock. 392, F. C. 11,384, holding further that person does not renounce citizenship by reason of absence from State for purpose of business; Berlin v. Jones, 1 Woods, 639, F. C. 1,343, holding averment that party is a citizen of Southern District of Alabama, equivalent to averment that he is citizen of State of Alabama; Merchants' Bank v. Brown, 4 Woods, 264, 17 Fed. 161, as to petition for removal of cause; Speigle v. Meredith, 4 Biss. 126, F. C. 13,227, holding insufficient, averment that residence of defendants is unknown; Stephenson v. The Francis, 21 Fed. Rep. 718, dismissing libel and holding description of charterers as being "of the city of New York," not sufficient averment of residence to establish maritime lien; United States v. Woolsey, 28 Fed. Cas. 769, holding further that defect may be taken advantage of by demurrer; Commissioners Court of Talladega Co. v. Thompson, 18 Ala. 697, holding that in order to establish

jurisdiction of County Court of roads it must appear affirmatively that road is within county; Ingraham v. Arnold, 1 J. J. Marsh. 407, holding that where jurisdiction limited, necessary facts must be averred in declaration; Jim v. The State, 3 Mo. 163, holding further as to means of taking advantage of defect; North River Steamboat Co. v. Hoffman, 5 Johns. Ch. 303, denying petition for removal where some of the parties, plaintiffs and defendants respectively, were citizens of same State. Approved in Donaldson v. Hazen, Hemp. 424, F. C. 3,984, discussing general subject.

2 Cr. 9, 10, 2 L. 191, WILLIAMS v. LYLES.

Variance between bond and execution.— Mere error in recitals of sums in forthcoming bond, given for stay of execution, does not invalidate bond where whole sum for which bond was given was amount of debt and costs of execution, p. 10.

Rule applied in Holt v. Lynch, 18 W. Va. 571, holding that where recital sets forth larger sum than is due, it is not such variance as will invalidate bond, but judgment should be given for amount actually due.

2 Cr. 10–33, 2 L. 191, FAW v. MARSTELLER.

Contract for payment of distinct sums of money at different times is of the nature of distinct contracts, and an action of debt lies for each as it becomes due, p. 24.

Cited and applied in Davis v. Preston, 6 Ala. 85, as to contract to pay certain sum for services in semi-annual installments; Broumel v. Rayner, 68 Md. 50, 11 Atl. 834, holding that where contract provides for paving certain streets, waiver as to some streets does not impair obligation as to others.

Parol evidence is inadmissible to contradict terms of deed, p. 29.

Applied in Warner v. Brinton, 29 Fed. Cas. 238, holding void, will containing patent ambiguity; Ratliff v. Ellis, 2 Iowa, 63, 63 Am. Dec. 473, holding parol evidence inadmissible to change absolute deed into trust deed, in absence of fraud, accident or mistake.

Construction of statutes.— Positive and explicit provisions in a statute, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words, unless such implication be clear, necessary and irresistible, p. 24.

A number of citing cases apply this rule: National Bank v. City of St. Joseph, 24 Blatchf. 440, 31 Fed. Rep. 218, construing statute providing for issue of bonds by city; United States v. Debs, 64 Fed. Rep. 749, where expression "in restraint of trade" held to extend

not only to combination in form of trusts, but also to combinations of labor; Bartlett v. Morris, 9 Port. 268, where statute authorizing alien to inherit such estates as she might have inherited had she not been an alien, held not to have removed alien ancestor's disability to transmit property to her; Mangham v. Cox, 29 Ala. 88, holding liability, under statute providing against transportation of slave without master's written consent, to extend to such act committed unintentionally; Simington v. State, 5 Ind. 484, interpreting act prescribing jurisdiction of courts; Leonard v. Wiseman, 31 Md. 205, construing act providing for bounty to volunteers and enlisted men, holding it to repeal prior statute so far as inconsistent; Jim v. State, 3 Mo. 167, as to construction generally; Chamberlain v. Western Transportation Co., 44 N. Y. 311, 4 Am. Rep. 686, holding exemption of carrier from liability for loss by fire of "any goods or merchandise whatsoever," to extend to baggage of passengers; Stiles v. Murphy, 4 Ohio, 97, construing statute prescribing effect of judgment as lien; and in Walden v. Lane, 1 Overt. 75, as to statute limiting jurisdiction of Justices' Courts.

Construction of statutes.— Where a case is shown to be out of the mischief guarded against, or out of the spirit of the law, the letter of the statute will not be deemed so unequivocal as to absolutely exclude another construction, p. 29.

Principle applied in Jim v. State, 3 Mo. 170, construing statute providing for change of venue on ground of interest of judge; Ayers v. Lawrence, 59 N. Y. 199, holding that under act for "protection of taxpayers against wrongful acts of public officers or agents" action lay to prevent unauthorized act by special commissioner.

Contract.— Obligation of contract to pay "current money" is satisfied by payment of that which the law recognizes as money when payment is due, p. 32.

Principle affirmed and applied in Legal Tender Cases, 12 Wall. 548, 20 L. 311, upholding power of congress to make United States notes legal tender; but distinguished in dissenting opinion, Herbert v. Eaton, 43 Ala. 553, holding, however, that true criterion is value of property at date of sale; so also in Bozeman v. Rose's Exrs., 51 Ala. 325; Higgins v. Bear River Mining Co., 27 Cal. 161, but holding further as to effect of agreement to pay in particular kind of money; dissenting opinion in Hepburn v. Griswold, 2 Duv. (Ky.) 72, majority holding legal tender acts unconstitutional; Howe v. Nickerson, 14 Allen, 402, where court refused to enforce specific performance of award to pay certain number of dollars "in gold;" applied in George v. Concord, 45 N. H. 448, under similar facts. Cited in Metropolitan Bank v. Van Dyck, 27 N. Y. 454, as to satisfaction of mortgage; Legal Tender Cases, 52 Pa. St. 70, where rent payable in "lawful silver money" held satisfied by payment in treasury notes;

Dearing's Admx. v. Rucker, 18 Gratt. 450, as to note taken in lieu of payment in Confederate currency. Criticised in dissenting opinion, Legal Tender Cases, 12 Wall. 661, 20 L. 348.

2 Cr. 33, 2 L. 198, OGLE v. LEE.

Certificate of division.— Court can consider only questions upon which judges below divided in opinion, p. 33.

Cited approvingly on this point in Ward v. Chamberlain, 2 Black, 434, 17 L. 323, refusing to consider irregularities in proceedings below; dissenting opinion, Dow v. Johnson, 100 U. S. 173, 25 L. 637, majority holding that Circuit Court could take cognizance of certificate of division in a case not within its jurisdiction, in first instance; State v. Crocker, 5 Wyo. 398, 40 Pac. 684, holding that although questions may be reserved before judgment, hearing of them upon certificate is within appellate jurisdiction of higher court.

Certificate of division.— By determination of questions, parties are not precluded from bringing writ of error on final judgment below, p. 33.

Rule applied in Daniels v. Railroad Co., 3 Wall. 255, 18 L. 225, dismissing action for want of jurisdiction, certificate having brought up whole case, both fact and law, although by single points; Bagg v. City of Detroit, 5 Mich. 70, holding that it is no objection to jurisdiction that whole matter may be again brought up on appeal.

Interlocutory decree may be reversed by court at any time, p. 33.

Cited approvingly on this proposition in Griffin v. Oman, 9 Fla. 47, as to decree directing reference for purpose of ascertaining material facts; dissenting opinion in County of Cook v. Canal Co., 131 Ill. 519, 23 N. E. 632, majority holding that after term has expired, court has no authority at subsequent term to set aside decree granting new trial; Deickhart v. Rutgers, 45 Mo. 136, as to decree directing payment of sum to be ascertained by referee.

2 Cr. 33-64, 2 L. 199, PENNINGTON v. COXE.

Construction of statutes.— Every part of an act must be considered to discover intent of legislature, p. 52.

This rule has been applied in the following citing cases, construing various statutes: United States v. Freeman, 3 How. 565, 11 L. 728; dissenting opinion, Henderson's Distilled Spirits, 14 Wall. 68, 20 L. 820; Arthur v. Lahey, 96 U. S. 117, 24 L. 767; Wilson v. Rousseau, 1 Blatchf. 84, F. C. 17,832; In re Jayne, 28 Fed. Rep. 424; Cross v. Seeberger, 30 Fed. Rep. 428; Van Patten v. Chicago, etc. Ry. Co., 81 Fed. Rep. 547; Eslava's Heirs v. Bolling, 22 Ala. 736; State, ex rel. v. Commissioners, 20 Fla. 432; Akin v. Freeman, 49 Ga. 54;

Lyles v. Barnes, 40 Miss. 609; Larned v. Corley, 43 Miss. 695; N. O. J. & G. N. Ry. Co. v. Evans, 49 Miss. 788; Jim v. State, 3 Mo. 167, 170; State v. Delesdenier, 7 Tex. 106.

2 Cr. 64–126, 2 L. 208, MURRAY v. THE CHARMING BETSEY.

Construction of acts of congress.— An act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, p. 118.

Cited and applied in opinion rendered by Appleton and Kent, JJ., to house of representatives, declaring "personal liberty acts" constitutional, 46 Me. 587; Ex parte Blumer, 27 Tex. 740, holding foreigners not domiciled in Confederate States not liable to enrollment under conscript laws.

Admiralty forfeiture.— Vessel and cargo belonging to one, who, though born in the United States, was resident of Danish island, and had taken oath of allegiance to king of Denmark, is not liable to forfeiture under act suspending intercourse with France, p. 120.

Cited and rule applied in Sands v. Knox, 3 Cr. 503, 2 L. 512, holding that nonintercourse act imposed no liability upon United States vessels sold bona fide to foreigners, while act in force; United States v. Wong Kim Ark, 169 U. S. 658, 42 L. 894, 18 S. Ct. 460, holding child born of Chinese parents resident in this country, to be citizen within meaning of fourteenth amendment; Comitis v. Parkerson, 56 Fed. Rep. 558, holding actual removal from country and acquisition of domicile elsewhere to be condition precedent to expatriation; Schooner Amado and Cargo, 1 Newb. 407, F. C. 12,005, holding liable to forfeiture, vessel owned by Frenchman domiciled in Mexico, with which country United States was at war; dissenting opinion in Amy v. Smith, 1 Litt. (Ky.) 341, majority holding free negro not citizen by reason of birth in this country; Lyndon v. Danville, 28 Vt. 816, holding that alien born does not have settlement in State which his father had, if before birth of child, father removed into foreign jurisdiction and did not return. Cited in general discussion of subject in note to The Mary and Susan, 1 Wheat. 55, 4 L. 35, n.; United States v. One Hundred and Fifty-nine Packages, 27 Fed. Cas. 286, 290.

Seizure, probable cause for.— To constitute probable cause there must have been substantial reason for believing vessel to have been, wholly or in part, an American vessel, within description of act, or hired or employed by Americans, or sold for purpose of carrying on trade prohibited, p. 121.

Cited in The George, 1 Mason, 27, F. C. 5,328, holding sufficient circumstances which warrant reasonable suspicion of illegal conduct; Burke v. Trevitt, 1 Mason, 102, F. C. 2,163, where officer of

revenue, seizing vessel under probable cause, held liable only for ordinary neglect; The Ship La Manche, 2 Sprague, 224, F. C. 8,004, holding probable cause to be excuse, although vessel acted involuntarily, and was misled by mistakes of revenue officers of captor's government; Williams v. Delano, 155 Mass. 14, 28 N. E. 1123, holding further pendency of libel for forfeiture of vessel to be bar to action of conversion against captor. Cited approvingly, but without particular application in The Marianna Flora, 3 Mason, 123, F. C. 9,080, and Shattuck v. Malley, 1 Wash. 247, F. C. 12,714.

Measure of damages for illegal seizure is actual prime cost of vessel and cargo, with interest thereon, including insurance actually paid, and such expenses as necessarily inured in bringing vessel into port, p. 125.

Rule applied in Manro v. Almeida, 10 Wheat. 486, 6 L. 372, holding further that damages are decreed against person of libellant; The Scotland, 105 U. S. 36, 26 L. 1005, holding that if cargo has no market value in place of shipment, measure is price at port of destination with fair deduction for profits and charges; The Schooner Lively and Cargo, 1 Gall. 322, F. C. 8,403, holding supposed loss of cargo not to be item of damages; in Dyer v. National etc., Co., 14 Blatchf. 489, F. C. 4,225, and in the Mary J. Vaughn, 2 Ben. 50, F. C. 9,217, ruling similarly in action for damages for loss of vessel in collision; also in Pacific Ins. Co. v. Conrad, 1 Bald. 143, F. C. 10,647, sustaining right of holder of goods on respondentia bond, to recover for illegal seizure; The Propeller Galatea, 6 Ben. 262, F. C. 5,185, holding further that report of commission to assess damages should state items explicitly; The Aleppo, 7 Ben. 125, F. C. 158, holding that where contract price of cargo included expenses for drayage, charges for brokerage, and commissions and consul's certificates, they should be allowed as part of prime cost. Cited approvingly in discussion of general subject in Malley v. Shattuck, 3 Cr. 489, 2 L. 508.

Defect apparent on face of report assessing damages is not cured by failure of party to except to it, p. 125.

Cited to same effect in Whitehead v. Perle, 15 Tex. 15, as to account of auditor, which failed to state items as required by statute.

Miscellaneous citations.— Cited in Price v. Thornton, 10 Mo. 138, on point that owners of vessel are liable for tortious acts of master, unless they are acts of piracy. Cited erroneously in Turley v. Dreyfus, 33 La. Ann. 887.

2 Cr. 126, 2 L. 229, CAPRON v. VAN NOORDEN

Jurisdiction of United States courts.— Circuit Court has not jurisdiction where record does not show affirmatively that plaintiff is an alien or a citizen of a particular State, p. 126.

A number of citations approve and apply this principle: Brown v. Keene, 8 Pet. 116, 8 L. 886, holding insufficient, allegation that party is "resident of Louisiana;" Bank of U. S. v. Moss, 6 How. 39, 12 L. 335, holding, however, that where declaration contains special and common counts, and jurisdiction is not apparent as to special counts, if common counts are sustained court will not set aside judgment unless objection made during trial; dissenting opinion, Marshall v. B. & O. R. R. Co., 16 How. 340, 14 L. 964, majority holding sufficient, averment that "defendants are a body corporate created by legislature of Maryland;" Börs v. Preston, 111 U. S. 263, 28 L. 422, 4 S. Ct. 412, holding allenage not presumable from mere fact that party is consul in this country of foreign government; Stuart v. Easton, 156 U. S. 47, 39 L. 341, 15 S. Ct. 268, holding insufficient, allegation that plaintiff is "a citizen of Londou, England;" Brown v. Noyes, 2 Wood. & M. 80, F. C. 2,023, where court held to have prima facie jurisdiction where diverse citizenship alleged; Parkhurst v. Kinsman, 3 Wood. & M. 174, F. C. 10,761, holding insufficient, allegation that party is "commorant" in a State; Berlin v. Jones, 1 Woods, 639, F. C. 1,343, holding averment that defendant is citizen of Southern District of Alabama, equivalent to averment that he is citizen of State of Alabama; Donaldson v. Hazen, Hemp. 424, F. C. 3,984, holding further that the record must show one of parties to be citizen of State where action brought; Speigle v. Meredith, 4 Biss. 126, F. C. 13,227, holding insufficient, an averment that residence of some of defendants is unknown; Fideliter v. United States, 1 Sawy. 156; 1 Abb. (U. S.) 579, F. C. 4,755, holding that where seizure of vessel is jurisdictional fact, it must be alleged; also in Commissioners' Court v. Thompson, 18 Ala. 697, holding that in order to establish jurisdiction of a County Court of roads, it must appear affirmatively that road is within county; dissenting opinion, Ex parte Holman, 28 Iowa, 156, on point that consent cannot confer jurisdiction, majority holding that mandamus is not in nature of a new and original action, but ancillary to an original action; Ingraham v. Arnold, 1 J. J. Marsh. 407, as to averment of jurisdictional facts where jurisdiction of court special and limited; Beebe v. Armstrong, 11 Mart. (O. S.) 441, as to averments in petition for removal of cause; Klein v. Pillsbury, 29 La. Ann. 790, applying principle in holding that where statute prescribes form of warrant any other form is of no effect; North River Steamboat Co. v. Hoffman, 5 Johns. Ch. 303, holding that cause cannot be removed to Circuit Court where some of parties, plaintiffs and defendants respectively, are citizens of same State; Myers v. Berry, 8 Okl. 618, 41 Pac. 582, holding jurisdiction of subject-matter is determined from allegations. The principal case has also been cited in the following cases discussing the general subject. Dred Scott v. Sandford, 19 How. 402, 430, 15 L. 699, 711; dissenting opinion, Salisbury v. State, 6 Conn. 106; Wandling v. Straw, 25 W. Va. 700.

Appeal and error.— Plaintiff may assign for error, want of jurisdiction of court in which he instituted suit, p. 126.

Discussed and affirmed in Dred Scott v. Sandford, 19 How. 473, 518, 566, 15 L. 729, 748, 768. Cited in M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 382, 383, 28 L. 464, 4 S. Ct. 511, 512, where plaintiff alleged citizenship of defendant as unknown; also in Mexican, etc., R. R. Co. v. Davidson, 157 U. S. 208, 39 L. 675, 15 S. Ct. 565, on same point; United States v. New Bedford Bridge, 1 Wood. & M. 406, F. C. 15,867, holding further that objection may be made at any time; likewise in Van Antwerp v. Hubbard, 7 Blatchf. 441, F. C. 16,826; Bobyshall v. Oppenheimer, 4 Wash. 483, F. C. 1,592, holding, no inference in favor of jurisdiction can be drawn from trial and judgment of cause; so also in The John C. Sweeney, 55 Fed. Rep. 541, dismissing libel after hearing on merits; Wabash Ry. Co. v. Barbour, 73 Fed. Rep. 516, 43 U. S. App. 102, as to removal to court lacking jurisdiction; Hale v. Crowell's Admx., 2 Fla. 538, 539, 50 Am. Dec. 300, 303, allowing appeal from judgment in action upon joint contract, against one defendant, after action discontinued as to others; Teal v. Russell, 2 Scam. 321, holding it to be error to take final judgment against parties defaulting in action against several, before plea filed by others disposed of; Jones v. Wight, 4 Scam. 339, 39 Am. Dec. 418, as to plaintiff's right to bring error when judgment rendered in his favor, in order to allow him to commence new action; Thayer v. Finley, 36 Ill. 264, where entry of confession of judgment without consent of plaintiff held to be error; Jordan v. Dennis, 7 Met. 590, as to judgment in replevin rendered in Justice Court; Downing v. Still, 43 Mo. 318, holding void, judgment rendered by court lacking jurisdiction; also in Evans v. Ills, 7 Ohio St. 235, and Abrams v. Jones, 4 Wis. 808, on same point. Cited approvingly in Ricks v. Hall, 4 Port. 180; Jim v. State, 3 Mo. 163, 168, discusing subject of appeal generally. Cited also in dissenting opinion, Lincoln, etc., Mining Co. v. District Court, 7 N. Mex. 530, 38 Pac. 594, but application not apparent.

Distinguished in Monti v. Bishop, 3 Colo. 607, where appeal denied defendant in equity who obtained affirmative relief upon answer praying only to be "hence dismissed;" Ward v. Bull, 1 Fla. 275, refusing to allow appeal where error one of fact.

2 Cr. 127-169, 2 L. 229, HEAD v. PROVIDENCE INSURANCE CO.

Corporations.— Corporate powers are derived from the charter and can be exercised only in the manner authorized by it, pp. 166-168.

The citations show this to be a great leading case upon this proposition, and affirm, follow and apply the doctrine in a variety of ways: United States Bank v. Dandridge, 12 Wheat. 98, 101, 6 L. 564, 565, holding however, that when by-laws provide for accept-

ance of cashier's bond, such provision is merely directory, and acceptance not a condition precedent to legal performance of duties; Bank of Augusta v. Earle, 13 Pet. 587, 10 L. 307, holding power to purchase bills of exchange includes foreign bills; Perrine v. Chesapeake, etc., Canal Co., 9 How. 184, 13 L. 97, where power to take toll for commodities held not to include power to take toll for vessel or passengers; Pearce v. Madison, etc., R. R. Co., 21 How. 444, 16 L. 185, holding power to do all necessary to construct lines does not include power to consolidate; dissenting opinion, Rogers v. City of Burlington, 3 Wall. 669, 18 L. 84, as to power of municipal corporation to borrow money; Sumner v. Marcy, 3 Wood. & M. 112, F. C. 13,609, holding powers of lumber corporation do not include power to purchase stock in bank for purpose of securing control; Russell v. Topping, 5 McLean, 197, F. C. 12,163, as to powers of bank to hold real estate; Alabama, etc., R. R. v. Jones, 5 Bank. Reg. 106, 1 Fed. Cas. 278, where corporation was not authorized to carry on business necessary to bring it within bankruptcy act, and proceedings dismissed; Hitchcock v. City of Galveston, 2 Woods, 286, F. C. 6,532, applying principle to municipal corporation in exercise of powers to construct and repair sidewalks; Merrill v. Monticello, 138 U. S. 687, 34 L. 1075, 11 S. Ct. 446, construing strictly section in municipal charter providing method of issuing bonds; Pullan v. Railroad Co., 4 Biss. 41, F. C. 11,461, holding void, a mortgage of corporate franchise, power to execute such mortgage not being inferable from power to mortgage "road, income and other property;" Laclede Fire Brick Co. v. Hartford, etc., Ins. Co., 60 Fed. Rep. 358, 19 U. S. App. 510, as to manner of executing policies; City of Superior v. Morton, 63 Fed. Rep. 359, 24 U. S. App. 59, construing strictly provision in municipal charter prescribing mode of executing contracts; Citizens' Ry. Co. v. City Ry. Co., 64 Fed. Rep. 654, as to provision in charter regarding use of city streets; First National Bank v. Citizens' Bank, 9 Fed. Cas. 87, holding that bank authorized to receive deposits generally could not receive special deposit in nature of wager to be paid to one of two persons upon certain contingency.

The authority of this case throughout the State courts is attested by the following: State v. Stebbins, 1 Stew. 307, as to inability of corporation to exercise of banking powers in absence of express authorization; State v. Mayor, etc., of Mobile, 5 Port. 310, 30 Am. Dec. 567, where power to regulate width of streets generally held not to apply to street whose width is fixed by charter; Smith v. Insurance Co., 4 Ala. 561, as to section of charter prescribing method of investing corporation capital; Ex parte Burnett, 30 Ala. 465, where power to fix price of liquor licenses held not to authorize fixing of prohibitory license; City of Selma v. Mullen, 46 Ala. 414, sustaining power of city to contract by parol where manner not otherwise prescribed; Lindauer v. Insurance Co., 13 Ark. 471, holding that agreement to cancel policy must be executed in same manner

as that prescribed for execution of policies; Dunbar v. Alcalde, etc., of San Francisco, 1 Cal. 356, as to act of city officers in destroying building to arrest progress of fire; Holland v. San Francisco, 7 Cal. 375, as to method prescribed for sale of city property; but see also McCracken v. San Francisco, 16 Cal. 619, overruling preceding case under similar facts; Zottman v. San Francisco, 20 Cal. 102, 81 Am. Dec. 101, construing strictly, provision regulating method of awarding contracts for public improvements; also in French v. Teschemaker, 24 Cal. 550, as to method prescribed for investing city funds, citing preceding case; Hartford Bank v. Hart, 3 Day, 495, as to power of banking corporation to discount notes; Weston v. Estey, 22 Colo. 344, 45 Pac. 370, denying power of bank to enter into contract to engage in mining; New York Firemen Ins. Co. v. Ely, 5 Conn. 568, 13 Am. Dec. 101, holding prohibition in charter against exercising banking powers includes loaning of money; Thames Mfg. Co. v. Lathrop, 7 Conn. 556, as to method of assessing taxes prescribed in city charter; Berlin v. New Britain, 9 Conn. 180, construing strictly limitations on city power to regulate streets; dissenting opinion, Philadelphia Loan Co. v. Towner, 13 Conn. 267, majority holding that where, under statute, contracts tainted with usury were not absolutely void, charge by corporation of greater interest than that prescribed in the charter did not render contract void; dissenting opinion, Stamford Bank v. Ferris, 17 Conn. 275, majority holding transfer of stock to cashier in his own name, effective as transfer to bank; Couch v. Insurance Co., 38 Conn. 187, 9 Am. Rep. 379, holding further as to inability of corporation to waive provisions in charter; also in dissenting opinion, Southern Ins. & Trust Co. v. Lanier, 5 Fla. 171, on same point; American Colonization Society v. Gartrell, 23 Ga. 452, where corporation empowered to receive property for the purpose of colonizing free negroes, held not capable of taking slaves under a will, for purpose of sending them to Africa; Betts v. Menard, Breese, 400, denying right of municipality to grant ferry privileges to corporation, charter providing for grant to "person;" Metropolitan Bank v. Godfrey, 23 Ill. 552, as to right of banking corporation to hold real property under charter; Doe v. Chunn, 1 Blackf. 337, holding that power of municipal corporation to sell land for delinquent taxes confers no power to execute conveyance; Leonard v. Insurance Co., 97 Ind. 304, construing strictly authorization to insure unincumbered property; Presbyterian, etc., Fund v. Allen, 106 Ind. 596, 7 N. E. 319, where provisions as to method of contracting held to be mandatory; City of Davenport v. Kelley, 7 Iowa, 106, as to exercise by municipal corporation of powers incidental to granted powers; Coles v. Insurance Co., 18 Iowa, 429, holding that insurance corporation cannot be sued upon policy annulled pursuant to charter; dissenting opinion, Cook v. School District, 40 Iowa, 446, majority holding defendant liable on parol contract for employment of teacher, although

statute provided that such contracts be in writing; Bank of U. S. v. Norvell, 2 A. K. Marsh. 102, holding corporation confined to charter powers in suing on note; Breaux v. Parish of Iberville, 23 La. Ann. 236, as to power of officers to bind city by issuing notes; Laycock v. City, 35 La. Ann. 477, denying power of city council to ratify unauthorized contract for purchase of gas, although city had received benefit; dissenting opinion, Bragdon v. Insurance Co., 42 Me. 267, majority holding that custom may change rule; Weckler v. The Bank, 42 Md. 590, 20 Am. Rep. 101, as to power of banking corporation to sell bonds on commission; approved in Perry v. House of Refuge, 63 Md. 23, 52 Am. Rep. 498, ruling similarly in holding corporation not liable for unauthorized assault by officers; McIntyre v. Ingraham, 35 Miss. 55, where power to assign notes held not implied from general power to hold property; Mobile, etc., R. R. Co. v. Franks, 41 Miss. 511, holding that railroad corporation cannot limit common-law liability as carriers; Plahto v. Insurance Co., 38 Mo. 255, holding by-laws to govern strictly method of issuing policies; Ruggles v. Collier, 43 Mo. 375, as to provision in city charter prescribing method of regulating street paving; Matthews v. Skinner, 62 Mo. 332, 21 Am. Rep. 427, construing strictly charter provision as to holding of land; Lebcher v. Commissioners, etc., 9 Mont. 320, 23 Pac. 714, as to power of county to regulate mode of caring for poor; Trustees v. Peaslee, 15 N. H. 331, as to powers of trustees of charitable corporation; Bergen v. Clarkson, 6 N. J. L. 364, construing strictly provision in city charter regulating method of levying taxes; Paxson v. Sweet, 13 N. J. L. 203, as to implied powers of municipal corporation; Beatty v. Insurance Co., 2 Johns. 114, 3 Am. Dec. 403, as to provision regulating method of paying losses; Hosack v. College of Physicians, 5 Wend. 552, holding corporation incompetent to transact business on days other than those specified in charter; Welland Canal Co. v. Hathaway, 8 Wend. 484, 24 Am. Dec. 55, holding corporation not estopped to deny capacity to execute unauthorized contracts; Safford v. Wyckoff, 4 Hill, 448, construing statute regulating method of issuing bills of exchange by banks; Bard v. Chamberlain, 3 Sandf. Ch. 33, holding that in action at law, corporation must allege powers; see also dissenting opinion in Curtis v. Leavitt, 15 N. Y. 257, 270; Crocker v. Whitney, 71 N. Y. 166, construing strictly provision in national bank act, limiting amount of real estate to be held by bank; State v. Railroad Co., Busbee's Law, 236, holding indictment against railroad corporation must allege powers and duties; Commissioners of Gallia County v. Holcomb, 7 Ohio, 232, as to right of municipal corporation to bring action not among those authorized by charter; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio (Pt. 2), 36, 30 Am. Dec. 187, where power to effect public improvements held to include power to borrow money necessary for such purpose; Bank of Chillicothe v. Swayne, 8 Ohio, 287, 32 Am. Dec. 715, holding violation of prohibi-

tion against usurious interest renders contract void; State v. Granville, etc., Society, 11 Ohio, 12, holding express words necessary to confer banking powers; Overmyer's Lessee v. Williams, 15 Ohio, 31, as to power of railroad corporation to hold real estate; Straus v. Insurance Co., 5 Ohio St. 62, as to limitations on investment of capital; Vanatta v. The Bank, 9 Ohio St. 34, as to method prescribed for discounting notes; Weckerley v. Lutheran Congregation, 3 Rawle, 181, holding further as to liability of corporation for acts of officers; Fowler v. Scully, 72 Pa. St. 461, 13 Am. Rep. 702, construing section of national currency act prescribing kind of securities on which banks might loan; Malóne v. Philadelphia, 147 Pa. St. 420, 23 Atl. 629, as to method of contracting for public improvements; Boston, etc., R. R. Co. v. New York, etc., R. R. Co., 13 R. I. 273, holding that power limited to performance of single act does not exist after performance of act; Ferguson v. Halsell, 47 Tex. 423, holding void, sale of county property at private sale, where statute provided for public sale at auction in all cases: Noel v. San Antonio, 11 Tex. Civ. App. 585, 33 S. W. 266, holding bond issue invalid where provision not made for payment of interest as required by statute; Hardware Co. v. Manufacturing Co., 86 Tex. 150, 24 S. W. 17, holding void, deed executed by insolvent corporation; Whitney v. Bank, 50 Vt. 400, 28 Am. Rep. 510, holding that national bank has no power to execute contract of bailment, and so is not liable for loss of property; Arnott v. Spokane, 6 Wash. St. 447, 33 Pac. 1065, as to method of contracting for public improvements; Pennsylvania, etc., Co. v. Board of Education, 20 W. Va. 365, and Exchange Bank v. Lewis County, 28 W. Va. 287, on same point; Janesville Bridge Co. v. Stoughton, 1 Pinn. 672, holding that grant of power to erect bridge is not exclusive unless so expressed.

The principal case is also cited in the following cases discussing the general subject: Bank of U. S. v. Dandridge, 12 Wheat. 68, 6 L. 554; Hartford, etc., R. R. Co. v. Kennedy, 12 Conn. 508; White v. Howard, 38 Conn. 360; Gifford v. Livingston, 2 Denio, 395; Dousman v. Milwaukee, 1 Pinn. 83; Mackey v. Mackey, 29 Gratt. 168.

Distinguished in Planters' Bank v. Sharp, 6 How. 322, 12 L. 456, holding void statute prohibiting bank from transferring notes by indorsement, charter having empowered bank to "hold and dispose of" property, real and personal (but see dissenting opinion, p. 337, 12 L. 462). Rule modified in Campbell v. Mining Co., 51 Fed. Rep. 4, 7, holding mere failure to exercise powers in manner prescribed renders acts voidable only; German Ins. Co. v. City of Manning, 78 Fed. Rep. 902, holding city estopped from denying validity of bonds signed by officers not authorized, in absence of mandatory requirement as to signing; likewise in Market Bank v. Smith, 16 Fed. Cas. 758, holding that charge of greater interest than amount allowed by charter does not avoid entire contract. Distinguished in Hitchcock's Admr. v. Bank, 7 Ala. 434, where limitation as to

rate of interest to be charged in State of incorporation, held not to apply to contract made elsewhere. Limited in Bulkley v. Derby, 2 Conn. 256, where usage held to render valid contracts not made pursuant to charter; so also in Warren v. Insurance Co., 16 Me. 449, 450, 451, 33 Am. Dec. 678, 679, 680. Rule modified in Wiley v. Starbuck, 44 Ind. 310, 312, holding violation of provision regulating rate of interest does not render contract entirely void; Sanborn v. Insurance Co., 16 Gray, 454, 77 Am. Dec. 421, holding that although charter requires policies to be in writing, preliminary insurance may be effected by parol. Limited in Barnes v. Bank, 19 N. Y. 163, where bank held liable on note, although not executed in accordance with banking law; Cincinnati v. Cameron, 33 Ohio St. 363, holding rule not to apply to executed contracts, corporation having received benefit. Distinguished in Trimmier v. Bomar, 20 S. C. 362, where provisions regarding manner of holding elections held to be merely directory; Parker v. Building & Loan Assn., 19 W. Va. 759, holding that where association is authorized to loan to members only, it may enforce contract against one who has acted as member, but never signed constitution.

2 Cr. 170–179, 2 L. 243, LITTLE v. BARREME.

Illegal acts.— Commission of, is not justified by authorization or command of superior, p. 179.

Cited and principle applied in In re Cooper, 143 U. S. 500, 36 L. 241, 12 S. Ct. 459, discussing cases on general subject; Belknap v. Schild, 161 U. S. 18, 40 L. 602, 16 S. Ct. 445, as to personal liability of officers of the United States for infringement of patent, although acting under orders; Hendricks v. Gonzalez, 67 Fed. Rep. 353, 35 U. S. App. 127, holding collector of customs not justified in refusing clearance papers, although acting under instructions from secretary of treasury in so doing; Averill v. Tucker, 2 Cr. C. C. 545, Fed. Cas. 670, holding treasurer of United States to be public agent and not liable as such as garnishee of employee of government; United States v. Bright, 24 Fed. Cas. 1238, holding militia officer liable for interfering with arrest by United States marshal, although acting under orders from governor; Christian County Court v. Rankin, 2 Den. 504, 87 Am. Dec. 507, as to acts of Confederate soldiers in destroying public building; Hogue v. Penn, 3 Bush, 666, 96 Am. Dec. 276, holding officer of State troops liable for trespass committed under orders. Cited approvingly in note to Burke v. Trevitt, 1 Mason, 102, F. C. 2,163, discussing general subject; likewise in United States v. One Hundred and Twenty-nine Packages, 27 Fed. Cas. 278; and in Thayer v. Hedges, 22 Ind. 302, discussing subject of incidental powers of congress.

Distinguished in Garland v. Davis, 4 How. 149, 11 L. 915, holding public agents not liable on contracts made for principals where no

misfeasance shown; The Marianna Flora, 3 Mason, 123, F. C. 9,080, in proceedings against vessel, seizure having been lawful, but made through mistake of fact; Mandeville v. Coopendorfer, 3 Cr. C. C. 400, 401, F. C. 9,010, refusing to extend rule to negligent act of agent where no misfeasance shown.

Miscellaneous citations.— Cited erroneously in State v. Cardinas, 47 Tex. 290.

2 Cr. 180–185, 2 L. 246, DUNLOP v. BALL.

Payment presumed from lapse of time.— To raise presumption of payment of bond, twenty years must have elapsed exclusive of period of plaintiff's disability to recover upon it, p. 184.

Cited upon this point in Lessee of Ransdale v. Grove, 4 McLean, 284, F. C. 11,570, holding statute of limitations does not run against nonresident owners of land claimed by lapse of time; Lynde v. Denison, 3 Conn. 392, as to incapacity of feme covert to sue on probate bond; Reddington v. Julian, 2 Ind. 225, holding further, presumption is rebuttable; McLellan v. Crofton, 6 Me. 334, where absence from country and poverty of debtor held not to prevent operation of statute of limitations; Gudlick v. Loder, 13 N. J. L. (1 Green L.) 73, 23 Am. Dec. 714, holding further as to pleading; Thorpe v. Corwin, 20 N. J. L. 318, holding further, presumption is rebuttable; Long v. Clegg, 94 N. C. 768, where time intervening between death of testator and administration of estate, held to be period of disability; dissenting opinion, Summerville v. Holliday, 1 Watts, 521, on point that question of sufficiency of disability is to be determined by court and not by jury; Foulks v. Brown, 2 Watts, 215, holding that death of feme covert legatee, whose husband survived, and the fact that her estate was not administered upon are not such facts as will repel presumption of payment of legacy; Exr. of Palmer v. Admr. of Dubois, 1 Mill (S. C.), 180, holding that commencement of suit afterwards abandoned did not affect presumption. See also note, 18 Am. Rep. 888, on general subject. Approved in Heirs of Marr v. Gilliam, 1 Cold. 502, discussing general subject.

Distinguished in Boardman v. De Forest, 5 Conn. 13, where discharge in insolvency held not to create disability to recover on judgment rendered after discharge; Shubrick v. Adams, 20 S. C., 56, holding currency of statute of limitations not interrupted by disability intervening after right of action accrued.

Miscellaneous citations.— Cited in Beverly v. Burke, 9 Ga. 447, 54 Am. Dec. 356, on point that question of adverse possession is one for jury.

2 Cr. 185–186, 2 L. 248, BLAKENEY v. EVANS.

No citations.

2 Cr. 187-239, 2 L. 249, CHURCH v. HUBBART.

Marine insurance — warranty.— Seizure of vessel for attempt at illicit trade is not loss within policy containing exception of risk of illicit trade, p. 234.

Cited on this point in Andrews v. Insurance Co., 3 Mason, 20, F. C. 374, holding mere proceeding to port for purpose of illicit trade to be within such exception; Goicoechea v. Insurance Co., 6 Mart. (N. S.) 58, 17 Am. Dec. 178, giving effect to exception of illicit trade, notwithstanding declaration in policy that goods belong to country at war with that to which vessel is bound.

Seizure must be justifiable in order to come within exception of risk of illicit trade, p. 236.

Cited on this point in Carrington v. Insurance Co., 8 Pet. 517, 518, 523, 8 L. 1029, 1031, holding, however, that there need not be justifiable cause for condemnation; Graham v. Insurance Co., 2 Wash. 120, F. C. 5,674, holding that circumstances of seizure and illicit trade must concur; Higginson v. Pomeroy, 11 Mass. 109, 112, holding further that terms of prohibitory law govern construction of excepting clause; Francis v. Insurance Co., 6 Cow. 424, 427, holding burden of proof on insurance company to show seizure authorized; Smith v. Insurance Co., 3 Serg. & R. 84, holding seizure resulting from ignorance of prohibition not within exception. Rule extended in Fandel v. Insurance Co., 4 Serg. & R. 69, holding that to bring seizure within exception it must appear in sentence that goods were condemned for violation of prohibition. The rule has also been approved in Thompson v. Insurance Co., 2 La. 238, discussing general subject and defining "illicit trade."

Admiralty.— Limit of jurisdiction on high seas is not fixed, but extends at least to distance of "cannon shot," p. 236.

Cited in The Brig Ann, 1 Gall. 63, F. C. 397, construing embargo act; The Kodiak, 53 Fed. Rep. 128, where jurisdiction held to extend over waters between headlands of an inlet, and in The Alexander, 60 Fed. Rep. 918, to same effect; The Coquitlam, 57 Fed. Rep. 710, 716, where jurisdiction held to extend thirty miles from coast; Cucullu v. Insurance Co., 5 Mart. (N. S.) 481, 482, 16 Am. Dec. 207, 208, and Francis v. Insurance Co., 6 Cow. 425, under facts similar to principal case. See also Mahler v. Norwich, 35 N. Y. 355, as to jurisdiction of State court over case of collision in sound, included within limits of State. Cited generally in United States v. New Bedford Bridge, 1 Wood. & M. 488, F. C. 15,867, discussing general subject.

Foreign laws and judgments must be proved before they can be received in court of justice, p. 236.

This holding is affirmed and applied in the following citing cases: Ennis v. Smith, 14 How. 427, 14 L. 484, holding copy of code civil,

indorsed "Les garde des Sceaux de France à la Cour Supreme des Etats Unis," competent evidence to prove rule of descent; Hanley v. Donoghue, 116 U. S. 4, 29 L. 536, 6 S. Ct. 244, holding allegation in declaration as to effect of foreign law, to be allegation of fact admitted by demurrer; Liverpool, etc., Co. v. Insurance Co., 129 U. S. 445, 32 L. 793, 9 S. Ct. 473, as to carrier's liability under contracts made in Great Britain; United States v. Wilson, 1 Bald. 91, F. C. 16,730, holding pardon granted by governor of State under great seal, evidence per se of fact of pardon; Edison, etc., Co. v. Electric, etc., Co., 60 Fed. Rep. 403, holding inadmissible, certificate of grant of patent by Russian government in absence of signature and seal of superior office of government; In re Metzger, 17 Fed. Cas. 237, as to authentication of depositions; Smith v. Zane, 4 Ala. 104, holding admissible as evidence, transcript of record of births and marriages signed and sealed by keeper of records and certified to be true copy; McNeil v. Arnold, 17 Ark. 166, as to proof of statutes of sister States; Griswold v. Pitcairn, 2 Conn. 90, holding admissible, judgment authenticated by public seal of Denmark; Dyer v. Smith, 12 Conn. 390, as to statutes of sister States; State v. Crawford, 28 Fla. 492, 10 So. 124, as to importance of national seal in authenticating commissions; Franklin v. Twogood, 25 Iowa, 528, 96 Am. Dec. 78, holding, however, that one State is not bound by construction of common-law rule by another State as to contract made in latter; Canne v. Sagory, 4 Mart. (O. S.) 87, as to protest of foreign bills of exchange, and in Las Caygas v. Larionda's Syndics, 4 Mart. (O. S.) 285, on same point; Woolsey v. Paulding, 9 Mart. (O. S.) 294, as to authentication of depositions; Isabella v. Pecot, 2 La. Ann. 391, holding that unwritten law may be proved by parol evidence; Levy v. Merrill, 4 Me. 190, as to foreign law providing for arrest of debtor on civil process; Corrie's case, 2 Bland Ch. 508, as to authentication of appointment as guardian; Kline v. Baker, 99 Mass. 255, holding further that where evidence of foreign law consists entirely of judicial opinion, question of its construction and effect is for the court; People v. Lambert, 5 Mich. 360, 72 Am. Dec. 51, as to proof of statute of sister States; Gunn v. Peakes, 36 Minn. 179, 1 Am. St. Rep. 662, as to proof of foreign judgments generally; Martin v. Martin, 1 S. & M. 177, as to laws regulating rate of interest; Stewart v. Swanzy, 23 Miss. 505, as to authentication of will executed in another State; Karr v. Jackson, 28 Mo. 318, as to proof of record of association of persons for purpose of establishing bank; Dunlap v. Waldo, 6 N. H. 453, as to authentication of depositions; Mahurin v. Bickford, 6 N. H. 570, as to proof of judgments rendered in courts of sister States; Beach v. Workman, 20 N. H. 382, holding inadmissible, a gazette purporting to contain copies of foreign laws; Watson v. Walker, 23 N. H. 496, holding that to prove unwritten laws, witness must have special knowledge of them; Pickard v. Bailey, 26 N. H. 167, and Hall v. Costello, 48 N. H. 179, 2 Am. Rep. 209, holding further that evidence

of foreign laws should be addressed to court and not to jury; Emery v. Berry, 28 N. H. 485, 61 Am. Dec. 626, holding that statute law cannot be proved by parol evidence; Hutchins v. Gerrish, 52 N. H. 207, 13 Am. Rep. 21, where record of conviction for larceny, improperly authenticated, held inadmissible as evidence to impeach witness; Francis v. Insurance Co., 6 Cow. 428, 429, as to laws of Great Britain, relating to seizures for illicit trading; Chanoine v. Fowler, 3 Wend. 177, holding that commercial code of France could not be proved by production of book admitted to be conformable to official edition published by government, and in Hill v. Packard, 5 Wend. 389, on same point; Lincoln v. Battelle, 6 Wend. 482, holding that statute law cannot be proved by parol evidence; Hosford v. Nichols, 1 Paige Ch. 226, as to foreign laws relating to mortgages; Dougherty v. Snyder, 15 Serg. & R. 87, 16 Am. Dec. 524, holding that registered edict must be proved by copy properly authenticated; Phillips v. Gregg, 10 Watts, 169, 36 Am. Dec. 161, 162, affirming principle that best evidence must be produced; Phillips v. Lyons, 1 Tex. 394, holding that great seal of State affixed to record does not import verity per se; State v. Cardinas, 47 Tex. 290, holding inadmissible copy of a copy of grant; Williams v. Conger, 49 Tex. 601, as to proof of power of attorney; Tunstall v. Pollard, 11 Leigh (Va.), 28, as to proof of appointment as executor. See on general subject, notes, 11 Am. Dec. 784, 82 Am. Dec. 412, 2 Am. Rep. 208.

Approved in note to Elliott v. Ray, 2 Blackf. 31, discussing subject of State statutes; Wilson v. Robertson, 1 Overt. 269, discussing general subject; also in Forsyth v. Vehmeyer, 176 Ill. 362, 52 N. E. 56, but without particular application of rule.

Distinguished in Schroecken v. Swift, etc., Co., 19 Blatchf. 210, 7 Fed. Rep. 471, under statute; Thompson v. Stewart, 3 Conn. 182, 3 Am. Dec. 171, holding that seal of Court of Admiralty proves itself; Adams v. Way, 33 Conn. 429, and Williams v. Wilkes, 14 Pa. St. 230, holding that Federal courts are domestic courts for purposes of proof of records in State courts; Snyder v. Wise, 10 Pa. St. 160, holding judgment of justice of peace not to be within meaning of act of congress directing mode of authenticating records. Limited in Barrows v. Downs, 9 R. I. 449, 11 Am. Rep. 285, holding parol evidence of expert admissible to prove foreign written law.

Miscellaneous citations.— Cited in Loree v. Abner, 57 Fed. Rep. 164, 6 U. S. App. 649, on point that Federal courts will take judicial notice of laws of the several States.

Foreign law.— Authentication of, is not a consular function. p. 237.

Cited and applied in Stein v. Bowman, 13 Pet. 218, 10 L. 134, holding insufficient authentication by minister resident from Great Britain; Levy v. Burley, 2 Sumn. 359, F. C. 8,300, holding consular certificate of any fact not to be evidence between third parties;

The Alice, 12 Fed. Rep. 925, as to copy of bill of lading certified by consul; Stein v. Stein's Curator, 9 La. 281, as to attestation of signatures of public functionaries; Sioux City, etc., R. R. v. Washington Co., 3 Neb. 42, holding that county board of equalization acting under special authority can exercise only powers expressly granted.

Rule limited, State v. Behrman, 114 N. C. 805, 19 S. E. 223, holding certificate of marriage attested by consul, admissible in corroboration.

New trial.— Submission to jury of inadmissible evidence of material fact is ground for, and court cannot consider the sufficiency of other evidence to justify verdict, p. 239.

Cited to this point in Smith v. Carrington, 4 Cr. 72, 2 L. 553, as to admission of unproved copy; Luty v. Purdy, 2 Overt. 165, as to erroneous charge upon a material point; Washburn v. Tracy, 2 D. Chip. 136, 15 Am. Dec. 663, as to refusal to charge jury on a material point.

Distinguished in Knapp v. McBride, 7 Ala. 30, holding mere omission to charge jury upon material point not ground for reversal. Rule limited in Wellborn v. Carr, 1 Tex. 469, holding admission of such evidence as to point not traversed not to be ground for reversal.

2 Cr. 240–271, 2 L. 266, MASON v. SHIP BLAIREAU.

Salvage.— No positive rule governs rate of; in fixing it, common usages of commercial nations should be regarded, pp. 268, 269.

This proposition approved and applied by the following citations: The Connemara, 108 U. S. 359, 27 L. 753, 2 S. Ct. 758, and Tyson v. Prior, 1 Gall. 135, F. C. 14,319, holding amount to be in discretion of court; Rowe v. Brig ——, 1 Mason, 377, F. C. 12,093, and Bond v. The Cora, 2 Pet. Adm. 376, 2 Wash. C. C. 82, F. C. 1,621, holding rate to be governed by circumstances; The Fannie Brown, 30 Fed. Rep. 221, holding, however, amount not measured by risk to salvor; Gaynor v. The Gier, 31 Fed. 426, holding tugboat entitled to salvage although city fire engines rendered greater service; Bay of Naples, 48 Fed. Rep. 739, 1 U. S. App. 47, readjusting amount awarded in lower court. Followed in The Waterloo, Blatchf. & H. 127, F. C. 17,257, under similar acts. See also note to same case, p. 134, where authorities classified and discussed. Cited and rule applied in Taylor v. The Cato, 1 Pet. Adm. 60, 63, 66, F. C. 13,786, holding dominant consideration to be benefit accruing to owners of property saved; Hand v. Elvira, Gilp. 73, F. C. 6,015, allowing two-fifths of property saved; Cape Fear, etc., Co. v. Pearsall, 90 Fed. Rep. 438, holding that apportionment of salvage between owners and crew is to be governed by circumstances; The Alabamian, 1 Fed. Cas. 284, holding further that salvors of cargo only cannot claim as salvors of ship; The Huntress, 12 Fed. Cas. 981, allowing one-fourth

of value of vessel and cargo; Pent v. The Ocean Belle, 19 Fed. Cas. 201, and Walter v. The Montgomery, 29 Fed. Cas. 115, where rate held to be governed by circumstances. Cited also in The Sandringham, 5 Hughes, 334, 10 Fed. Rep. 571, discussing general subject.

Rule limited in The Brixham, 54 Fed. Rep. 541, allowing no salvage to cargo, as such, of saving vessel; The Dupuy de Lome, 55 Fed. Rep. 96, 97, holding shipper not entitled to salvage, unless he was on board and consented to deviation.

Salvage.— Owner of saving vessel is entitled to share in amount awarded. One-third allowed, p. 269.

Rule applied in The Camanche, 8 Wall. 478, 19 L. 403; The Saragossa, 1 Ben. 559, F. C. 12,335, but allowing one-half in case of steamship; Waterbury v. Myrick, Blatchf. & H. 44, F. C. 17,253, basing right on risk incurred; The Galaxy, Blatchf. & H. 274, F. C. 5,186, but allowing only one-fourth; and in The C. W. Ring, 2 Hughes, 102, 103, F. C. 3,525, allowing three-fifths; The Charles, Newb. 334, 339, F. C. 4,556; The T. P. Leathers, Newb. 421, F. C. 9,736; Bond v. The Cora, 2 Pet. Adm. 382, F. C. 1,621, and in The Henry Eubank, 1 Sumn. 426, 427, F. C. 6,376; likewise in The Nathaniel Harper, 3 Sumn. 577, F. C. 10,032, holding right not affected by fact that vessel is sailing under charterparty; The Pomona, 37 Fed. Rep. 816, allowing four-fifths to owners. Followed in Sewell v. Nine Bales of Cotton, 21 Fed. Cas. 1108.

Distinguished in The Persian Monarch, 23 Fed. Rep. 822, 823, 824, allowing no share to owner where consent not given to deviation.

Salvage.— Embezzlement on part of salvor works forfeiture of his share, p. 271.

The principle has been applied by the following citing cases: Flinn v. The Leander, Bee, 262, F. C. 4,870, as to concealment of part of property, and in Cromwell v. Island City, 1 Cliff. 229, F. C. 3,410, on same point; The Schooner Boston, 1 Sumn. 339, 340, F. C. 1,673, as to embezzlement while vessel in port; The Albany, 44 Fed. Rep. 434, decreeing forfeiture of owner's share for embezzlement by crew; The Missouri's Cargo, 1 Sprague, 270, F. C. 9,654, holding, however, that embezzlement by master does not affect rights of crew. Rule extended in Lewis v. The Elizabeth and Jane, 1 Ware, 43, F. C. 8,321, where gross negligence held ground for forfeiture. Cited in The Rising Sun, 1 Ware, 381, F. C. 11,858, holding, however innocent, salvors not affected by embezzlement. Rule extended in American Ins. Co. v. Johnson, Blatchf. & H. 29, F. C. 303, decreeing forfeiture for neglect of salvor to inform master of wrecked vessel of imminent danger, known only to former. Cited in Alexander v. Gallway, Abb. Adm. 262, F. C. 167, holding seaman's wages forfeited by embezzlement of part of cargo. So, also, in note to Breevoor v.

The Fair American, 1 Pet. Adm. 99, F. C. 1,847. Cited in note to The Sumner's Apparel, Brown Adm. 54, F. C. 13,608, on general subject; The Florence, 9 Fed. Cas. 296, as to forfeiture of seaman's wages. Followed in The Mulhouse, 17 Fed. Cas. 965. Cited in Roberts v. The St. James, 20 Fed. Cas. 928, holding further that it is discretionary with court to determine what interest shall be benefited by forfeiture; Williams v. Waterman, 29 Fed. Cas. 1417, as to forfeiture of seaman's wages, holding, however, that embezzlement works forfeiture only to value of property taken.

Salvage.— Share of apprentice belongs to him and not to master, p. 270.

Rule applied in Waterbury v. Myrick, Blatchf. & H. 43, F. C. 17,253; Bell v. The Ann, 2 Pet. Adm. 282, F. C. 1,245; The Wave, Blatchf. & H. 263, F. C. 17,297. Approved and principle applied in Ex parte Steiner, 22 Fed. Cas. 1234, enforcing agreement of master to pay apprentice for overwork; Gale v. Parrott, 1 N. H. 30, 32, 33, as to minor's share in prize money, holding further that it cannot be recovered by parents from master. Cited generally in Browning v. Baker, 2 Hughes, 41, F. C. 2,041, enumerating classes entitled to salvage.

Distinguished in Bailey v. King, 1 Whart. 114, 29 Am. Dec. 44, denying right of apprentice to recover from master for extra services performed during apprenticeship.

Salvage.— Mariner of vessel saved, left on board when vessel deserted by officers and crew, and who did salvage service is entitled to share in compensation, p. 269.

Approved and principle applied in Hobart v. Drogan, 10 Pet. 122, 9 L. 368; The Centurion, 1 Ware, 482, F. C. 2,554, and The Wave, Blatchf. & H. 243, F. C. 17,297, holding that pilot, having discharged duty as such, is entitled to salvage for saving vessel subsequently deserted; The Two Catherines, 2 Mason, 335, F. C. 14,288, and The Massasoit, 1 Sprague, 98, F. C. 9.260, where seamen allowed salvage to amount of wages, when not entitled otherwise because of failure of freight. So, also, in The Wave v. Hyer, 2 Paine, 140, F. C. 17,300, holding seaman discharged by such circumstances from contract of mariner; The Triumph, 1 Sprague, 430, 431, F. C. 14,183, and The Umatilla, 12 Sawy. 178, 29 Fed. 259, under facts similar to principal case; The Acorn, 3 Ware, 98, F. C. 10,252, holding seamen entitled to salvage, although after desertion by most of crew, they left vessel, returning the following day; The Aguan, 48 Fed. Rep. 322, holding seamen entitled to salvage when vessel wrecked and voyage broken up. Cited generally on this point in The John Perkins, 13 Fed. Cas. 704.

Distinguished in Phillips v. McCall, 4 Wash. 147, F. C. 11,104, holding seamen on vessel taken as prize not entitled to salvage for retaking; The Olive Branch, 1 Low. 287, F. C. 10,490, holding seamen not discharged by desertion of master alone; The C. P. Minch, 73 Fed. Rep. 862, 38 U. S. App. 536, holding that abandonment by rest of crew must be final; The Nebraska, 75 Fed. Rep. 600, 24 U. S. App. 559, holding that detention of vessel in civil suit does not discharge master, and entitle him to salvage for saving vessel while in marshal's custody; The D. M. Hall v. The John Land, 7 Fed. Cas. 775, holding that transfer of crew of vessel in peril to another vessel, pursuant to agreement between masters, does not discharge crew

Salvage — jurisdiction.—Admiralty courts of United States may assume jurisdiction of case of salvage of one foreign vessel by officers and crew of another at instance of latter, p. 264.

Applied in The Belgenland, 114 U. S. 363, 29 L. 155, 5 S. Ct. 863, as to collisions between foreign vessels on high seas; The Adolph, 1 Curt. 89, F. C. 86, ordering marshal to pay salvage money into court at instance of French consul; The Jerusalem, 2 Gall. 199, F. C. 7,293, entertaining suit to enforce bottomry bond executed in foreign country between subjects of foreign country, vessel being in United States territory; The Tilton, 5 Mason, 471, F. C. 14,054, ordering sale of wrecked ship upon application of master; One Hundred and Ninety-four Shawls, Abb. Adm. 322, F. C. 10,521, holding, however, jurisdiction to be in discretion of court, and not compulsory; Fisher v. Rutherford, 1 Bald. 193, F. C. 4,823, sustaining jurisdiction where no objection made; in Barrell v. Benjamin, 15 Mass. 357, sustaining an action, on contract made in foreign country, against foreigner temporarily within jurisdiction of State courts; Cofrode v. Circuit Judge, 79 Mich. 340, 44 N. W. 625, holding consent sufficient to give jurisdiction over persons in action on contract. Cited also in note, 13 Am. Dec. 567, on general subject of jurisdiction of torts on high seas.

Distinguished in Piquignat v. Railway Co., 16 How. 106, 14 L. 864, where it did not affirmatively appear that defendant was an alien.

Miscellaneous citations.— Cited in The Waterloo, Blatchf. & H. 122, F. C. 17,257, on point not arising in principal case. So, also, in Gourdin v. West, 11 Rich. L. 296, as to right of owner of slave to salvage earned by latter. Also in Dabney v. Insurance Co., 14 Allen, 318, on point that underwriter is not discharged by deviation to assist vessel in distress. Erroneously cited in Scott v. Jones, 5 How. 374, 12 L. 196, and Luther v. Borden, 7 How. 57, 12 L. 605. See also Thatcher v. McCulloch, Olcott, 371, F. C. 13,862, citing note to principal case as to what constitutes deviation.

2 Cr. 272-279, 2 L. 276, OGDEN v. BLACKLEDGE.

Repealed statute is not affected by a subsequent statute declaring the repeal to have been inoperative, so far as cases prior to this last statute are concerned, p. 279.

The following citations approve and apply this principle: Maryland v. Todd, 1 Biss. 71, F. C. 9,220, holding right to sue barred under statute, not revived by subsequent statute; Tinker v. Van Dyke, 1 Flipp. 534, F. C. 14,058, construing bankrupt act; in Boyce v. Holmes, 2 Ala. 56, holding statute not to act retrospectively; in Dockery v. McDowell, 40 Ala. 481, 482, holding statute inoperative to impair vested right; Thorne v. San Francisco, 4 Cal. 136, holding statute not retrospective when not expressly declared so; Perkins v. Perkins, 7 Conn. 564, 566, 18 Am. Dec. 123, 126, as to statute providing for appeal in certain cases; in Forsyth v. Marbury, Charlt. (Ga.) 834, holding that statute of limitations, to be operative, must allow time in futuro to commence action. Cited in Wilder v. Lumpkin, 4 Ga. 219, holding act requiring security on appeal and injunction inapplicable to cases pending at time of passage; in Lewis v. Brackenridge, 1 Blackf. 222, 12 Am. Dec. 230, declaring retrospective statute unconstitutional and void; in McKinney v. Springer, 8 Blackf. 507, 46 Am. Dec. 496, as to statute reviving action barred by statute; White v. Brown, 8 Martin (N. S.), 20, as to statute regulating execution of notes; State v. Reed, 31 N. J. L. 135, distinguishing between ex post facto and retroactive laws, and holding that in latter retroactive intention must be expressed; Dash v. Van Kleeck, 7 Johns. 490, 498, 507, 5 Am. Dec. 299, 304, 312, where sheriff held liable for escape occurring before passage of act removing such liability; Nichols v. Poulson, 6 Ohio, 309, holding contract invalid when made, not revived by repeal of statute under which it was invalidated; Bedford v. Shilling, 4 Serg. & R. 403, 411, 8 Am. Dec. 719, where statute prohibiting certain suits held not to apply to suits already pending; Girdner v. Stephens, 1 Heisk. 285, 2 Am. Rep. 703, as to inability of legislature to divest right under statute of limitations; Vanderpool v. La Crosse, etc., R. R. Co., 44 Wis. 668, holding necessary expression of intention that statute shall act retrospectively. Cited generally in Fisher v. Cockerill, 5 T. B. Mon. 135, where authorities collected and discussed. Also in dissenting opinion, Cunningham v. Dixon, 1 Marvel (Del.), 170, 41 Atl. 522.

Distinguished in Goshen v. Stonington, 4 Conn. 223, 10 Am. Dec. 127, enforcing statute expressly declared to be retrospective. Denied in Smith v. Hickman, Cooke, 336. Distinguished in Ex parte Quarrier, 4 W. Va. 212, continuing an act requiring attorneys-at-law to take oath before being allowed to practice, and enforcing it as to attorney previously admitted.

Statutes.— Construction of, is not a function of the legislature, p. 277.

Cited and rule applied in Koshkonong v. Burton, 104 U. S. 678, 26 L. 890, holding court bound to disregard erroneous construction; United States v. Chong Sam, 47 Fed. Rep. 886, as to construction of terms in Chinese exclusion acts; In re Landsberg, 14 Fed. Cas. 1068, as to revenue acts; in Jones v. Wootten, 1 Harr. 81, holding legislature incompetent to declare what the law has been; State v. Dews, Charlt. (Ga.) 400, distinguishing between legislative and judicial power; Wilder v. Lumpkin, 4 Ga. 214, as to provisions in statute repealing statute requiring security on appeal; Rockhold v. Canton, etc., Society, 129 Ill. 461, 21 N. E. 797, holding legislative construction of act relating to powers of corporations not binding on courts; Merrill v. Sherburne, 1 N. H. 204, 8 Am. Dec. 56, holding act of legislature granting new trial unconstitutional; in People v. Supervisors of New York, 16 N. Y. 432, as to act declaratory of intention of legislature in prior act regulating taxation; in Respublica v. McClean, 4 Yeates, 406, as to act declaratory of judicial powers under State Constitution; and in Eakin v. Raub, 12 Serg. & R. 360, as to power of court to declare legislative acts unconstitutional.

Distinguished in Satterlee v. Matthewson, 2 Pet. 413, 7 L. 469, holding statute judicial in its nature not to be repugnant to Constitution.

Miscellaneous citations.— Cited in Brown v. Hiatt, 1 Dill. 386, F. C. 2,011, and Caldwell v. Southern Express Co., 1 Flipp. 90, F. C. 2,303, to the point that war suspends operation of statute of limitations [point not in issue in principal case]; also in Bender v. Crawford, 33 Tex. 751; S. C., 7 Am. Rep. 272, to the point that retrospective laws are obligatory unless forbidden by State Constitutions.

2 Cr. 280–336, 2 L. 279, McILVAINE v. COXE'S LESSEE.

(See 4 Cr. 209, 2 L. 598.)

Sovereignty.— The several States of the Union became entitled on July 4, 1776, to the rights and powers of sovereign States, so far as respects their internal regulations.

Cited in United States v. New Bedford Bridge, 1 Wood. & M. 431, F. C. 15,867, in discussing the subject of the powers of the Federal government.

Citizenship.—Where the State of New Jersey, by act of 1776, asserted the right to allegiance of all persons born, and at that time residing within the State, the act of such a person in afterwards leaving and adhering to the crown did not render him an alien.

Rule applied in Jones v. McMasters, 20 How. 20, 15 L. 810, holding burden of proof on party asserting change of allegiance; Brooks v.

Clay, 3 A. K. Marsh. 550; S. C., 1 Litt. (Ky.) 266, holding expatriation not to deprive owner of property previously acquired; Lessee of Jackson v. Burns, 3 Binn. 86, holding British subject, resident in Pennsylvania before declaration of independence, incapable of taking land by descent.

Distinguished in Hebron v. Colchester, 5 Day, 173, where British subject coming to this country prior to 1775 was held to have become legally settled by purchase of lands after treaty of peace.

Miscellaneous citations.— Cited in following cases, but not in point: Andrews v. Fenter, 1 Ark. 197; Biggers v. Pace, 5 Ga. 176; State v. Laughlin, 10 Mo. App. 2.

2 Cr. 336-342, 2 L. 297, ADAMS v. WOODS.

Statute of limitations.— A qui tam action founded on an act prohibiting slave trade is barred by lapse of time, under an act limiting prosecution under penal statutes, p. 342.

Rule applied in Huntington v. Attrill, 146 U. S. 673, 36 L. 1130, 13 S. Ct. 230, as to penalty for falsifying certificate of amount of capital stock; Campbell v. Haverhill, 155 U. S. 616, 39 L. 282, 15 S. Ct. 220, as to actions for infringement of letters-patent; United States v. Mayo, 1 Gall. 397, F. C. 15,755, as to forfeiture under embargo act; in Johnson v. United States, 3 McLean, 89, F. C. 7,418, holding statute limiting prosecutions to apply to offenses under subsequent statutes; so also in United States v. Ballard, 3 McLean, 470, F. C. 14,507; United States v. Dustin, 25 Fed. Cas. 946, and United States v. Platt, 27 Fed. Cas. 549, under similar acts. Cited in United States v. Shorey, 27 Fed. Cas. 1072, as to prosecution under indictment for violation of revenue laws; Johnson v. Hughes, 1 Stew. 265, as to penalty for failure to keep cotton gin inclosed; Western Union Telegraph Co. v. Nunnally, 86 Ga. 505, 12 S. E. 579, as to penalty for failure of telegraph company to deliver dispatch; Davidson v. Mo. Pac. Ry., 3 Tex. App. Civ. 217, as to penalty for overcharge on freight.

Distinguished in United States v. Tithing Yard, 9 Utah, 277, 34 Pac. 56, under facts.

Penalty or forfeiture.— Action of debt lies for recovery of, p. 342.

Cited and applied in Ex parte Marquand, 2 Gall. 554, F. C. 9,100, as to fine for impeding customs officers; United States v. Elliott, 25 Fed. Cas. 1266, holding further that declaration must state precise sum demanded; State v. Desporges, 5 Rob. (La.) 259, as to suit on recognizance; State v. Williams, 7 Rob. (La.) 267, where indictment held not to lie, if statute provides penalty; Scarborough v. Judges, 43 La. Ann. 1167, 10 So. 255, holding procedure civil and not criminal in nature within sense of articles of the Constitution relative to appellate jurisdiction; State v. Baker, 47 Miss. 95, holding debt to be the only appropriate remedy; also in Morrison v. Bedell,

for penalty for cutting of trees
; and in Davidson v. Mo.
debt to be proper remedy
Cited approvingly in the
subject: United States v.
States v. Gates, 25 Fed. Cas.
Cas. 397.
, 2 Low. 268, F. C. 14,665.
by imprisonment not to be
ions for penalties; also in
, 7 Rob. (La.) 274 (see S. C.,

expressions in a statute will
within their scope, unless
be used in a particular sense,

v. Debs, 64 Fed. Rep. 749, con-
in restraint of trade; dis-
Ill. 181, as to construction of
, 5 Ind. 58, holding that to
must be clearly repugnant.

v. HACKLEY.

— A creditor upon an open ac-
with assent of the debtor, may
against the debtor for the use of

Blatchf. 361, F. C. 13,655, holding
cannot sue in his own name;
, 20 Blatchf. 496; S. C., 11 Fed.
policy assignable only to extent
v. Summers, 14 N. J. L. 512, where
was not allowed to release action

Hardin (Ky.), 563, holding that
name for use of assignee if instru-
v. Balnbridge, 4 N. J. L. 356, denying
, where bonds made assignable

— In action by the assignor, the
against the assignee, p. 344.
v. Hamilton, 4 Wash. 94, F. C. 2,359,
v. Johnson, 5 Wend. 356, as to nego-
overdue; Patts v. St. Clair, 11 Gratt.

24, rendering judgment for costs against real plaintiff when suit abandoned; Wartman v. Yost, 22 Gratt. 606, allowing judgment assigned to defendant to be set off in action on bond.

Set-off.— Claim for unliquidated damages cannot be subject of, p. 344.

Cited and principle applied in Hutchinson v. Coombs, 1 Ware, 69, F. C. 6,955, as to claim for damages for tortious discharge of seaman; Smith v. Washington Gas Light Co., 31 Md. 18, 100 Am. Dec. 51, as to claim arising from breach of contract; Jackson v. Bell, 31 N. J. Eq. 557, as to trespass; Murray v. Toland, 3 Johns. Ch. 576, as to negligence; and in Heck v. Scheuer, 4 Serg. & R. 260, 8 Am. Dec. 710, holding evidence of embezzlement not admissible as set-off in action to recover for services.

2 Cr. 344–357, 2 L. 300, REILY v. LAMAR.

Appeal.— Citation is not necessary if appeal be taken during the same term at which the final decree is made, p. 355.

Rule applied in The San Pedro, 2 Wh. 142, 4 L. 205, as to appeal in admiralty. Approved in Hudgins v. Kemp, 18 How. 537, 15 L. 514, but holding citation necessary when appeal allowed by judge in vacation; also in Hewitt v. Filbert, 116 U. S. 144, 29 L. 582, 6 S. Ct. 320, but holding citation necessary when appeal allowed at subsequent term.

Miscellaneous citations.— Cited in Ex parte Hull, 12 Fed. Cas. 856; also in Merril v. Sherburne, 1 N. H. 204, but not in point.

2 Cr. 358–405, 2 L. 304, UNITED STATES v. FISHER.

Construction of statutes.— In construing a statute, every part is to be considered, including the titles, p. 386.

United States v. Fisher is a leading case on this point, as is evident from the number of the citations. They show that the rule has been very extensively affirmed and variously applied; Smythe v. Fiske, 23 Wall. 380, 23 L. 49, construing revenue laws; Doggett v. Railroad Co., 99 U. S. 78, 25 L. 303, as to statute providing for taxation of bonds; Lake County v. Rollins, 130 U. S. 671, 32 L. 1063, 9 S. Ct. 652, construing constitutional limitation on counties as to indebtedness; Church of the Holy Trinity v. United States, 143 U. S. 462, 36 L. 229, 12 S. Ct. 513, as to act relating to immigration under contract to perform labor; Coosaw Mining Co. v. South Carolina, 144 U. S. 563, 36 L. 542, 12 S. Ct. 692, construing strictly legislative grant of property; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 38, 39 L. 611, 15 S. Ct. 517, as to patent laws; United States v. Oregon, etc., R. R., 164 U. S. 541, 41 L. 545, 17 S. Ct. 170, holding, however, that title cannot be considered, unless act otherwise ambiguous; Price v. Forrest, 173 U. S. 427, holding preamble may be

considered; Ogden v. Strong, 2 Paine, 588, F. C. 10,460, where rule is applied to private statutes; Copeland v. Memphis, etc., R. R. Co., 3 Woods, 661, F. C. 3,209, as to preamble of act of incorporation; in Hahn v. Salmon, 10 Sawy. 196; S. C., 20 Fed. Rep. 809, but holding preamble to be considered only in case of ambiguity; Wilson v. Spaulding, 19 Fed. Rep. 305, as to title of tariff statute; in United States v. Union Pac. Ry. Co., 37 Fed. Rep. 553, as to title of act granting land to railroad company; United States v. Chong Sam, 47 Fed. Rep. 884, in construing Chinese exclusion act; Berlin Bridge Co. v. San Antonio, 62 Fed. Rep. 889, as to constitutional limitation on contraction of debts by city; Oregon, etc., Ry. Co. v. United States, 67 Fed. Rep. 655, 29 U. S. App. 497, as to railroad land grant; Knox Co. v. Morton, 68 Fed. Rep. 789, 32 U. S. App. 513, as to statute limiting time for presentment of county warrants; Shreve v. Cheesman, 69 Fed. Rep. 789, 32 U. S. App. 676, as to statute providing for recovery of costs; St. Paul, etc., Ry. Co. v. Sage, 71 Fed. Rep. 47, 36 U. S. App. 340, as to railroad land grants. Approved, Barber, etc., Co. v. City of Denver, 72 Fed. Rep. 345, 36 U. S. App. 499, construing city charter; Pearsall v. Great Northern Ry. Co., 73 Fed. Rep. 942, as to statutes amending corporate charter; in In re Wong Fock, 81 Fed. Rep. 561, determining jurisdiction under Chinese exclusion act; In re Chadwick, 5 Fed. Cas. 400, construing bankruptcy act; Ludington v. The Nucleus, 15 Fed. Cas. 1095, as to act extending jurisdiction of admiralty to lakes and rivers; Prentiss v. Ellsworth, 19 Fed. Cas. 1282, construing patent laws; in Bartlett v. Morris, 9 Port. 268, 270, as to private statute, holding title to govern only when act ambiguous; Wiswell v. Monroe, 4 Ala. 17, construing statute as to duty of register to certify facts to court; Enslava's Heirs v. Bolling, 22 Ala. 736, as to private act for relief of heirs of decedent; Broadbent v. Tuskaloosa Scientific, etc., Association, 45 Ala. 171, as to corporate charter, where State Constitution requires title to clearly express intention of legislature; Ex parte Ellis, 11 Cal. 225, holding statute in derogation of common law to be construed strictly; Tape v. Hurley, 66 Cal. 474, 6 Pac. 130, construing statute opening schools to white children, to include Chinese under amendment making no mention of race; Metcalf v. Gillet, 5 Conn. 403, as to act regulating method of appraisement of property taken under execution; dissenting opinion in Booth v. Booth, 7 Conn. 368, as to statute regulating levy of executions; Farrell Foundry v. Dart, 26 Conn. 381, holding statute not to be extended beyond clearly expressed intention of legislature; White v. Camp, 1 Fla. 109, holding statute in derogation of common law to be strictly construed; State v. Commissioners of Jefferson Co., 20 Fla. 432, as to act regulating sale of intoxicating liquors; Eastman v. McAlpin, 1 Ga. 171, but holding title not to be part of statute; Akin v. Freeman, 49 Ga. 54, as to statute amending prior statute of limitations, holding prior statute should be considered; dissenting

opinions in People v. Wren, 4 Scam. 277, 282, when construing an act creating a county which included part of another county, majority held act to create county absolutely, without regard to option of inhabitants to organize or not; Perry County v. Jefferson County, 94 Ill. 220, giving effect to title in construing act establishing boundary between counties; Ohio & Miss. Ry. Co. v. People, 123 Ill. 485, 14 N. E. 881, as to constitutional provision regarding corporations; Spencer v. State, 5 Ind. 58, holding clearly repugnant language necessary to effect repeal of statute, and giving effect to title of act; Simington v. State, 5 Ind. 484, as to construction of acts defining jurisdiction of courts; Dodd v. State, 18 Ind. 62, as to amendatory act; Dufour v. Dufour, 28 Ind. 425, construing term "final settlement" in statute regulating administration; Garrigus v. Commissioners of Parke Co., 39 Ind. 71, holding title to be considered when act otherwise ambiguous; Cory v. Carter, 48 Ind. 337, 17 Am. Rep. 745, as to provisions of State Constitution; Stout v. Commissioners of Grant County, 107 Ind. 347, 8 N. E. 224, holding intention of legislature must be regarded; United States Saving, etc., Co. v. Harris, 142 Ind. 231, 40 N. E. 1073, holding term "conveyance of real estate" to include mortgage; dissenting opinion in Jones v. Iowa, 1 Iowa, 403, as to proviso in repealing act; Doane v. Farrow, 9 Mart. (La.) (O. S.) 254, as to statute requiring notice in certain actions; Borie v. Borie, 5 La. 92; as to statute regulating control of property of feme covert; State v. Cazeau, 8 La. Ann. 116, holding title not to govern clear expressions of act; in Harlow v. Young, 37 Me. 91, but holding title and preamble not parts of act; Frazier v. Warfield, 13 Md. 301, 304, as to act providing for inspection of grain; Miller v. Cumberland Cotton Factory, 26 Md. 492, as to act creating liens; also in Smith v. Thursby, 28 Md. 260, construing State Constitution; Leonard v. Wiseman, 31 Md. 205, as to act providing for payment of bounty to enlisted men; Maxwell v. State, 40 Md. 292, as to act providing for assessment of taxes.

Cited also approvingly and followed in Commonwealth v. Casey, 12 Allen, 221, construing statute providing penalty for violation of revenue laws; Bronson v. Newberry, 2 Doug. (Mich.) 43, as to "nonimprisonment act;" Wales v. Lyons, 2 Mich. 285, as to statute abolishing special pleadings; People v. Plumsted, 2 Mich. 468, as to act exempting homesteads from forced sale; Taylor v. Taylor, 10 Minn. 120, construing strictly statute in derogation of common law; Minor v. State, 36 Miss. 636, as to statute providing for appeals in criminal cases; Learned v. Corley, 43 Miss. 695, as to statute regulating procedure in ejectment; State v. Williams, 35 Mo. App. 547, construing "Sunday laws;" Boyd v. Ward Furniture, etc., Co., 38 Mo. App. 217, construing, liberally, statute regulating executions on personal property; State v. Macklin, 41 Mo. App. 342, as to statute prescribing qualifications of school directors; Westport v. Mastin, 62 Mo. App. 658, construing section of city charter providing for tax

levy; Smith v. Williams, 2 Mont. 200, as to act to prevent trespassing of cattle; Davis v. Clark, 2 Mont. 396, as to ejectment under statute; Smiley v. Sampson, 1 Neb. 90, restraining general words when particular intent not apparent; Shellenberger v. Ransom, 41 Neb. 643 59 N. W. 939, as to statute regulating descent; Brown v. Davis, 1 Nev. 414, as to statute defining duties of public officers; Bow v. Nottingham, 1 N. H. 264, as to statute providing for settlement of illegitimate children; Kidder v. Stewartstown, 48 N. H. 292, holding title of statute to be considered. Cited in Hale v. Everett, 53 N. H. 82, 16 Am. Rep. 127, construing clause of State Constitution holding, where intention is clear, there is no room for construction; but see also dissenting opinion, pp. 165, 225, the minority holding that consequences should be considered, and if the language results in an exception to a general rule, the intention must be clearly and irresistibly so expressed; Ogden v. Price, 9 N. J. L. 170, but holding statute must be ambiguous in order to apply rules of construction; Brown v. Wright, 13 N. J. L. 242, construing insolvency act; State v. Clark, 29 N. J. L. 99, as to act constituting willful destruction of property an indictable offense; Rudderow v. State, 31 N. J. L. 515, as to act regulating assessment of stock; Evernham v. Hulit, 45 N. J. L. 55, but holding title incompetent to supply defects or omissions in body of statute; Wallace v. Wallace, 3 N. J. Eq. 623, construing statute regulating probate of wills; Morris Canal, etc., Co. v. Central R. R. Co., 16 N. J. Eq. 428, as to title of act of incorporation; Tafoya v. Garcia, 1 N. Mex. 483, as to title of act "relative to revision of statutes;" Buel v. Southwick, 2 N. Mex. 384, dissenting opinion to effect that where terms are plain there is no room for construction; Jackson v. Van Zandt, 12 Johns. 175, construing statute abolishing entails; People v. Roper, 35 N. Y. 635, as to statute exempting class from taxation; People v. Molyneux, 40 N. Y. 122, considering title in act relative to national guard; People v. Potter, 47 N. Y. 382, applying principle to construction of State Constitution; Ayers v. Lawrence, 59 N. Y. 197, as to act for protection of taxpayers against frauds of public officers; People v. Wood, 71 N. Y. 374, as to act providing for settlement of floating debt of city; Van Voorhis v. Brintnall, 86 N. Y. 37, 40 Am. Rep. 519, as to statute relating to validity of marriage contracts; Cogswell v. N. Y., etc., R. R. Co., 103 N. Y. 22, 8 N. E. 542, construing section of corporate charter granting certain powers; also in Hill v. Mayor of New York, 139 N. Y. 502, 34 N. E. Rep. 1092, on same point Morton v. Mayor of New York, 140 N. Y. 213, 35 N. E. 491, and Simonton v. Lanier, 71 N. C. 502, construing corporate charter; Freight Discrimination Cases, 95 N. C. 447, holding title of act competent to indicate intention; State v. Pugh, 43 Ohio St. 113, 1 N. E. 448, as to title of act to reorganize certain cities; State v. Robinson, 32 Or. 46, 48 Pac. 358, holding title is to be considered in construing penal statute; Deddrick v. Wood, 15 Pa. St. 12, construing act pro-

hibiting obstruction of river. Cited in State v. Holman, 3 McCord (S. C.), 307, as to act relating to fraudulent packing of cotton; State v. Williams, 2 Strob. L. 477, as to penal statute; and in Asdell v. Sutherland, Peck (Tenn.), 129, holding further that prior statutes on same subject should be considered; Trott v. McGavock, 1 Yerg. 479, construing statute relating to officer's duties in levying executions; Fisher v. Dabbs, 6 Yerg. 149, construing statute providing for manumission of slaves; State v. Delesdenier, 7 Tex. 104, 106, as to statute exempting certain public lands from taxation; dissenting opinion, Texas B. & I. Co. v. Cohen, 47 Tex. 413, and principle applied to construction of provision in policy of insurance; Cline v. State, 36 Tex. Cr. Rep. 351, 61 Am. St. Rep. 870, 36 S. W. 1108, construing section of Constitution regarding right to "speedy public trial;" United States v. Snow, 4 Utah, 320, 9 Pac. 702, construing terms of "Edmunds act;" Pratt v. Swan, 16 Utah. 491, 52 Pac. 1094, construing statute relative to powers of municipal officers; State v. Shattuck, 69 Vt. 409, 60 Am. St. Rep. 939, 38 Atl. 82, as to statute forbidding guilty party to decree of divorce to remarry; Crafford v. Supervisors of Warwick Co., 87 Va. 115. 12 S. E. 148; holding word "persons," inclusive of "corporations;" Buffham v. Racine, 26 Wis. 453, in dissenting opinion to the point that where language is plain, rules of construction not to be applied. See note, 56 Am. Rep. 9, on general subject of construction; as also note, 44 Am. St. Rep. 232.

The principal case has also been cited in the following cases, discussing general subject; In re Smith, 22 Fed. Cas. 402; Opinion of Justices, 46 Me. 586; Jim v. State, 3 Mo. 167, 170; Wear v. Bryant, 5 Mo. 172; dissenting opinion, Seldon v. Hall, 21 Mo. App. 466; dissenting opinion, Rich v. Flanders, 39 N. H. 370; State v. Whitaker, 85 N. C. 569; Weatherhead v. Bledsoe, 2 Overt. 379.

Insolvency — Preference of United States.— Act is not confined to persons accountable for public money, but extends to debtors of the United States generally, p. 395.

The principal case has also been largely cited on this point and its doctrine applied: Lewis v. United States, 92 U. S. 621, 23 L. 514, as to money advanced for disbursement; United States v. Hoar, 2 Mason, 316, F. C. 15,373, holding statute of limitations does not extend to debts due United States; United States v. Cook County Bank, 9 Biss. 58, F. C. 14,853, as to postal and money order funds deposited in bank; United States v. Wilkinson, 5 Dill. 277, F. C. 16,695, holding priority of United States secured only when by act of law or the debtor property is being administered for benefit of creditors generally. See also note, Ib. 279. Applied in United States v. Eggleston, 4 Sawy. 204, F. C. 15,027, but holding that priority does not create lien; to same effect also in United States v. Griswold, 7 Sawy. 303; S. C., 8 Fed. Rep. 501; Anderson v. State, 23 Miss. 475,

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Miscellaneous citations.— Cited to the effect that a mortgage is a conveyance and passes property conditionally to mortgagee; in Porter v. Greene, 4 Iowa, 574; Babcock v. Hoey, 11 Iowa, 377; United States v. Hawkins, 4 Mart. (La.) (N. S.) 330; Pickett v. Buckner, 45 Miss, 244; Bank of Muskingum v. Carpenter's Admrs., 7 Ohio, pt. 1, 70, 28 Am. Dec. 620, Holmes v. Gardner, 50 Ohio St. 176, 33 N. E. 646; Jordan v. Peak, 38 Tex. 442, a point not decided by the case. Also in the following cases on the point that construction is not to be retrospective; Boyce v. Holmes, 2 Ala. 56; Thorne v. San Francisco, 4 Cal. 136; in Mussey v. Noyes, 26 Vt. 474, as to distinction between general and partial assignment.

2 Cr. 406, 2 L. 320, UNITED STATES v. SCHOONER SALLY.

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2 Cr. 407–418, 2 L. 320, TELFAIR v. STEAD'S EXECUTORS.

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2 Cr. 419–444, 2 L. 324, GRAVES v. BOSTON MARINE INS. CO.

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Rule applied in Hipp v. Babin, 19 How. 278, 15 L. 635, where bill brought in equity to recover real estate based on purely legal title; Parker v. Winnipiseogee, etc., Co., 2 Black, 551, 17 L. 337, as to action for injury to water power when no allegation of irreparable injury; Insurance Co. v. Bailey, 13 Wall. 621, 20 L. 503, refusing to order cancellation of policy on ground that representations were fraudulent, where these representations can be used in suit at law upon the policy; Baker v. Biddle, 1 Bald. 407, 416, 420, F. C. 764, holding bill for account not to lie where account has been rendered and received; Berry v. Ginaca, 6 Sawy. 395, 5 Fed. Rep. 481, where complainant failed to establish right to vendor's lien; Dugan v. Cureton, 1 Ark. 42, 31 Am. Dec. 733, 734, holding mere failure to perform contract not ground for equitable relief against payment.

Distinguished in Oelrichs v. Spain, 15 Wall. 228, 21 L. 44, holding that although action at law may be maintained on injunction bond, equity must still settle rights of obligees; Pierpont v. Fowle, 2 Wood. & M. 29, F. C. 11,152, as to violation of copyright, equitable action being more effective.

2 Cr. 445–453, 2 L. 332, HEPBURN v. ELLZEY.

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The citations reveal a large number of cases which have affirmed this ruling and applied it: New Orleans v. Winter, 1 Wh. 94, 4 L. 45, holding a territory not a State for purpose of suing in United States courts; Scott v. Jones, 5 How. 377, 12 L. 197, holding that Supreme Court of United States has not jurisdiction to try the question as to whether a political body passing a law was a State; Barney v. Baltimore City, 6 Wall. 287, 18 L. 827, under facts similar to principal case; dissenting opinion in Texas v. White, 7 Wall. 737, 19 L. 241, majority holding citizens of Texas during reconstruction period to be citizens of "a State;" Railroad Co. v. Harris, 12 Wall. 86, 20 L. 359, holding railroad company extending into the District of Columbia amenable to courts of the District for injuries to a citizen of Washington; Metropolitan R. R. v. District of Columbia, 132 U. S. 9, 33 L. 234, 10 S. Ct. 22, but holding the District to be a municipal corporation capable of suing and being sued; Hooe v. Jamieson, 166 U. S. 397, 398, 41 L. 1050, 17 S. Ct. 597, holding citizen of District cannot sue, although joined with competent person as coplaintiff; Picquet v. Swan, 5 Mason, 55, F. C. 11,134, as to action by alien against citizen of District; also in Prentiss v. Brennan, 2 Blatchf. 164, F. C. 11,385, and in Cissel v. McDonald, 16

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Rule limited in Geofroy v. Riggs, 133 U. S. 269, 33 L. 645, 10 S. Ct. 297, holding the District of Columbia to be one of the "States of the Union," within meaning of treaty regulating taking of land by descent; Talbott v. Silver Bow Mining Co., 139 U. S. 444, 35 L. 212, 11 S. Ct. 596, holding act of congress providing that States may tax national banks extends to territories; The Ullock; 9 Sawy. 642, 19 Fed. Rep. 212; The Panama, Deady, 33, F. C. 10,702, and In re Bryant, Deady, 121, F. C. 2,067, holding term "State" includes territory under act of congress regulating navigation; Neil v. Wilson, 14 Or. 415, 12 Pac. 812, holding power of territory to regulate pilotage co-ordinate with that of State.

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1. In a bill in equity by executors it is not cause of demurrer that they have not set forth their letters testamentary. *Telfair v. Stead,* 408
2. It is no cause of demurrer to a bill in equity against an executor seeking a discovery of assets, that the complainant had a right of action at law.
Telfair v. Stead, 409

DEPRECIATION.

On a deed made in 1799, of land in Virginia, rendering an annual rent of 26*l.* current money for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land at the date of the contract, in specie, or other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller,* 10

DEVIATION.

A detention at sea to save a vessel in distress, is such a deviation as discharges the underwriters, and the owner stands his own insurer.
Mason v. Blaireau, 268, 269

DOMICILE.

See Aliens, 1.

DUTIES.

Sugar refined, but not sold and sent out of the manufactory before the first of July, 1802, was not liable to any duty, upon being sent out after that day. *Pennington v. Coxe,* 33

EMIGRATION.

Distinguished from Expatriation.
M'Ilvaine v. Coxe's Lessee, 302

EQUITY.

1. *Quære,* whether a person who has neglected at law to plead his discharge under an insolvent act, can avail himself of it in equity.
Reily v. Lamar et al., 244

2. In a bill in equity it is not necessary for executors to set forth their letters testamentary.
Telfair v. Stead, 408
3. That property of the debtor has come to the hands of the defendant, is a ground of equity.
Id. *Ib.*
4. It is not a good plea in bar to a bill in equity, for a discovery of assets, that a judgment at law has been recovered against the executor of the debtor. *Id.* *Ib.*
5. It is no cause of demurrer to a bill in equity against an executor seeking a discovery of assets, that the complainant has a right of action at law.
Id. 409
6. A creditor may in equity follow the assets of his debtor into the hands of his devisees, legatees, and distributees. *Id.* 410
7. The evidence of the knowledge of the underwriters of the intention of the insured at the time of making the policy, ought to be very clear to justify a court of equity, in conforming the policy to that intention.
Graves et al. v. Boston Marine Insurance Company, 419

ERROR.

1. A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Capron v. Van Noorden,* 126
2. A party may take advantage of an error in his favor, if it be an error of the court. *Id.* *Ib.*
3. The citation must accompany the writ of error, or it will be dismissed. *Bailiff v. Tipping,* 406
4. It is no error that the decree is for pounds, shillings and pence sterling.
Telfair v. Stead, 414
5. It is no error that the decree does not apportion the amount among those defendants who have assets, unless it appears that the whole assets in the hands of all the defendants are more than sufficient to pay the plaintiff's debt. *Id.* *Ib.*

EVIDENCE.

1. To induce a presumption of payment from the age of a bond, 20 years must have elapsed exclusive of the period of the plaintiff's disability.
Dunlop & Co. v. Ball, 180
2. Foreign laws must be proved as facts. They must be verified by oath, or by some other high authority which the law respects not less than an oath. *Church v. Hubbart,* 187, 236
3. The certificate of a consul of the United States under his seal is not evidence of a foreign law.
Id. *Ib.*
4. The proceedings of a Portuguese court, under the seal of a person who states himself to be Secretary of Foreign Affairs in Portugal, is not evidence. *Id.* *Ib.*
5. If the decrees of the courts in the Portuguese colonies are transmitted to the seat of the Portuguese government, and registered in the department of state of that government, a certificate of that fact under the great seal of Portugal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence.
Id. *Ib.*

EXECUTORS.

It is not necessary in a bill in equity by executors, that they should set forth their letters testamentary. *Telfair v. Stead,* 408

EXPATRIATION.

1. An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicile, and by making himself the subject of a foreign power, he places himself out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance.
Murray v. Charming Betsy, 64
2. *Quære,* whether a citizen of the United States can devest himself of that character otherwise than in such manner as may be prescribed by law.
Id. *Ib.*
M'Ilvaine v. Coxe's Lessee, 280
3. Whether by becoming the subject of a foreign power, he is rescued from punishment for a crime against the United States? *Id.* *Ib.*
4. Whether by expatriation he becomes an alien, so that he cannot take and hold lands by descent from a citizen of the United States.
M'Ilvaine v. Coxe's Lessee, 280

FACTOR.

The defendant cannot offset bad debts made by the misconduct of the plaintiff, in selling the defendant's goods as factor; the plaintiff not having guaranteed those debts; but such misconduct is properly to be inquired into in a suit for that purpose. *Winchester v. Hackley,* 342

FOREIGN LAWS.

1. Foreign laws must be proved as facts.
Church v. Hubbart, 187, 236
2. The certificate of a consul of the United States under his seal, is not evidence of foreign laws.
Id. *Ib.*

FORTHCOMING BOND.

See Bond, Forthcoming.

GEORGIA.

Lands of a deceased debtor in Georgia are liable in equity for his debts, without making the heir a party. *Telfair v. Stead,* 407

ILLICIT TRADE.

The right of a nation to seize vessels attempting an illicit trade is not confined to their harbors, or to the range of their batteries.
Church v. Hubbart, 187

INSOLVENCY.

1. By the insolvent law of Maryland of 3d January, 1800, the Chancellor of Maryland could not discharge an insolvent citizen of Maryland named in that law, and who resided in the District of Columbia at the time of its separation from Maryland, unless the insolvent had complied with all the requisites of the insolvent law, so as to entitle himself to a discharge before the separation.
Reily v. Lamar et al., 344
2. *Quære,* whether an insolvent who has neglected at law to plead his discharge, can avail himself of it in equity? *Id.* *Ib.*
3. A certificate of discharge under the insolvent act of Maryland of 3d January, 1800, relates back to the date of the deed of trust, and the applicant must show himself to be a citizen of Maryland on that day. *Id.* 349
4. In all cases of insolvency of their debtor, the United States are entitled to priority of payment out of his effects.
United States v. Fisher, et al., 358

INSTRUCTIONS.

The instructions of the President of the United States to a commanding officer of a United States ship of war, if not warranted by law, will not justify the officer. *Little v. Barreme,* 170

INSURANCE.

1. If the insured make a proposition to the underwriters to cancel a policy, which they reject, and afterwards assent to; but before information of such assent reaches the insured, they hear of the loss of their vessel, such proposition and assent do not in law amount to an agreement to cancel the policy.
Head et al. v. Providence Insurance Company, 127
2. If it be inserted in a policy that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned by the Portuguese for an attempt to trade illicitly, the underwriters are not liable for the loss. *Church v. Hubbart,* 187
3. An exclusion of the risk of seizure for illicit trade, means, of a lawful seizure.
Church v. Hubbart, 236
4. A detention at sea to save a vessel in distress is such a deviation as discharges the underwriters. *Mason v. Blaireau,* 268, 269
5. A policy in the name of one joint owner "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner.
Graves et al. v. Boston Marine Insurance Company, 419

6. The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual.
Graves et al. v. Boston Marine Insurance Company, 419
7. The evidence of the knowledge the underwriters had of the intention of the insured at the time of making the policy, ought to be very clear to justify a court of equity in conforming the policy to that intention. *Id.* *Ib.*

JOINT OWNER.
See Insurance, 5, 6. Partners, 1, 2.

JURISDICTION.
1. The courts of the United States have no jurisdiction between citizens of the United States unless the record expressly states them to be citizens of different states.
Wood v. Wagnon, 9
Capron v. Van Noorden, 126
2. A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Capron v. Van Noorden,* 126
3. The courts of admiralty of the United States have jurisdiction in cases of salvage where all the parties are aliens, if the jurisdiction is not objected to. *Mason v. Blaireau,* 240
4. *Quære,* whether the common law courts of the United States have jurisdiction where all the parties are aliens? *Bailiff v. Tipping,* 406
5. The question of forfeiture of a vessel under the act of Congress against the slave trade, is a question of admiralty and maritime jurisdiction.
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6. A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia in the circuit court of the United States for the Virginia district. *Hepburn v. Ellzey,* 445

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LEGISLATIVE POWER.
The legislature cannot declare what the law was, or is, but what it shall be.
Ogden v. Blackledge, 272

LIMITATIONS.
1. The 9th section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claims within 7 years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary.
Ogden v. Blackledge, 272
2. The act of limitations of North Carolina was suspended as to British creditors during the war.
Id. *Ib.*
3. The act of Congress of 30th April, 1790, limiting the prosecutions upon penal statutes, extends as well to penalties created after, as before that act, and to actions of debt for penalties as well as to informations and indictments.
Adams, q. t., v. Woods, 336

MARINER.
1. If a vessel in distress is abandoned at sea by the master and all the crew, except one man, who is left either by design or accident, he is discharged from his contract as mariner of that vessel, and entitled to salvage.
Mason v. Blaireau, 240
2. If a mariner embezzles a part of the goods saved, he forfeits his salvage. *Id.* *Ib.*

MARYLAND.
See Insolvent, 1, 2.

MONEY.
1. It is no error that a decree is for pounds, shillings and pence sterling.
Telfair v. Stead, 414
2. On a deed made in 1779, of land in Virginia, rendering an annual rent of 26l. current money for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land at the date of the contract, in specie, or other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller,* 10

NAVY OF UNITED STATES.
1. If there was no reasonable ground of suspicion that the vessel was trading contrary to law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.
Murray v. Charming Betsy, 64
2. *Quære,* what degree of arming constitutes an armed vessel? *Id.* *Ib.*
3. A commanding officer of a ship of war of the United States is not justified by the instructions of the President of the United States, if those instructions are not warranted by law; but is answerable in damages to any person injured by his execution of those instructions.
Little v. Barreme, 170

NEW JERSEY.
Quære, whether a person born in the colony of New Jersey before the revolution, and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he has ever since resided, and who has always claimed to be a British subject, can now take and hold lands in the state of New Jersey by descent from a citizen of the United States? Whether by the act of the state of New Jersey, of October 4, 1776, he became a member of the new government against his will? Whether he could expatriate himself after the peace? And, if expatriated, whether he became thereby completely an alien to all intents and purposes?
M'Ilvaine v. Coxe's Lessee, 280

NON-INTERCOURSE.
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NORTH CAROLINA.
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PARTNERS.
1. A policy in the name of one joint owner, "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner.
Graves et al. v. Boston Marine Insurance Company, 419
2. The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual. *Id.* *Ib.*

PAYMENT.
See Evidence, 1.
The principle upon which the presumption of payment arises from the lapse of time is a reasonable principle, and the presumption may be rebutted by any facts which destroy the reason of the rule. *Dunlop & Co. v. Ball,* 180

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PLEADINGS.
1. It is not a good plea in bar to a bill in equity that the complainant has recovered a judgment at law against the executor of the debtor.
Telfair v. Stead, 408
2. It is no cause of demurrer to a bill in equity against an executor, seeking a discovery of assets, that the complainant had a right of action at law.
Id. 409

POLICY.
See Insurance, 1, 2, 3, 5, 7.

PRACTICE.

1. In Virginia a forthcoming bond which misrecites the amount of costs on the execution, is not thereby vitiated, if the aggregate of debt and costs be truly stated; but will support a judgment on motion. *Williams et al. v. Lyles,* 9

2. The court will require a statement of the points of a case before argument.
Faw v. Marsteller, 10
Reily v. Lamar et al., 349

3. If a question upon which the judges below differ in opinion be certified to this court, and be here decided, the parties are not precluded from a writ of error where the whole cause is before the court. *Oyle v. Lee,* 33

4. Upon a case certified, this court can only consider the point upon which the judges below differed. *Id.* *Ib.*

5. The report of the assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum without explanation.
Murray v. Charming Betsy, 64

6. If an appeal is prayed in the court below at the same term in which the decree is rendered, a citation is not necessary.
Reily v. Lamar, 349

7. A citation must accompany the writ of error, or it will be dismissed.
Bailiff v. Tipping, 406

8. In a bill in equity by executors it is not necessary to set forth their letters testamentary.
Telfair v. Stead, 408

PRESIDENT OF UNITED STATES.

The instructions of the President of the United States, if not warranted by law, will not justify the commander of a ship of war of the United States in executing them.
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In all cases of insolvency or bankruptcy of their debtor, the United States are entitled to priority of payment out of his effects.
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1. If a suit be brought by the assignor of an open account in his own name for the use of the assignee, the defendant may offset his claims against the assignee. *Winchester v. Hackley,* 342

2. The defendant cannot offset bad debts made by the misconduct of the plaintiff in selling the defendant's goods as factor. *Id.* *Ib.*

SLAVE TRADE.

1. Prosecutions under the act of Congress against the slave trade must be commenced within two years after the offense committed.
Adams, q. t., v. Woods, 336

2. The question of forfeiture of the vessel under the act of Congress against the slave trade, is a question of admiralty and maritime jurisdiction.
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In all cases of insolvency of their debtor, the United States are entitled to a priority of payment out of his effects.
United States v. Fisher et al., 358

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1805,

AND

FEBRUARY TERM, 1806.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. 1.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

SECOND EDITION.

REVISED AND CORRECTED BY THE AUTHOR.

VOL III.

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Supreme Court of the United States.

1*] *FEBRUARY TERM, 1806.

HUIDEKOPER'S LESSEE v. DOUGLASS.[1]

Under the act of Pennsylvania, of 3d April, 1792, for the sale of the vacant lands, &c., the grantee, by warrant of a tract of land, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land for the space of two years from the date of his warrant, but during that time persisted in his endeavors to make such settlement and improvement, is excused from making such actual settlement as is described in the ninth section of the act, and the warrant vests in such grantee a fee simple.

THIS was a case certified from the circuit court of the United States, for the district of Pennsylvania, in which the opinions of the judges of that court were opposed.

The action was an ejectment to try the title of the "Holland Company" to a very large tract of land in Pennsylvania, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, purchased of that state under the act of assembly of the 3d of April, 1792, which act is as follows, viz.:

An act for the sale of the vacant lands within this Commonwealth.

Whereas the most valuable lands within this commonwealth, included within the purchase made from the native Indians in the year one thousand seven hundred and sixty-eight, have been taken up, located, and appropriated 2*] *for the use of divers purchasers, at prices heretofore established by law, and those which remain unsold and unsettled, being inferior in quality or situation, cannot be sold at the same prices: And whereas the prices fixed by law for other lands belonging to the commonwealth are found to be so high as to discourage actual settlers from purchasing and improving the same:

SECTION I. *Be it therefore enacted by the senate and house of representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same,* That from and after the passing of this act, the price of all the vacant lands within the limits of the purchase made of the Indians in the year one thousand seven hundred and sixty-eight, and all preceding purchases, excepting always such lands as have been previously settled upon or improved, shall be reduced to the sum of fifty shillings for every hundred acres; the price of vacant lands within the limits of the purchase made of the Indians in the year one thousand seven hundred and sixty-four, and lying east of the Alleghany river and Conewango creek, shall be reduced to the sum of five pounds for every hundred acres thereof; and the same shall and may be granted to any person or persons applying for the same at the price aforesaid, in the manner and form accustomed under the laws heretofore enacted and now in force.

SEC. II. *And be it further enacted by the authority aforesaid,* That from and after the passing of this act, all other lands belonging to this commonwealth, and within the jurisdiction thereof, and lying north and west of the rivers Ohio and Alleghany, and Conewango creek, excepting such parts thereof as heretofore have been, or hereafter shall be, appropriated to any public or charitable use, shall be, and are hereby, offered for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of seven pounds ten shillings for every hundred acres thereof, with an allowance of six per centum for roads and highways, to be located, surveyed and secured to such purchasers in the manner hereinafter mentioned.

*SEC. III. *And be it further enacted by* 3*] *the authority aforesaid,* That upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid, to the secretary of the land office, which application shall contain a particular description of the lands applied for, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding four hundred acres, requiring the surveyor general to cause the same to be surveyed for the use of the grantee, his heirs and assigns for ever, and make return thereof to the surveyor general's office, within the term of six months next following, the grantee paying the purchase money, and all the usual fees of the land office.

SEC. IV. *And be it further enacted by the authority aforesaid,* That the surveyor general shall, with the approbation of the governor, divide the lands thus offered for sale into proper and convenient districts, in such manner as he may think expedient, so that the boundaries of each district, either natural, or artificial, may be known, and appoint one deputy surveyor for each district, who shall give bond and security, as is customary with other deputy surveyors in this commonwealth, and shall reside within, or near as possible, to his respective district; and every such deputy surveyor shall, within sixty days next after his appointment, certify to the surveyor general, the county, township and place where such deputy surveyor shall keep his office open, for the purpose of receiving warrants in order that all persons who may apply for lands as aforesaid, may be duly informed thereof; and every deputy surveyor, who shall

1.—Present, Marshall, Ch. J., Cushing, Paterson, Washington, and Johnson, Justices.

receive any such warrant, shall make fair and clear entries thereof in a book, to be provided by him for that purpose, distinguishing therein the name of the person therein mentioned, the quantity of land, date thereof, and the day on which such deputy surveyor shall receive the same, which book shall be open at all seasonable hours to every applicant, who shall be entitled to copies of any entries therein, to be certified as such, and signed by the deputy surveyor, the party paying one-quarter of a dollar therefor.

4*] *SEC. V. *And be it further enacted by the authority aforesaid,* That the deputy surveyor shall, at the reasonable request and proper cost and charges of the respective grantees, in such warrants named, proceed to survey the lands in such warrants described, as nearly as may be, according to the respective priorities of their warrants; provided, that they shall not, by virtue of any warrant, survey any tract of land, that may have been actually settled and improved prior to the date of the entry of such warrant with the deputy surveyor of the district, except for the owner of such settlement and improvement; and having perfected such surveys, shall enter the same in a book, to be kept by the deputy surveyor, and to be called the survey book; and the same book shall remain in his office, liable to be inspected by any person whatsoever, who shall demand to see the same, upon the payment of eleven pence for every search; and the deputy surveyor shall cause copies of any such survey to be made out, and delivered to any person, upon the payment of one-quarter of a dollar for each copy.

SEC. VI. *And be it further enacted by the authority aforesaid,* That in making any survey by any deputy surveyor, he shall not go out of his proper district to perform the same, and that every survey made by any deputy surveyor without his proper district shall be void and of no effect; and the surveyor general and his deputies are hereby severally directed and enjoined to survey, or cause to be surveyed, the full amount of land contained and mentioned in any warrant, in one entire tract, if the same can be found, in such manner and form, as that such tract shall not contain in front on any navigable river or lake, more than one-half of the length or depth of such tract, and to conform the lines of every survey in such manner as to form the figure or plot thereof, as nearly as circumstances will admit, to an oblong, whose length shall not be greater than twice the breadth thereof; and in case any such survey should be found to contain a greater quantity of land, than is mentioned in the warrant on which it shall be made, so that such excess be not more than one-tenth of the number of acres mentioned in such warrant, besides the usual allowance for roads and highways, the return 5*] thereof shall, nevertheless, be *admitted, under the warrant, provided the party procuring such return to be made, shall forthwith pay to the receiver general of the land office, the price or value of such excess or overplus land, at the same rate at which he paid for the land mentioned in the warrant.

SEC. VII. *And be it further enacted by the authority aforesaid,* That every deputy surveyor to be appointed by virtue of this act, shall, within the month of February in the next year, make and return into the office of the surveyor general, plots of every survey which he shall have made in pursuance of any warrant, connected together in one general draft, so far as they may be contiguous to each other, with the courses and distances of each line, the quantity of land contained in each survey, and the name of the person for whom the same was surveyed; and every succeeding year he shall make a like return of the surveys made in the year preceding.

SEC. VIII. *And be it further enacted by the authority aforesaid,* That the deputy surveyor of the proper district shall, upon the application of any person who has made an actual settlement and improvement on lands, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, and, upon such person paying the legal fees, survey and mark out the lines of the tract of land to which such person may, by conforming to the provisions of this act, become entitled by virtue of such settlement and improvement: Provided, That he shall not survey more than four hundred acres for such person, and shall, in making such survey, conform himself to all the other regulations by this act prescribed.

SEC. IX. *And be it further enacted by the authority aforesaid,* That no warrant or survey, to be issued or made in pursuance of this act, for lands lying north and west of the rivers Ohio and Alleghany, and Conewango creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating, at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and *residing, or caus- [*6 ing a family to reside thereon, for the space of five years next following his first settling of the same, if he or she shall so long live; and that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so often as defaults shall be made, for the time and in the manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this act. Provided always, nevertheless, That if any such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued.

SEC. X. *And be it further enacted by the authority aforesaid,* That the lands actually settled and improved according to the provisions of this act, to whosesoever possession they may descend or come, shall be and remain liable and chargeable for the payment of the consideration

or purchase money at the rate aforesaid, for every hundred acres, and the interest thereon accruing from the dates of such improvements; and if such actual settler, not being hindered as aforesaid, by death, or the enemies of the United States, shall neglect to apply for a warrant for the space of ten years after the time of passing this act, it shall and may be lawful to and for this commonwealth to grant the same lands, or any part thereof, to other, by warrants, reciting such defaults; and the grantees, complying with the regulations of this act, shall have, hold and enjoy, the same to them, their heirs and assigns; but no warrant shall be issued in pursuance of this act, until the purchase money shall be paid to the receiver general of the land office.

SEC. XI. *And be it further enacted by the authority aforesaid*, That when any caveat is 7*] determined by the *board of property, in manner heretofore used in this commonwealth, the patent shall, nevertheless, be stayed for the term of six months, within which time the party against whom the determination of the board is, may enter his suit at common law, but not afterwards; and the party, in whose favor the determination of the board is, shall be deemed and taken to be in possession, to all the intents and purposes of trying the title, although the other party should be in actual possession, which supposed possession, shall, nevertheless, have no effect upon the title; at the end of which term of six months aforesaid, if no suit is entered, a patent shall issue according to the determination of the board, upon the applicant producing a certificate of the prothonotary of the proper county that no suit is commenced, or if a suit is entered, a patent shall, at the determination of such suit, issue, in common form, to that party in whom the title is found by law; and in both cases, the patent shall be and remain a full and perfect title to the lands against all parties and privies to the said caveat or suit; saving, nevertheless, to infants, femes coverts, persons beyond sea, *non compotes mentes*, and others under disabilities, their respective rights, until twelve months after such disabilities are removed.

SEC. XII. *And be it further enacted by the authority aforesaid*, That no direct taxes shall be levied, assessed, or collected, for the use of this commonwealth, upon or from any of the lands or tenements lying north or west of the purchase made of the Indians, in the year one thousand seven hundred and sixty-eight, or the personal estate found thereupon, for the full space or term of ten years, from and after the passing of this act.

SEC. XIII. *And be it further enacted by the authority aforesaid*, That the following tracts of land shall be reserved for the use of the commonwealth, that is to say, at Presqu'isle, formed by Lake Erie, the island or peninsula which forms the harbor, and a tract extending eight miles along the shore of the lake, and three miles in breadth, so as to include the tract already surveyed, by virtue of a resolution of the general assembly, and the whole of the harbor formed by the said Presqu'isle, at the mouth of 8*] Harbor creek, which empties into the *Lake Erie, and along the shore of the lake, on both sides of said creek, two thousand said acres.

SEC. XIV. *And be it further enacted by the authority aforesaid*, That all the lands within the triangle on Lake Erie, purchased from the United States, shall be taken and deemed, and they are hereby declared to be, within the limits of the county of Alleghany.

SEC. XV. *And be it further enacted by the authority aforesaid*, That it shall and may be lawful to and for the holder or holders of any unsatisfied warrant and warrants, heretofore issued for lands, agreeably to the seventh section of the act, entitled "An act to alter and amend an act of assembly, entitled an act for opening the land office, for granting and disposing of the unappropriated lands within this state," passed on the twenty first day of December, in the year one thousand seven hundred and eighty-four, to locate the quantity of land for which such unsatisfied warrant and warrants was and were granted, in any district of vacant and unappropriated land within this commonwealth; provided the owner or owners of such unsatisfied warrants shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Alleghany river and Conewango creek, are made subject by this act, the said recited act, or any other act or acts of the general assembly, to the contrary thereof in anywise notwithstanding.

WILLIAM BINGHAM,
Speaker of the House of Representatives
SAMUEL POWELL,
Speaker of the Senate.

Approved, April 3d, 1792,
THOMAS MIFFLIN,
Governor of the Commonwealth of Pennsylvania.

The points upon which the opinions of the judges of the court below were opposed, were cetrified to be as follows, viz.:

1. Whether, under the act of the legislature of Pennsylvania, passed on the third day of April, one thousand *seven hundred and [*9 ninety-two, entitled "An act for the sale of the vacant lands within this commonwealth," the grantee, by warrant of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the tenth day of April, one thousand seven hundred and ninety-three, the date of the said warrant, until the first day of January, one thousand seven hundred and ninety-six, but who, during the said period, persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the ninth section of the said law prescribes, to vest a title in the said grantee.

2d. Whether a warrant for a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, granted in the year one thousand seven hundred and ninety-three, under and by virtue of the act of the legislature of Pennsylvania, entitled "An act for the sale of the vacant lands within this commonwealth," to a person who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land and from residing thereon from the date of the said warrant until the first day of January, one thousand seven hundred and ninety-six, but who, during the said period, persisted

in his endeavors to make such settlement and residence, vests any, and if any, what title in or to the said land, unless the said grantee shall, after the said prevention ceases, commence, and within the space of two years thereafter, clear, fence and cultivate at least two acres for every hundred acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside, or cause a family to reside, thereon for the space of five years next following his first settling the same, the said grantee being yet in full life.

3d. Whether a grantee in such a warrant as aforesaid, who has failed to make such settlement as the enacting clause of the said ninth section requires, and who is not within the benefit of the proviso, has thereby forfeited his right and title to the said land, until the com-
10*] monwealth has *taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the possession of said land in ejectment against a person who at any time after two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land, and has ever since been in possession of the same.

Dallas, for the plaintiff, contended for three general propositions.

1. That a warrantee (meaning thereby a person claiming under a warrant from the commonwealth) who has been prevented, by force of arms of the enemies of the United States, from improving, settling and residing on the land, but has persisted in his endeavors to do so, during two years from the date of his warrant, is forever and totally released, by the operation of the proviso, from the obligation of making the improvement, settlement and residence described in the enacting clause of the ninth section of the law.

2. If not for ever and totally excused under the specified circumstances, yet the warrant vests in such warrantee and his heirs, a title to the land under one of three aspects; 1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavors to accomplish an improvement, settlement and residence, although his endeavors should not be successful; 2d. Provided he accomplishes the settlement and improvement within two years, and the residence within five years, after the prevention by hostilities ceased; 3d. Provided he has accomplished the improvement, settlement and residence, at any time before the commonwealth has taken advantage of the forfeiture.

3. The inceptive title of the warrantee gives a right of possession which can only be defeated by an act of the commonwealth, taking advantage of a forfeiture for non-compliance with the terms of the grant.

1st point.

In order to understand the act of 1792, it will be necessary to take a view of the situation of
11*] the state of *Pennsylvania at that period. Her finances were embarrassed, and an Indian war existed on her frontiers. Hence she had two great objects in view, the protection of those frontiers, and the accession of wealth to her treasury. To accomplish the first, no means were so sure as to establish on the frontiers a firm, hardy, and vigilant population, bound by their dearest interests to watch and repel the predatory incursions of the Indians. And to attain the second no means presented themselves so obviously as the sale of the vacant lands.

Although the war was raging at the time when the act passed, yet negotiations were pending, and peace was expected.

The general provisions of the act, therefore, especially those which relate to settlement and residence, are predicated upon a state of peace, while the legislature also took care to provide for a state of war.

The extent of that provision is the principal subject of litigation.

Without resorting to the words, but considering the law as a contract, what are the motives and ideas which may be reasonably ascribed to the parties?

1st. As to the state.

1. The settlement might be prevented by two means; public calamity, or negligence in the grantee. For the one, it was just that the state should answer; for the other, the grantee. 2. It was unreasonable for the state to require the same from him who should be prevented, as from him who should not be prevented from making a settlement. A mere enlargement of time diminishes, but does not obviate the objection. It does not put both on an equal footing. The man who has spent years in fighting and toiling to obtain a settlement, is still to do just as much as the man who has staid at home by his fireside till war is over, and then purchases his warrant. The former has no credit for his toil and wounds. This construction is evidently contrary to the spirit of the act, which was to *gain hardy adventurers, who should [*12 join their exertions to those of the state and of the United States, to subdue the Indians; for it totally destroys all motive for such exertions. The state, therefore, might say, and, without doubt, meant to say, to the war warrantee, that a persistence in the endeavor to settle, during the period prescribed, shall be accepted in lieu of actual settlement. That the man who has actually accomplished the settlement and residence in time of peace, and he who shall have persisted in his endeavors to settle and reside for the stipulated time, during a state of war, but who has been prevented by the enemy from accomplishing his settlement and residence, are equally meritorious, and shall be put on the same footing.

2d. As to the warrantee.

Would he purchase during the war, if he was liable to forfeit his warrant although he persists during the limited time, and if all his expenses and damages were to go for nothing, and if at the end of the war he would be in the same situation as if he had remained at home?

The situation of the state then called for money, population and improvement. The means were a sale of the land, subject to settlement, if not prevented by a public calamity.

The words and spirit of the act are conformable to these ideas.

The title is, for the sale of vacant lands.

The preamble states, that the prices at which they have been heretofore held were found so high as to discourage actual settlers from purchasing and improving.

The second and third sections contain the of-

ser of the lands for sale, and the ninth describes the terms.

On this overture, companies and individuals became purchasers. Among the rest the Holland Company, in April, 1792, and August, 1793, purchased 1,162 tracts of 400 acres each, 13*] which, by losses upon resurveys, *and bounties to actual settlers, are reduced to 776 tracts, which have cost the company 222,071 dollars and 10 cents for purchase money, and (up to the year 1802) 202,000 dollars in expenses, endeavors to settle, and actual improvements. The Population Company also expended nearly the same amount. The consequence was, that the public treasury was supplied; a bank was established, which furnishes revenues adequate to the whole expenses of the government, so that no taxes have been since imposed; industry and improvements have been stimulated, and the state has advanced rapidly in wealth and prosperity.

The persistence and prevention of the Holland Company are admitted.

The treaty made with the Indians in 1795, is considered as the epoch from which the two and the five years mentioned in the ninth section begin to run. But there was still further prevention by distance, by the season, (for the treaty was ratified in the winter,) by intruders, (who were pushing in upon the lands under pretence that the warrants were forfeited by want of settlement within the two years,) and by the construction of the act given by the board of property.

How, then, are the terms of the contract to be expounded? Not by the words, (for they are inconclusive and repugnant,) but by the nature of the transaction.

By the third section, a fee simple is granted; but the ninth section annexes a condition precedent. The warrant shall not vest any title "unless," &c.

The nature of the transaction, however, gives a possessory title, and an usufructuary property, at least for the two and the five years, else the warrantee could not go and make a settlement. It is always spoken of in the act as a grant. It may be devised, sold, descend, be taken in execution, &c. By the 9th section, what is given can only be devested by default. The whole estate does not remain in the grantor until performance of the condition.

14*] *But the settlement and residence for the time mentioned is not a *sine qua non* to vest an absolute title. There are cases within the ninth section, in which the title becomes absolute, although the residence shall not have been completed. The words of the act are, "reside thereon for the space of five years next following his first settling of the same, if he shall so long live." If the warrantee, having begun his settlement, should die before the expiration of the five years, his title is complete. So if he puts a family on the land to reside, and dies before the end of the term, and the family quits its residence before the expiration of the five years, the title is absolute. So if an actual settler shall by force of arms of the enemies of the United States be driven from his settlement. And so, (as we say,) " if any grantee" "shall" by like force "be prevented from making an actual settlement," "and shall persist in his endeavors to make such actual settlement," during the time allowed for making the same, that is, for two years, "he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." In each of these cases the condition is released. If the legislature meant anything less, words were not wanting in which to express their ideas, and here was an opportunity of using them.

The particular words of the proviso are important.

"If any grantee shall be prevented." This implies an attempt and failure. "And shall persist," implying still the want of success. "In his endeavors;" still holding up the idea that the thing is not accomplished; "to make," not until he make, not persist to make, but persist in his endeavors to make, implying a continued attempt, not a performance. "Shall be entitled to have and to hold, in the same manner as if." Here the words "as if" necessarily imply that the thing itself is not done. The first part of the section gives the lands, if the thing is done, but the proviso also gives it, in a certain case, if it be not done, in the same manner as if it had been done. They who contend that the persistence must continue until the object is accomplished, make the legislature speak this absurd language: persist until *the settlement has been made, and you [*15 shall have the land in the same manner as if the settlement had been made. But we make them speak much more rationally. If you are prevented by the enemy from making the settlement, but persist in your endeavors for two years, you shall have the land in the same manner as if the settlement had been made. We will take your endeavors for success. If settlement and residence were necessary in all cases, the proviso is useless. If the legislature meant by the proviso only to extend the time, they have been very unfortunate in their language, for there is no expression which indicates such an idea, and it is contradicted by the preceding part of the section, by which the commonwealth reserve the right to grant new warrants as often as defaults shall be made for the time, and in the manner aforesaid. No time is expressed in the act but the two and the five years. If the time is to be enlarged, who shall say how long? There is no provision for trying by a jury the question, what is a reasonable time.

The act contemplates but two cases. An actual settlement within the time, or a prevention during the time by the act of God, or of the public enemy.

In both cases the title was to be absolute.

The same reason that releases the warrantee who dies, applies more strongly to the warrantee prevented by the enemy, and the tenth section puts them both on the same footing.

Let us consider what is required by the ninth section, and what is relinquished by the proviso.

It requires, within two years, a settlement, by clearing two acres for every hundred, by erecting a habitation and by residing five years.

Here is evidently a confusion of terms, by requiring a settlement consisting of five years' residence, to be accomplished in two years.

*There are also other absurdities in the [*16 same section, equally glaring. Thus it is declared that in default of such actual settlement the commonwealth may issue new warrants to other actual settlers; and that if such

actual settler shall be prevented from making such actual settlement, he shall be entitled in the same manner as if the actual settlement had been made.

2. What is relinquished?

The condition of residence is released by the death of the warrantee, and prevention releases both residence and settlement.

The enacting part of the section may be considered as a covenant to settle; and the proviso as a covenant to convey in case of prevention.

2d point.

If persistence for two years does not forever and totally release the condition of settlement, yet the warrant vests a title under one of three aspects.

1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavors to accomplish an improvement, settlement and residence, although his endeavors should not be successful.

To suppose the title to be forfeited, although an accomplishment of the condition has been prevented by the enemy, is to make the proviso of no use whatever.

But giving a use to the proviso, and supposing it to mean an extension of time, everything is at sea. Every case would have a different rule, and decisions would vary with every jury. No case could be decided without a lawsuit.

But if you allow the warrantee to gain a title by persisting during the war and for a reasonable time after, although without success, you render the law intelligible, and give effect to every part.

17*] *This construction comports with the peculiar expressions of the act, and is justified by the nature and equity of the case.

Endeavors during war would be more expensive than success in time of peace, and equally beneficial to the state. By this means also you put the war warrantee and the peace warrantee upon an equal footing.

But the legislature fixed a positive period, and left nothing to discretion.

Who shall change the nature of the contract? Who give discretion to courts and juries? Who substitute endeavor for performance, in reference to any other time than the legislature contemplated?

2d. The second aspect is, provided he persists after the war, and accomplishes the improvement in two years, and continues the residence for five years from the cessation of the prevention.

This is what is contended for on the other side, but this is not the express contract which fixes the times, as well as the acts which are to be done.

It is not a contract which can be implied; for an undertaking to act in two years from the date of the warrant, does not imply an undertaking to act in two years after a war, which may be fifty years from the date of the warrant.

The proviso contemplates no new act, no new epoch, but under the specified circumstances gives a title as if the act had been done in the time prescribed.

This construction would make the proviso a mere mockery. It would place the warrantee, who had toiled through the dangers of the war, at a heavy expense, in no better situation than if he had used no exertions at all.

3d. The third aspect is, provided he persists during and after the war, and perform the conditions at any *time before the common- [*18 wealth takes advantage of the forfeiture.

This regards the case as a condition subsequent, the estate continuing after the contingency, until the grantor enters and claims.

But this is contrary to the words, which call for endeavors, not performance.

This construction destroys all limitation of time.

Upon the whole, there is no clear, safe, equitable and satisfactory construction, but that which supposes the condition to be released by the impossibility of performance within the time prescribed.

3d point.

The inceptive title of the warrantee gives a right of possession which can only be defeated by an act of the state.

All forfeitures are to be construed strictly. And where compensation can be made, they are never enforced in equity.

The forfeiture claimed is entitled to no favor. The contract itself was ambiguous, and renderd more so by official misinterpretations.

The price has been paid. Time, labor and money have been expended in improvements, and attempts to settle. The prevention has been by a public calamity, not by private negligence.

The operation of the forfeiture is dishonorable to the state. She seizes the land with all their amelioration, to sell them again to a stranger.

Even the state herself, therefore, ought not to be countenanced in taking advantage of the forfeiture.

*But what pretext can justify a [*19 stranger in intruding upon the possession of the warrantee?

This is the case of a trespasser who thrusts himself in upon the land, pretending that the warrantee has forfeited his title.

Is every person, who chooses to intrude, to be the judge whether the possessor has forfeited his title? This would encourage forcible entries and riots; riot would grow to rebellion. The peace of the commonwealth is at stake.

No man can acquire a title by his own tort.

But turn to the words of the act.

"That in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers, for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof," &c.

There must be proof of default, the party must be heard. The commonwealth may, not shall, grant new warrants.

It is said, however, that they are to be issued to other actual settlers; which gives a right to any person to enter on a forfeiture.

The terms of the act, as well as the nature of the transaction, show that the case of a warrantee, and not a mere settler, is meant.

It supposes a new warrant, where an old one had issued.

Actual settler is a *descriptio personæ*. It

does not mean a man who has completed, but who contemplates, an actual settlement. This appears from the manner in which the terms actual settler are used in the preamble, 20*] *and in the 5th, 8th and 10th sections of the act, and even in the 9th section itself.

The commonwealth may grant new warrants to other actual settlers. Other than whom? Other than the actual settlers who had failed to make an actual settlement in the manner described in the beginning of that section.

It means a person who had purchased with an intention, or under a stipulation, to make an actual settlement.

There is no express authority given to any person to enter on a warrantee. Can it be implied by saying that the state may grant to another actual settler?

Her act must constitute the forfeiture of the old title.

Her act must grant the new.

E. Tilghman, on the same side.

Confined his argument principally to the support of the proposition, that a persistence for two years after the date of the warrant, and in time of war, in endeavors to make a settlement, gave the same title as if the actual settlement had been made and continued.

He contended that revenue and population were equally the objects of the legislature in passing the act. It ought not, therefore, to be construed with a sole view to population.

The act, like a will, ought to be so construed as to carry into effect the intention of the legislature, and to give operation to all its parts.

To understand the true meaning of the proviso of the 9th section, it is necessary to distinguish between settlement and residence.

The warrantee is, by the first part of the section, to make a settlement, "by clearing, fencing, and cultivating at least two acres for every 21*] hundred, and by *erecting thereon a messuage for the habitation of man." Thus much was to be done in two years, and this may with propriety be called "actual settlement." But this alone was not sufficient to give a title. The party must also "reside, or cause a family to reside, thereon five years next following his first settling of the same, if he shall so long live."

Residence is superadded to settlement, which is the principal requisite.

It is absurd to say that residence is comprehended in settlement, because settlement must be within two years from the date of the warrant; but the residence is to continue five years following the first settlement. The smaller number (2) cannot include the larger number (5), which must be the case if residence is a part of settlement. It certainly is not. But it is a requisite additional to settlement, and which must be complied with to complete the title. Settlement may be begun and completed in the last three months of the two years. Residence, the other requisite, is to commence with the inception of the settlement, and to continue five years, unless the party die, so that settlement is one thing, and residence another. Unless they are different, how can the one commence from the other? If residence be a part of settlement, and not a distinct member of the condition, the death of the grantee, within two years from the date of the warrant, would vest a complete title. A construction plainly inconsistent with the views of the legislature.

That residence is considered a distinct part of the condition, is evident from other parts of the section. Thus it says: "And that in default of such actual settlement and residence, it shall and may be lawful," &c. Again, "reciting the original warrants, and that actual settlements and residence have not been made."

The proviso also considers settlement and residence as distinct. The party is to persist in endeavors to make an actual settlement; and if he does so persist, is to hold and enjoy in the same manner as if the actual settlement had been made and continued. If actual settle- *ment included residence, why say con- [*22 tinued? Settlement is considered as a distinct thing, separately existing, and continued by residence. If the settlement is not made in two years, in peace, is there not a forfeiture? If so, residence is another essential. If residence is a part of settlement, it must be had in two years; but residence is to be five years from the first settlement. Then if you abolish two years as incompatible with five years, you set all at large, no time is prescribed for either settlement or residence; because residence is not to be five years from the date of the warrant, but from the first settlement, which may, on this construction, be at any time. There is no means to reconcile the whole but to construe settlement to be one thing, to be done in two years from the date of the warrant; and residence to be another, to continue five years from the first settling.

Such, then, were the requisites to a complete title.

But at the time of making the act there was an Indian war, which might probably last more than two years. It was necessary, then, for the legislature to do justice as well to the warrantee who paid money, as to the actual settler: one of whom might, by the continuance of the war, be prevented from commencing and completing settlement and residence; the other be driven from settlement and residence actually commenced.

The provision is, that if the actual settler with or without warrant) shall be driven therefrom, or the warrantee be prevented from making such actual settlement, "and shall persist in his endeavors to make such actual settlement as aforesaid," "then, in either case, he and his heirs shall be entitled to have and to hold the said lands in the same manner as if the actual settlement had been made and continued."

The plaintiff and defendant are at issue upon a great question:

Is the condition to be performed according to the terms of the enacting clause, at some time?

*If this is determined in the negative, [*23 in what time is the matter, substituted in lieu of what was required by the enacting clause, to be performed?

These questions are distinct and independent of each other; not to be blended together in argument, and if blended, will introduce the utmost confusion.

In considering the proviso, it is natural to inquire,

1st. Who are the objects of relief against the condition?

2d. On what terms is such relief to be granted? and,

3. What is that relief?

1st. The objects of relief under the proviso certainly are persons not having done what was necessary under the former part of the section, to complete their titles; who had not united settlement and residence; settlers without warrant; and warrantees having commenced settlements or not.

2d. If any such "actual settler, or any grantee shall be prevented by force of arms of the enemies of the United States from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case,

3d. "He and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued.

The terms of relief are, persisting in endeavors to make such actual settlement as aforesaid.

The whole question is as to the legitimate meaning of "persist in his endeavors," &c. For if the grantee or actual settler complies with the proper construction as to the thing intended to be done, the condition is done away.

It is contended that the party must persist until settlement and residence are actually achieved.

This we say is utterly inconsistent with the letter and spirit of the proviso. Had the legis- [*24] lature intended this, *it would have been so expressed, and might have been readily done by a declaration that, during war, time should not run against the warrantee or settler.

Instead of which, a substitute for settlement and residence is plainly introduced. That substitute is a persisting in endeavors to make such actual settlement as aforesaid. Instead of requiring a persisting in endeavors until settlement and residence actually obtained or made, the law contemplates something short of settlement and residence, which being performed was to operate in the same manner as if the actual settlement and residence had been made and continued. Such actual settlement, in the proviso, is considered as distinct from residence; and to it, as such, the proviso relates. And if the party persists in his endeavors to make such actual settlement as aforesaid, (that is, clear, fence, cultivate and build, not reside,) then he is to hold in the same manner as if the actual settlement had been made and continued; to wit, by residence. In the proviso, residence is nowhere contemplated, except where the effect of persistence in endeavors is declared to be, to hold "in the same manner as if," &c. The legislature having thus plainly considered settlement and residence as different things, have declared that persistence in endeavors to attain the one shall be equivalent to the actual accomplishment of both.

The proviso affords relief on the ground, and solely on the ground, that settlement and residence were not had.

How strange is their construction! If the actual settler or warrantee persists in his endeavors until he actually makes a settlement with residence, he shall hold the land as if actual settlement had been made and continued. This renders all the words "in the same manner as if," &c., entirely nugatory.

This is not the case to which the proviso applies. It applies only to a case in which settlement and residence had not taken place, but in which, from a proper consideration of circumstances, the party was to hold as if, &c., looking to something other which is to be as if. *Nullum simile est idem.* As if does not mean the same.

*Persisting in endeavors is all the pro- [*25] viso requires. If unsuccessful, they are still endeavors within the meaning of the proviso. Attaining the end is not the only evidence of persisting in endeavors; else all endeavors must necessarily be successful, as, without success, on their principles, there can be no endeavors persisted in.

If attaining the end was to be absolutely necessary, why did not the legislature expressly prescribe the end and not the means? Or rather, why, having already prescribed the end, in the former part of the section, did they say anything of the endeavor (the means) in the proviso?

By the construction on the other side, the only benefit the grantee or actual settler gains from the proviso is time during the actual existence of the impossibility to perform; so that if the then raging war should last ten years, and the party persist in his endeavors the whole time, his title would still be incomplete without actual settlement and residence.

The legislature never intended to impose such ruinous hardships on persons whose money they had taken, or on actual settlers. If time only was their object, why not give it absolutely during the war, without requiring a circumstance that must be attended with great expense and trouble to the party? Why make endeavors and persistence necessary, unless intended as a substitute for settlement and residence?

On these principles, the proviso does the party more harm than good; it was better for him at once to fall a victim to the strict letter of the condition. Had these principles been fairly and clearly avowed and stated in the act, would any man *flagrante bello*, have paid his money for warrants? No. The state would have remained involved in debt till the close of the war.

But it is said, you are not to persist in your endeavors during war, but you are to begin after the peace.

There is nothing of this sort in the law; and why, after peace, is persistence required? Why should not the enacting *clause, after [*26] some certain time, recur in full force, if this was the intention? Why not say that during war and for such a time after peace the condition shall not run against you?

Surely, the persistence in endeavors to make a settlement refers to the time during which a hindrance existed; and cannot apply to a time when there would be nothing to hinder the compassing the thing itself.

What is the relief granted?

They say it is only time; a suspension of the forfeiture during the war. There is no idea of this kind held up in the law. Instead of dispensing with a forfeiture, it dispenses with the condition. It declares that if something is done it shall amount to a performance of the condition, and the party shall hold in the same manner as if the condition itself had been performed.

It is not enough to say that the general in-

tention and spirit of the law is only to suspend the forfeiture for a time. Such spirit and intention must be shown and extracted from the bowels of the act.

By our construction, viz., that two years' persistence from the date of the warrant gives a complete title, everything is rendered intelligible and consistent, and every word of the act has its proper meaning and effect. But upon theirs all is confusion and inconsistency. They confound the larger with the smaller number; they make the legislature speak without any meaning, and they reject whole passages of the law.

If it is settled that persistence in endeavors to make actual settlement is a performance of the condition, how long is such persistence to be?

Surely, two years only from the date of the warrant, that being the time within which, by the enacting clause, the settlement is to be made, and as persistence is a substitute for settlement, must be for the same term, and not longer.

27*] *The act affords no other terms, no other rule of construction. Persistence cannot apply to the five years' residence, because there can be no residence without settlement; and when there had been a fruitless perseverance for two years in endeavors to attain a settlement, there cannot, in the nature of things, be a persistence to attain residence; for settlement being out of the question, there cannot be residence, which presupposes settlement, and which cannot exist without settlement.

Besides, the proviso excludes all ideas of endeavor being applied to residence; they are attached to settlement, and are to operate as if actual settlement had been made and continued.

Consequently, endeavors are only to be commensurate with the time required for settlement, viz., two years from the date of the warrant.

M'Kean, (Attorney General of Pennsylvania,) contra.

The defeat of Harmer in 1790, and of St. Clair in 1791, shows that the power of the United States, aided by that of Pennsylvania, was insufficient to protect that part of the country. The view of the legislature, therefore, was the settlement, not the sale of the lands. They reduced the price from 80 to 20 dollars per 100 acres. Settlement was not a condition subsequent, but precedent; or rather it was a part of the consideration of the sale. With the same view the legislature reduced the size of the tracts from 1,000 to 400 acres, so that on every tract of 400 acres they might have a soldier. It was not their intention that a large tract should be purchased by any one person or body of men. They meant to have a family upon every tract of 400 acres. The Holland Company purchased 1,162 tracts, which was to produce 1,162 soldiers, distributed among the same number of tracts. The object was, that the country should be settled during the war, if possible, so as to form a barrier against the incursions of the Indians. But it is said a peace was in contemplation. If so, why did they enact the proviso? why stipulate for immediate settlement? why oblige purchasers to persist in their endeavors? Immediate settlement was the object; and if so, they could not mean to limit the perseverance 28*] to *two years; they meant a perseverance as long as there was any obstacle. Everything in the act shows this to be their meaning.

The preamble states that the price at which they had been held was so high as to discourage, not purchasers, but actual settlers.

The 2d section offers the lands "for sale to persons who will cultivate, improve, and settle the same, or cause the same to be cultivated, improved, and settled."

The 3d section declares, that "upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid, to the secretary of the land office, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding 400 acres, requiring the surveyor to cause the same to be surveyed for the use of the grantee, his heirs and assigns for ever."

The 5th section prohibits the deputy surveyor, by virtue of any warrant, to survey any tract of land that may have been actually settled and improved prior to the date of the entry of such warrant with the deputy surveyor of the district, except for the owner of such settlement and improvement.

The 8th section authorizes the deputy surveyor, upon application of any person who has made an actual settlement and improvement, to survey and mark out the lines of the tract to which such person may, by conforming to the provisions of this act, become entitled by virtue of such settlement and improvement, provided it does not exceed 400 acres.

The 10th section provides, that the lands thus actually settled and improved, according to the provisions of this act, shall remain liable for the purchase money and interest from the dates of the improvements. And if such actual settler, not being hindered as aforesaid by death, or the enemies of the United States, shall neglect to apply for a warrant in ten years after the passing *of this act, the common- [*29 wealth may grant the same lands to others, by warrants reciting such defaults.

The 9th section contains a condition precedent, and if it be not strictly complied with, the purchaser has not title. It is a part of the contract made with his eyes open. The act must be construed as a contract. The several parts must be considered together. The second and third must refer to the 9th section, and be controlled by it.

What is a condition precedent? It is a condition to be performed before the estate can vest. As if a man grant that if A. pay 100 marks before such a day, he shall have the land. No title will vest until the 100 marks are paid.

It has been considered as a condition precedent by every judge who has passed sentence upon it. Thus, Judge Yeates, in giving his opinion in the case of the mandamus, says: "It is admitted on all sides, that the terms of actual settlement and residence are, in the first place, precedent conditions to the vesting of absolute estates in these lands, and I cannot bring myself to believe that they are dispensed with by unsuccessful efforts, either in the case of war-

1.—This question has been agitated in a variety of forms in the state of Pennsylvania, and a great degree of sensibility is said to have been excited upon the subject. In the year 1800, a rule was obtained in the Supreme Court of Pennsylvania, by the Holland Company, upon the secretary of the

rant holders or actual settlers."[n] The condition 30*] is not dispensed with but in *the case of prevention by death, or by force of arms of the enemies of the United States. The question here arises, is the prevention and perseverance for two years equivalent to a performance of the condition? Is the will to be taken for the deed? 31*] *What is the settlement intended? We say it includes five years' residence. The proviso speaks of "such actual settlement as aforesaid," thereby referring to the description of settlement in the former part of the section, that is, "by clearing, fencing and cultivating, at least *two acres for every hundred, [*32 erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside, thereon for the space of five years next following his first settling of the same."

*By the proviso no time is limited for [*33 the persisting. We say it means persisting with effect; otherwise, the object of the legislature would be totally defeated if the war should continue two years after the dates of *the [*34 warrants. Besides, the proviso would be repugnant to the enacting clause, and therefore void. It only provides that the incipient title

land office, to show cause why a mandamus should not be awarded, commanding him to prepare and deliver patents for various tracts of land, for which they had obtained warrants under the act of April 3d, 1792. The judges delivered their opinions in the following terms:

SHIPPEN, *Ch. J.* The legislature, by the act of 3d April, 1792, meant to sell the remaining lands of the state, particularly those lying on the north and west of the rivers Ohio and Alleghany. The consideration money was to be paid on issuing the warrants. They had, likewise, another object, namely, that, if possible, the lands should be settled by improvers. The latter terms, however, were not to be exacted from the grantees at all events. The act passed at a time when hostilities existed on the part of the Indian tribes. It was uncertain when they would cease; the legislature, therefore, contemplated that warrants might be taken out during the existence of these hostilities, which might continue so long as to make it impossible for the warrantees to make the settlements required, for a length of time; not, perhaps, until these hostilities should entirely cease. Yet, they make no provisions that the settlements should be made within a reasonable time after the peace; but expressly within two years after the dates of the warrants. As, however, they wished to sell the lands, and were to receive the consideration money immediately, it would have been unreasonable, and, probably, have defeated their views in selling to require settlements to be made on each tract of four hundred acres, houses to be built, and lands to be cleared, in case such acts should be rendered impossible by the continuance of the Indian war. They, therefore, make the proviso, which is the subject of the present dispute, in the following words: "Provided always, nevertheless, That if any such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

When were such actual settlements to be made? The same section of the act which contains the above proviso, gives a direct and unequivocal answer to this question: "within the space of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force or reasonable dread of the enemies of the United States, and it was evident that the parties had used their best endeavors to effect the settlement, then by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with, and their title to the lands was complete, and patents might issue accordingly. It is contended, that the words "persists in their endeavors," in the proviso, should be extended to mean, that if within the two years they should be prevented by the Indian hostilities from making the settlement, yet, when they should be no longer prevented by those hostilities, as by a treaty of peace, it was incumbent on them then to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms, (and they would not, perhaps, have been unreasonable,) but they have not done so; they have expressly confined the time of making such settlements to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for, from the words they have used, in which there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made use of the word "endeavors," which supposes a possibility, at least, if not a probability, as things then stood, of those endeavors failing on account of the hostilities, and would, therefore, have expressly exacted actual settlements to be made, when the purchasers should no longer run any risk in making them.

The state having received the consideration money, and required a settlement within two years, if not prevented by enemies; and in that case dispensing with the condition of settlement and residence, and declaring that their title shall be then good and as effectual as if the settlement had been made and contained, I cannot conceive they could mean to exact that settlement at any future indefinite time. And although it is said they meant that condition to be indispensable, and that it must be complied with in a reasonable time, we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves.

It is urged, that the main view of the legislature was to get the country settled, and a barrier formed; this was, undoubtedly, one of their views, and for that purpose, they have given extraordinary encouragement to individual settlers; but they had, likewise, evidently another view, that of increasing the revenue of the state, by the sale of the lands. The very title of the act is "for the sale of the vacant land within this commonwealth;" this latter object they have really effected, but not by the means of the voluntary settlers; it could alone be effected by the purses of rich men, or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued upon the presumption that the words "persist in their endeavors," relate to the grantees as well as the settlers; but, in considering the words of the proviso, it may be well doubted whether they relate to any other grantee or settler than those who have been driven from their settlements; the word "persist" applies very properly to such; the words of the proviso are, "If such actual settler, or any grantee, shall, by force of arms of the enemies of the United States, be prevented from making such settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement; then, in either case, he and his heirs shall be entitled," &c. Here, besides that the grammatical construction of referring the word "persist" to the last antecedent is best answered, but the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence; one relates to the grantees, who, it is supposed, may be prevented from making their settlements; the other to the settlers, who are supposed to be driven away from the settlements. The latter words, as to them, are proper; as to the grantees, who never began a settlement, improper. The act says, in either case, that is, if the grantees are prevented from making their settlements, or if the settlers are driven away, and persist in their endeavors to complete their settlements, in either case they shall be entitled to the land.

I will not say this construction is entirely free from doubt; if it was, there would be an end of the question.

But taking it for granted, as it has been done at the bar, that the words relate to the grantees, as well as the settlers; yet, although inaccurate with regard to the former, it seems to me, the legislature could only mean to exact from the grantees

should not be lost during the war, if thereby 35*] the settlement was prevented. *Every person who claims under this act must be an actual settler. It does not say that if the grantee or actual settler shall be prevented, or driven away, he shall hold; but if prevented, or driven away, and he shall persist, then he shall 36*] hold. *What is persisting? Buying implements? No. Going on the land? We do not contend for that. But still it is something, and who is to determine what it is? It is a fact which must be decided by a jury in every case; which would be productive of endless litigation.

*When the prevention ceased, they [*37 were to settle in a reasonable time; otherwise the purchaser of 1793 would be in a better situation than the purchaser of 1796, because the former would get his title without the condition of settlement.

*If the settlement is begun within the [*38 two years, and continued for five years, it is sufficient. Until a survey there could be no appropriation; and until appropriation there could be no settlement, and there could be no effectual residence unless the settlement was made *within the two years. Did the [*39

their best endeavors to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then entitled to their patents. If the legislature really meant differently, all I can say is, that they have very unfortunately expressed their meaning.

The propriety of awarding a mandamus is another question, which I mean not to discuss, as I presume a decision of a majority of the court will make it unnecessary.

YEATES, J. I have long hoped and flattered myself, that the difficulties attendant on the present motion would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision; the question has often occurred to our minds, under the act of 3d of April, 1792, which has so frequently engaged out attention in our western circuits.

The Holland Company have paid to the state the consideration money of one thousand one hundred and sixty-two warrants, and the surveying fees on one thousand and forty-eight tracts of land; besides making very considerable expenditures by their exertions, honorable to themselves, and useful to the community, (as has been correctly stated,) in order to effect settlements. Computing the sums advanced, the lost tracts, by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands, it is said, that averaging the whole, between two hundred and thirty and two hundred and forty dollars, have been expended by the company on each tract of land they now lay claim to.

The Indian war, which raged previous to, and at the time of the passing of the law, and until the ratification of the treaty at Fort Granville, must have thrown insurmountable bars in the way of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances; the scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions; besides, it is obvious that settlements, in most instances, could not be made until the lands were designated and appropriated by surveys; and more especially so, where warrants have express relation to others depending on a leading warrant, which particularly locates some known spot of ground.

On the head of merit, in the Holland Land Company's sparing no expense to procure settlements, I believe there are few dissenting voices beyond the mountains; and one would be induced to conclude, that a variety of united, equitable circumstances, would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion upon the abstract legal question; whether, if a warrant holder, under the act of 3d of April, 1792, has begun to make his actual settlement, and is prevented from completing the same, "by force of arms of the enemies" of the United States, or is driven therefrom, and shall make new endeavors to complete the same, but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with and extinguished?

I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons collected from the body of the act itself.

1. The motives inducing the legislature to enact the law are distinctly marked in the preamble, that "the prices fixed by law for other lands" (than those included in the Indian purchase of 1768) "are found to be so high, as to discourage actual settlers from purchasing and improving the same." 3 State Laws, 209.

2. "The lands lying north and west of the rivers Ohio and Alleghany, and Conewango creek, are offered for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of 7l. 10 for every hundred acres thereof." By s. 2, the price of lands is thus lowered, to encourage actual settlements.

3. By s. 3. "Upon the application of any person who may have settled or improved, or is desirous to settle and improve, a plantation within the limits aforesaid, there shall be granted to him a warrant not exceeding four hundred acres," &c.

The application granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form all such warrants have issued.

4. By s. 5, "Lands actually settled and improved, prior to the date of the entry of a warrant with the deputy surveyor of the district, shall not be surveyed thereon, except for the owner of such settlement and improvement."

This marked preference of actual settlers over warrant holders, who may have paid their money into the treasury for a particular tract, even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intentions of the legislature.

5. By s. 8, "The deputy surveyor of the district shall, upon the application of any person, who has made an actual settlement and improvement on these lands, survey and mark out the lines of the tract of land, not exceeding four hundred, for such applicant."

The settlement and improvement alone are made equivalent to a warrant; which may be taken out by section 10, ten years after the time of passing this act.

6. I found my opinion, on what I take to be the true and legitimate construction of the s. 9, in the close of which is to be found the proviso, from whence spring all the doubts on the subject.

It has been said at the bar, that three different constructions have been put on this section.

1. That if the warrant holder has been prevented by Indian hostilities from making his settlement within two years next after the date of his warrant, and until the 22d of December, 1795, (the time of ratification of Gen. Wayne's treaty,) the condition of settlement and residence is extinct and gone.

2. That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavors to make an actual settlement and residence for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the conditions: And,

3. That in all events, except the death of the party, the settlement and residence shall precede the vesting of the complete and absolute estate.

Though such great disagreement has obtained, as to the true meaning of this s. 9, both sides agree in this, that it is worded very inaccurately, inartificially and obscurely. Thus, it will be found towards the beginning of the clause, that the words "actual settlement" are used in an extensive sense, as inclusive of residence for five years; because its

legislature mean to dispense with the five years' residence, if the settlement could not be made in two years? The 9th section says, the title shall not vest, unless, &c. The only difficulty was, to limit the time within which the settlement 40*] should be made. *If the settlement is incomplete, he is still to persist. If the improvements are made, but the residence not completed, it is said he is not to persist. But the proviso says, that if the actual settler shall be driven off, and shall persist, &c. What is he 41*] to persist to do? Something *certainly which remained to be done; and nothing remained to be done but to complete his residence. But if he persists in his endeavors to do this, the time during which he is prevented and persists, shall go to his credit. Hence there must be a persistence for five years at least.

*The warrant gave a right to enter the [*42 land, to survey it, and to make the settlement. But this right would be forfeited under the former part of the section, if not exercised in two years.

This was the right which the proviso meant to protect, and nothing more. This is the right which is saved *by persisting as long [*43

constituent parts are enumerated and described to be by "clearing, fencing and cultivating, at least two acres for every hundred acres, contained in one survey; erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside, thereon for the space of five years next following his first settling the same, if he or she shall so long live." In the middle of the clause, the same words are used in a more limited sense, and are coupled with the expressions "and residence," and in the close of the section, in the proviso, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense as they first conveyed; because the terms "such actual settlement," used in the middle of the section, are repeated in the proviso, and refer to the settlement described in the foregoing part; and the words "actual settlement as aforesaid," evidently relate to the enumeration of the qualities of such settlement. Again, the confining of the settlement to be within the space of two years next after the date of the warrant, seems a strange provision. A war with the Indian natives subsisted when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay could not be ascertained generally.

Still I apprehend that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction said to have been made of the proviso in this ninth section, because it rejects as wholly superfluous, and assigns no operation whatever to the subsequent expressions, "if any grantee shall persist in his endeavors," &c., which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me to militate against the general spirit and words of the law, and distorts its great prominent features in the passages already cited, and for other reasons which I shall subjoin. I adhere to the third construction, and will now again consider the s. 9. It enacts, in the first instance, that "no warrant or survey for lands, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, shall vest any title, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, &c. Provided, always, nevertheless, That if any such settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid; then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

"Persist" is the correlative of attempt or endeavor, and signifies "hold on," "persevere," &c. The beginning words of the section restrict the settlement "to be within two years next after the date of the warrant, by clearing, &c. and by residing for the space of five years, next following his first settling of the same, if he or she shall so long live," and in default thereof, annexes a penalty of forfeiture in a mode prescribed; but the proviso relieves against this penalty, if the grantee is prevented from making such settlement by force, &c., and shall persist in his endeavors to make such actual settlement as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the proviso declares, that persisting, &c., shall be equivalent to a continuation of the settlement.

To be more intelligible, I paraphrase the ninth section thus: Every warrant holder shall cause a settlement to be made on his lands within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture by a new warrant. Nevertheless, if he shall be interrupted or obstructed by external force, from doing these acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time, after the removal of such force, until those objects are accomplished, no advantage shall be taken of him for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question proposed by the counsel of the Holland Company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground the 11th April, 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defense; and then fixes his residence as near the spot as he can consistently with his personal safety, does the warrantee lose all pretensions of equity? Or, suppose he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the Indian hostilities; but is, at length, compelled to remove by a superior force; is all to go for nothing, and must he necessarily begin again? I answer to both queries, in the negative; by no means. The proviso supplies the chasm of successive years of residence; for every day and week he resides on the soil, he is entitled to credit in his account with the commonwealth; but, upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement; although a charity cannot take place according to the letter, yet it ought to be performed *cy pres*, and the substance pursued. 2 Vern. 266, 2 Fonb. 221.

It has been objected, that such a contract with the state is unreasonable, and hard on those landholders, and ought not to be insisted upon: it will be said, in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences. The only question is, whether the interpretations given of it be correct or not.

7. A due conformity to the provisions of the act is equally exacted of those who found their preference to lands on their personal labor, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of landholders, as to actual settlement and residence, than that the claims of the former must be limited to a single plantation, and the labor be exerted by them, or under their direction; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. Addison, 340, 341.

It is admitted, on all sides, that the terms of actual settlement and residence are, in the first place, precedent conditions to the vesting of absolute estates in these lands; and I cannot bring myself to believe that they are dispensed with, by unsuccessful efforts, either in the case of warrant holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controlled by imperious

as the prevention continues. But when the prevention ceases, the ultimate condition of settlement is still to be performed. As the law does not require impossibilities, a reasonable 44*] time after cessation *of the war must be allowed to make the settlement. We say two years is that reasonable time, because that was the time originally fixed by the contract, which was predicated upon the idea that there was no obstacle.

45*] *But it is said that the commonwealth alone can enter for the forfeiture, and that there is no private right of entry.

But if this is a condition precedent, no right ever vested, and, therefore, there can be no forfeiture. The *only right given was a [*46 permission within two years to enter, for the purpose of surveying and settling; but this right expired with the two years after the date of the warrant, or of the close of the war.

*The land is to be granted to other [*47 actual settlers; this term is explained in the 5th and 10th sections, and means those who were actually on the land and had begun their settlement. The commonwealth could not grant these lands to actual settlers unless there was

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circumstances was the great criterion which marked the preference in such cases; and I have seen no reason to alter my opinion.

8. Lastly, it is obvious from the preamble, and s. 2, that the settlement of the country, as well as the sale of the lands, were meditated by this law; the latter, however, appears to be a secondary object with the legislature. The peopling of the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute, and, I fear, tedious, in delivering my opinion, it remains for me to say a few words respecting those persons who have taken possession of part of these lands, supposing the warrants to be dead, according to the cant word of the day, and who, though not parties to this suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth, in a method prescribed by law. Innumerable mischiefs, and endless confusion, would ensue, from individuals taking upon themselves to judge when warrants cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in *Morris's Lessee v. Neighman and Shaines:* "If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing that no person should take advantage of their own wrong, and that it does not lie in the mouths of men, like those we are speaking of, to say the warrants are dead; we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act." On the whole, I am of opinion, that the rule should be discharged.

SMITH, *J.* I have had a full opportunity of considering the opinion delivered by my brother Yeates; and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent. I could not hope, indeed, to add to the argument; and I am certain I could not equal the language, which he has used on the occasion.

By the Court. Let the rule be discharged.

Since this decision was pronounced, the subject has been revived and agitated in various interesting forms. In the winter of 1801-2, several petitions were presented by the intruders to the legislature, requesting their interposition, but the committee of the senate to whom these petitions were referred, reported against them, and admitted that the controversy belonged exclusively to the courts of justice. But soon after this report was made, a bill was introduced, which recites the existing controversies, gives a legislative opinion against the claim of the warrantees, and institutes an extraordinary tribunal to hear and decide between the parties. The appearance of this bill produced two remonstrances from the Holland Company, but without effect. As soon as it became a law, the attorney general and the counsel for the company were invited to a conference with the judges, on the carrying of it into effect; but, upon mature consideration, the counsel for the company declined taking any part in the business, and assigned their reasons in a letter addressed to the judges, dated the 24th of June, 1802. An issue was then formed, by the direction of the judges, which was tried at Sunbury, on the 25th of November, following, before Yeates, Smith and Brackenridge, Justices.

The charge, as delivered by Mr. Justice Yeates, is as follows:

That the decision of the Court and jury on the present feigned issue should "settle the controversies arising from contending claims to lands north and west of the rivers Ohio and Alleghany, and Conewango creek," is an event devoutly to be wished for by every good citizen. "It is indispensably necessary that the peace of that part of the state should be preserved, and complete justice done to all parties interested, as effectually as possible." (Close of preamble to the act of 2d April, 1802, p. 155.)

We have no hesitation in declaring that we are not without our fears that the good intentions of the legislature, expressed in the law under which we now sit, will not be effected. We hope we shall be happy enough to acknowledge our mistake hereafter.

It is obvious that the validity of the claims of the warrant holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of the 3d April, 1792, considered as a solemn contract between the commonwealth and each individual.

The circumstances attendant on each particular case may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act.

The first question proposed to our consideration is as follows:

Are warrants heretofore granted under the act of 3d April, 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence required by the said act, at any time before the date of such warrants respectively, or within two years after?

It will be proper here to observe, that on the motion for the mandamus to the late secretary of the land office, at the instance of the Holland Company, the members of this court, after great consideration of the subject, were divided in their opinions. The chief justice seemed to be of opinion, that if a warrantee was, "by force of arms of the enemies of the United States, prevented from making an actual settlement, as described in the act, or was driven therefrom, and should persist in his endeavors to make such actual settlement thereafter," it would amount to a performance of the condition in law. Two of us (Yeates and Smith) thought, that in all events, except the death of the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant holder should cause a settlement to be made on his lands, within two years next after the date of the warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture, by a new warrant; but if, nevertheless, he should be interrupted or obstructed by force of the enemy from doing those acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time after the removal of such force, until these objects should be accomplished, no advantage shall be taken of him for the want of a successive continuation of his settlement." To this opinion Judge Brackenridge subscribes.

It would ill become us to say which of these constructions is entitled to a preference. It is true, that in the preamble of the act of the 2d April, 1802, (p. 154,) it is expressed, that "it appears from the act aforesaid, (3d of April, 1792,) that the commonwealth regarded a full compliance with those conditions of settlement, improvement and residence, as an indispensable part of the purchase or consideration of the land itself." But it is equally certain that the true test of title to the lands in question must be resolved into the legiti-

48*] *a private right of entry, for there cannot be actual settlement without actual entry. These expressions of the act imply as complete a right of entry as a warrant itself. By the act of the 22d of April, 1794, vol. 3, p. 81, 636, no warrant can be obtained for unimproved lands. There must be a previous actual settlement.

49*] *It is not necessary that any act should be done on the part of the commonwealth, because there is no title to be defeated. But if she is bound to do any act, the act of the actual settler is her authorized act. He cannot be a trespasser, because the land was vacant.

*By the 15th section of the act, certain [*50 holders of warrants theretofore granted are authorized to locate them in any district of vacant land in the state, provided that the owners of such warrants "shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Alleghany river and Conewango creek are made subject by this act;" that is, they are to make their settlement in two years from the date of their warrants, although their warrants were more than two years old when the act *passed. This can only be done by giv- [*51

mate meaning of the act of 1792, extracted *ex visceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered in bank; yet, if a different interpretation of the law shall be made by courts of competent jurisdiction in the *dernier resort* I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question be, are titles under warrants issued under the law of the 3d of April, 1792, for lands north and west of the rivers Ohio and Alleghany, and Conewango creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the law at any time before, or within two years after, the dates of the respective warrants, in time of profound peace, when they were not prevented from making such actual settlement by force of arms of the enemies of the United States, or reasonable and well grounded fear of the enemies of the savages? The answer is ready in the language of the acts before us, and can admit of no hesitation.

"No warrant or survey for those lands shall vest any title, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, &c., and in default thereof, it shall and may be lawful to and for the commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof," &c. (Act of the 3d of April, 1792, *sec* 8.) For "the commonwealth regarded a full compliance with these conditions of settlement and residence as an indisputable part of the purchase or consideration of the lands so granted." Preamble to act of 1802.

But if the true meaning of the question be, whether under all given or supposed circumstances of peace or war, of times of perfect tranquillity or imminent danger, such warrants are not *ipso facto* void and dead in law, we are constrained to say that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant taken out early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the land applied for, by all the necessary preparation of provisions, implements of husbandry, laborers, cattle, &c., cannot, with any degree of personal safety, seat himself on the lands within two years after the date of the warrant, and by reason of the just terror of savage hostilities. Will not the proviso in the 9th section of the act of 3d April, 1792, excuse the temporary nonperformance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no control?

Or, suppose another warrant, depending, in point of description, on other leading warrants, which the district surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey until the two years were nearly expired, and the depredations of the Indians should intervene for the residue of the term, will not this also suspend the operation of the forfeiture? Nothing can be clearer to us than that the terms of the proviso embrace and aid such cases; and, independent of the strong expressions made use of, we should require strong proof to satisfy our minds that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.

It is said in the books, that conditions rendered impossible by the act of God are void. Salk. 107, 2 Co. 79, b; Co. Lit. 206, a. 290, b; 1 Roll. Abr. 449, l, 50; 1 Fonb. 199.

But conditions precedent must be strictly performed to make the estate vest, and though become impossible, even by the act of God, the estate will not vest; *Aliter*, of conditions subsequent. 12 Mod. 183; Co. Lit. 218, a; 2 Vern, 339; 1 Ch. Ca. 129, 138; Salk. 231; 1 Vern. 183; 4 Mod. 66; We desire to be understood to mean that the "prevention by force of arms of the enemies of the United States" does not, in our idea, absolutely dispense with and annul the conditions of actual settlement, improvement and residence, but that it suspends the forfeiture by protracting the limited periods. Still the conditions must be performed *cy pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavors to make such actual settlement, improvement and residence, until the conditions are fairly and fully complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretense of being an actual settler, shall seat himself on lands previously warranted and surveyed within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. If the party himself is the cause wherefore the condition cannot be performed, he shall never take advantage. Co. Lit. 206; Doug. 661; 1 Roll. Abr. 454, pl. 8; Godb 76; 5 Vin. 246, pl. 25.

We trust that we have said enough to convey our sentiments on the first point. Our answer to the question, as proposed, is, that such warrants may or may not be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of our opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by, its own peculiar circumstances.

The second question for decision is, are the titles that have issued from the land office under the act aforesaid, whether by warrant or patent, good and effectual against the commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded on the certificates of two justices of the peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence, required by the said act, could not be complied with?

It was stated in evidence on the motion for the mandamus, and proved on this trial, that the board of property being desirous of settling a formal mode of certificate on which patents might issue for lands north and west of the rivers Ohio and Alleghany, and Conewango creek, required the opinion of Mr. Ingersoll, the then attorney general thereon; on due consideration, a form was afterwards adopted on the 21st of December, 1797, which was ordered to be published in the Pittsburgh Gazette, and patents issued of course, on the prescribed form being complied with.

The received opinion of the supreme executive magistrate, the attorney general, the board of property, and of a respectable part of the bar, (whose sentiments on legal questions will always have great and deserved weight,) at that day, certainly

ing a construction to this section similar to that which we contend ought to be given to the 9th.

W. Tilghman, on the same side.

The treasury of Pennsylvania was overflowing by the sales of lands between 1784 and 1792. The utmost that has been received from the sale of the lands under the act of 1792, including the tract called the triangle, is 500,000 dollars.

There are two descriptions of persons contemplated by the act. 1st. The moneyed men who could procure settlers; and, 2d. The hardy but poor actual settler, who was to have a credit of ten years for his purchase money. The state did not want money; but a barrier. Population, and not revenue, was the object. The actual settlement of the land was the *sine qua non* *of the contract. This appears [*52 from the whole tenor of the act itself, as well as from the general circumstances and policy of the state.

The term actual settler has two different significations, as used in the act. But there can be no settlement without actual personal residence. An actual settler sometimes means a person who is on the land with an intent to re-

was, that if a warrant holder was prevented by force of arms of the enemies of the United States from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavor to make such settlement, that the condition was extinguished and gone. Persisting in endeavors, was construed to mean something, attempts, essays, &c., but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some it was thought that the endeavors were only to be commensurate as to the time of making the actual settlement, and were tantamount, and should avail the parties "in the same manner as if the actual settlement had been made and continued."

The decisions of the court in *Morris's Lessee v. Neighman and Shaines*, at Pittsburgh, May, 1799, tended to make the former opinion questionable; and two of the justices of the Supreme Court adopted a different doctrine, in their judgment between the Holland Company and Tenche Coxe.

In the argument in that case, it was insisted by the counsel for the plaintiffs, that the board of property in their resolves, and the governor by his patent, represented the commonwealth *pro hac vice;* and that interests vested under them which could not afterwards be defeated.

We cannot subscribe hereto. If the conditions of settlement, improvement and residence, are indispensable at all events, they become so by an act of the different branches of the legislature. The governor, who has a qualified negative in the passing of laws, cannot dispense with their injunctions; it cannot be said that this case falls within the meaning of the 9th section of the second article of the constitution. "The governor shall have power to remit fines and forfeitures, and grant reprieves and pardons except in case of impeachment." It relates merely to penalties consequent on public offences, nor can it be pretended that the board of property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the law of 1792 cannot, with any degree of justice, be ascribed to the governor or board of property for the time being. They considered themselves in their different functions virtually discharging their respective duties in carrying the act into execution according to the generally received opinion of the day; they never intended to purge a forfeiture if it had really accrued, nor to excuse the non-performance of a condition, if it had not been complied with agreeably to the public will, expressed in a legislative contract.

The rule of law is thus laid down in England. A false or partial suggestion by the grantee to the King, to the King's prejudice, whereby he is deceived, will make the grant of the King void. Hob. 229; Cro. El. 632; Yelv. 48; 1 Co. 44, a. 51, b; 3 Leon. 5; 2 Hawk. 398; Bl. 226. But where the words are the words of the King, and it appears that he has only mistaken the law, there he shall not be said to be so deceived to the avoidance of the grant, per Sir Samuel Eyre, Just. Ld. Ray. 50; 6 Co. 55, b. 56, b. accord. But if any of the lands concerning which the question arises, become forfeited by the omission of certain acts enjoined on the warrant holders, they do not escheat to the governor for the time being, for his benefit, nor can he be prejudiced as governor by any grant thereof; they become vested in the whole body of the citizens, as the property of the commonwealth, subject to the disposition of the laws.

We are decidedly of opinion, that the patents, and the prevention certificates recited in the patents, are not conclusive against this commonwealth, or any person claiming under the act of 3d of April, 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the land officers. But we also think that the circumstance of recital of such certificates will not *ipso facto*, avoid and nullify the patent, if the actual settlement, improvement and residence, pointed out by the law, can be established by other proof.

We must repeat on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2. Here we feel ourselves irresistibly impelled to mention a difficulty which strikes our minds forcibly. Our reflections on the subject have led us to ask ourselves this question on our pillows. What would a wise, just and independent chancellor decree on the last question? Executory contracts are the peculiar objects of chancery jurisdiction, and can be specifically enforced by chancery alone; equity forms a part of our law, says the late Chief Justice, truly. 1 Dall. 213.

If it had appeared to such a chancellor, by the pleadings or other proofs, that the purchase money had been fully paid to the government by the individual for a tract of land under the law of the 3d April, 1792; that times of difficulty and danger had intervened; that sums of money had been expended to effect an actual settlement, improvement and residence, which had not been accomplished fully; that by means of an unintentional mistake on the part of the state officers in granting him his patent; not led to that mistake by any species of fraud or deception on the part of the grantee; he had been led into an error and lulled into a confidence that the conditions of the grant had been legally complied with, and, therefore, he had remitted in his endeavors therein; would not he think, that under all these circumstances, thus combined, equity would interpose and mitigate the rigid law of forfeiture by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the United States, and peace with the Indian nations, both which rendered an immediate settlement of the frontiers, in some measure, less necessary than heretofore.

But it is not submitted to us to draw the line of property to these lands; they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated. We are confined to the wager on the matter before us, and on both questions we have given you our dispassionate sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess and feel an ardent desire that peace and tranquility should be preserved to the most remote inhabitants of this commonwealth.

The same question was again agitated in the circuit court of the United States, in April, 1803, in the case of *Balfour's Lessee v. Meade*. The charge of Judge Washington to the jury was as follows:

WASHINGTON, *J.* The importance of this cause led the court to wink at some irregularities in the argument of it at the bar, which has tended to protract it to an unreasonable length. Depending on the construction of laws of the state, and particularly on that of the 3d of April, 1792, it had

main, and sometimes it means fencing, clearing, cultivating, building, and residing five years. By the act of the 30th December, 1786, vol. 2, p. 488, it is declared, "that by a settlement shall be understood an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going on the military service of this country during the war." Thus, the word settlement, in the 8th section, is used in its common acceptation. It is merely the inception of title; but the settlement mentioned in the 9th section is the completion of title. The 9th section was intended to define more exactly what kind of settlement should vest a title.

There being, then, no settlement without residence, and no time of residence prescribed, except the five years, if there has not been such a residence, there has been no residence, and if no residence, no settlement. Settlement, therefore, includes both improvement and residence.

Every tract of 400 acres was to be specifically settled. The misfortune of the Holland Com-

at first the appearance of a difficult and very complicated case. It is not easy, at the first reading of a long statute, to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was formed on Saturday before we parted, open, however, as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain and to understand the subject, it will be necessary to take a general view of the different sections of the act of the 3d of April, 1792, upon which this cause must turn. The first section reduces the price of all vacant land, not previously settled or improved within the limits of the Indian purchase made in 1768, and all precedent purchases to 50 *s.* for every 100 acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Alleghany river and Conewango creek, to 5*l.*, to be granted to purchasers in the manner authorized by former laws. The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Alleghany and Conewango, to persons who will cultivate, improve and settle the same, or cause it to be done at the price of 7*l.* 10*s.* per hundred acres, to be located, surveyed and secured as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by settlement, and to all except those lying north and west of the Ohio, Alleghany and Conewango, by warrant without settlement.

The third section, referring to all the above lands, authorizes application to the secretary of the land office by any person having settled and improved, or who was desirous to settle and improve a plantation to be particularly described, for a warrant for any quantity of land not exceeding 400 acres, which warrant is to authorize and require the surveyor general to cause the same to be surveyed, and to make return of it, the grantee paying the purchase money and fees of the office. The eighth section, which I notice in this place because intimately connected with the third section, directs the deputy surveyor to survey and mark the lines of the tract upon the application of the settler. This survey, I conceive, has no other validity than to furnish the particular description which must accompany the application at the land office for a warrant.

The fourth section, amongst other regulations, protects the title of an actual settler against a warrant entered with the deputy surveyor posterior to such actual settlement.

The ninth section, referring exclusively to the lands north and west of the Ohio, Alleghany and Conewango, declares, "that no warrant or survey of lands within that district shall give a title, unless the grantee has, prior to the date of the warrant made or caused to be made, or shall, within two years after the date of it, make, or cause to be made an actual settlement, by clearing, fencing and cultivating two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing, or causing a family to reside, thereon for five years next following his first settling the same, if he shall so long live, and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case, as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Alleghany and Conewango, could be acquired in no other manner than by actual settlement; no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or if not so preceded by actual settlement, the warrant would give no title unless it were followed by such settlement within two years thereafter.

The question then is, what constitutes such an actual settler within the meaning and intention of this law, as will vest in him an inceptive title so as to authorize the granting to him of a warrant? not a *pedis possessio*, not the erection of a cabin, the clearing or cultivation of a field. These acts may deserve the name of improvements, but not settlements. There must be an occupancy accompanied with a bona fide intention to reside and live upon the land, either in person or by that of his tenant; to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this intention be only future, either as to his own personal residence or that of a tenant, then the execution of that intention by such actual residence fixes the date; the commencement of the settlement, and the previous improvements, will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the *quo animo* with which it was done, of the intention to settle; but neither nor all will constitute a settlement, if unaccompanied by residence. Suppose, then, improvements made, the person making them declaring at the time that they were intended for temporary purposes of convenience, and not with a view to settle and reside; could this be called an actual settlement within the meaning and intention of the legislature? Surely no. But though such acts against express declarations of the *quo animo* will not make a settlement, it does not follow that the converse of the proposition will; for a declaration of an intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff. In 1793 he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five pens, (for not being covered, they do not deserve the name of cabins,) and in five, six or seven days, having accomplished this work, he returns into the fort to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing these labors which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins, and from inhabiting them? Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight in the instance of this plaintiff. It is most obvious that the object of his visit to this wilderness was to erect what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and, consequently, could not have been intended for a present settlement. He was, besides, an officer in the army, and whilst in that service he could not settle and reside at his cabin, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards; his own statements when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistible, that he did not mean, in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right to those lands. It is not pretended even now, nor is it proved by a single witness, not even by Crouse, who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down for a

pany was, that they undertook an impossibility. They had engaged to settle 1,162 tracts in two years.

The words "in default," &c., show that settlement was the main object. It is improbable that the proviso should be intended totally to defeat the great object of actual settlement; and yet that would be its effect, if the war should continue for two years, which, at the time of passing the act, was a very probable 53*] event. *Much reliance has been placed on the words "as if;" yet on our construction we allow them their full effect. The settlement was to be made in two years; but, says the proviso, if you shall be prevented from making it within two years, and persist until it be accomplished, you shall hold the land as if it had been made within the two years according to the enacting clause.

But if persisting two years in time of war gives a complete title, the proviso gives the purchaser in time of war better terms than the enacting clause gives to a purchaser in time of peace. For the latter is obliged to settle and reside five years, while the former gets the land without any such condition.

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moment on lands encompassed by dangers from a savage enemy? I answer no. At such a time it was very improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement was in the spring of 1796, long after the actual bona fide settlement of the defendant with his family, for I give no credit to the notice from the plaintiff to the defendant in July, 1795 since, so far from accompanying it with an actual settlement, he speaks of a future settlement, which, however, was never carried into execution. Every thing which I have said with respect to the 400 acres surveyed in the name of George Balfour, will apply *a fortiori* against the three other surveys in the name of Elizabeth Balfour, &c., who, it is not pretended, were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law, then, had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made such a settlement as the law required, by urging the danger to which any person attempting a residence in that country would have been exposed. He relies on the proviso to the ninth section of the law, which declares, "That if any such actual settler, or any grantee in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands in the same manner as if each actual settlement had been made and continued." Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Granville was signed on the 3d of August, 1795, and ratified the 22d of December in the same year; although Meade settled with his family in November, 1795, it is not conclusive proof that there was no danger even then, and at any rate, it would require some little time and preparation, for those who had been driven off, to return to their settlements, and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other, and this could only have been created by actual settlement preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant.

I do not mean to say that he must have had such an actual settlement as this section requires, to give a perfect title; for if he had built a cabin, and commenced his improvement in such manner as to afford evidence of a bona fide intention to reside, and had been forced off by the enemy, at any stage of his labors, persevering at all proper times afterwards in endeavors to return, when he might safely do so, he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso which was made for his benefit; this he has not done.

Decisions in the Supreme Court and in the common pleas of this state have been cited at the bar, two of which I shall notice for the purpose of pointing out the peculiar mark which distinguishes them from the present, and to prevent any conclusions from being drawn from what has been said either to countenance or impeach those decisions. The cases I allude to are *The Holland Company v. Cooke*, and the feigned issue tried at Sunbury.

The incipient title under which the plaintiffs claimed in those causes were warrants authorized by the third section of the law. The incipient title in the present case is settlement. The former was to be completed by settlement, survey and patent. This to precede the warrant, and for the most distinct explanation of this distinction, it will be important to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained who may be an actual settler to demand a warrant, namely, one who has gone upon and occupied land with a bona fide intention of an actual present residence, although he should have been compelled to abandon his settlement by the public enemies in the first stages of his settlement; but actual settlement, intended by the 9th section, consists in clearing, fencing and cultivating two acres of ground at least on each of one hundred acres, erecting a house thereon, fit for the habitation of man, and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso which declares that "if such actual settler shall be prevented from making such actual settlement," &c.; the plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared nor fenced any land, and is forced off by the enemies of the United States before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required; or if the warrant holder, who likewise has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause from making these improvements, &c., he too shall be excused if, as is required also of the settler, he has persevered in his endeavors to make those improvements, &c.

But what it becomes such a grantee to do before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys; 1st. Because they are a mere description of the land which the surveyor is authorized by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the land office at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and give notice of the bounds thereof, that others may be able to made adjoining locations without danger of interference; this is not such a survey as is returnable so as to lay the foundation of a patent; 2d. It is not authorized by a warrant; 3d. It was not for an actual settler; 4th. It was not made by an authorized surveyor, if you believe, upon the evidence, that the authority to Steel was antedated, and given after the survey was returned. Not the warrant; 1st. Because it was not a warrant of

But, say they, the proviso operates in favor of those only who have been prevented from improving. Suppose a man has improved, but is driven away before the end of his five years' residence: upon their construction he would lose his land, while that of the man who has done nothing would be saved.

We admit that persistence is not required during the war; for it would be idle to impose unavailing efforts; and the question what is persistence? would open a door to endless litigation. One jury would decide one way and another the contrary. The persisting is to begin when the war ceases.

If actual settlement means only improvement, it would be absurd to say made and continued. The word continued cannot apply to a thing which, when once done, is done for ever.

There was the same reason for settlement after the war, as during its existence.

Ingersoll, in reply.

Three questions arise in this case.

1st. Are endeavors persisted in, accepted by the act as a substitute for actual settlement and residence?

54*] *2d. For what period must those endeavors be continued, so as to operate as a dispensation with the condition, and amount to such substitute?

3d. If a forfeiture has been incurred, who is to take advantage of it? Actual settlers or the commonwealth?

1st. Does the act contemplate a persistence in endeavors as a substitute for actual settlement and residence?

It may be necessary first to ascertain the meaning of the words improvement, settlement and residence, both in their general import, and in the appropriate sense in which they are used in the act of 1792.

By improvement is understood clearing, cultivating, or building on lands previously unappropriated. In degree it is infinitely various, from the blazing of a tree with a tomahawk to the highest degree of cultivation.

The first improver has generally been favored in Pennsylvania. But by the present act he has no preference, except in certain specified cases.

Improvement and settlement are not convertible terms. There may be improvement without settlement, but there cannot be settlement without improvement.

Settlement, in the order of things, is subsequent to improvement, and includes it. It signifies a place on which a person lives after having made an improvement, with or without his family.

Whenever the residence commences, the settlement is computed from the time that the improvement was first tenanted.

The act of assembly adopts words of a previously ascertained import. Warrant, survey, improvement and settlement were an inception of, and gave to the warrantee, a defeasible title. The patents were not to issue until after five years' residence, when the right was complete and indefeasible.

Payment of the purchase money, warrant and survey gave a defeasible title, inchoate, and possessory. This *right, whatever it [*55 was, was liable to forfeiture by a non-compliance with the terms of the act. Residence is a continued settlement.

Improvement, as described in the act, settlement, and residence for five years next following the first settlement, were conditions precedent, not to a possessory, but to an absolute title, unless prevention by war should furnish an excuse.

That improvement, settlement, and residence are used in the act as successive and distinct terms is evident from the act itself.

The 5th section speaks of land settled and improved; the 7th of actual settlement and improvement; and the 9th of actual settlement and residence; and of actual settlement made and continued.

The settlement, including such an improvement as is described in the law, is to commence within two years from the date of the warrant. The residence for five years is to commence from the first settling. Hence residence is a continuation of settlement, not a constituent part of it.

It is true that the legislature, when declaring by what means a settlement shall be made, have included a residence of five years, but the absurdity of including a residence of five years in a settlement to be made in two years, evidently shows that they have admitted an error in their language. It is clear that they do not mean what they say, and the question is, what did they mean to say? To make the least possible alteration in the words, so as to express their meaning, is to substitute the future tense for the participle; shall reside, instead of "residing. This removes all the difficulties of the language, and throws great light upon the whole act. The sentence will then read thus: "no warrant shall vest any title in the lands unless the grantee shall, within two years from the date of such warrant, make an actual settlement thereon by clearing, fencing and cultivating at least two acres for every hundred, erecting thereon a messuage for the habitation of man, and shall reside thereon for the space of five years next following his first settling of the same." If, then, the word "residing" be rejected for its *substitute *shall reside*, [*56 there is nothing in the act to justify the proposition that settlement includes five years' residence. There is not another word in the whole act which can suggest such an idea; on the contrary, there are many expressions totally repugnant to the supposition.

Having thus endeavored to ascertain the

title, but of acceptance; 2d. It is not founded on settlement but improvement, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal valid consequence.

As to the caveat; the effect of it was to close the doors of the land office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door, but still the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff, therefore, having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say anything about the defendant's title, and your verdict ought to be for the defendant.

The jury found for the defendant.

meaning of the terms improvement, settlement and residence, let us consider the meaning of the proviso.

We contend that if the grantee has, by force of arms of the enemies of the United States, been prevented from making an actual settlement within two years after the date of his warrant, having during that time persisted in his endeavors to make such settlement, such persistence, though ineffectual, is accepted as a substitute for actual settlement and residence.

We admit that it was with a hope that hardy adventurers would effect an establishment reaching from the Ohio to Lake Erie, and cut off the intercourse between the northern and the western Indians, that the assembly of Pennsylvania passed the law in question. It was at a time when the President of the United States was preparing to hold a treaty of peace with the western Indians at Detroit; and in the same session they authorized the employment of a military force to aid and strengthen those who were exposed on the frontiers. We agreed that it was to encourage the immediate actual residence of bold but poor men, that the legislature required no purchase money for ten years from such as placed themselves upon the lands and began settlements. To this description of adventurers they gave a further security, by protecting them against all warrants not entered in the books of the surveyor of the district at the time the settler fixed himself on the land. From such as inclined to pay money, and operate by placing tenants on the land, and giving such tenants bounties for settling, they required a prompt co-operation with the actual settlers in accomplishing the great undertaking.

Let it be recollected that the person who claimed by actual settlement could hold but one tract, the warrant holder as many as he could 57*] pay for, using only different *names which is perfectly known to be but matter of form. The warrantees were obliged to place a settler on each tract within two years from the date of the warrant, if there should be peace, and at all events to be ready, and make the attempt, to supports the settlers, if the war should continue. Thus they made it the interest of both descriptions, operators with money, and operators with labor, to make a joint and steady effort for two years to realize the expectations formed of this new barrier.

Here it may not be improper to remind the court, that, as the law of Pennsylvania then stood, any alien might purchase and hold land in that state. It has been said that the act was not intended to give an opportunity for speculation; it was certainly intended that foreigners should buy any quantity of land, to the extent of their means of payment.

We do not wish to treat this subject technically; but from the very nature of the property, and the condition as expressed in the law, the grantee has a right to enter upon the land, maintain suits for its recovery or defense, take the profits, alienate, mortgage it, bind it by suffering judgments, transmit it to heirs, subject only to the conditions of the original grant.

Suppose there had been no proviso: take the enacting clause of the section absolutely by itself, what would be the condition of the holders of warrants dated in 1792 and 1793?

The warrantee might enter, nay, he was bound to enter, by the nature of his grant; the public enemy prevents him; the state and the United States are unable to protect him; without any laches in him, the performance of the condition becomes impossible by the act of the public enemy. Would the common law say that the estate should be lost?

Are not these conditions what the law terms subsequent? If precedent, no interest could arise. The warrantee could exert no act of ownership until the *conditions were all [*58 performed. Here, his performance depends upon his being exclusively the possessor and owner.

In one sense of the word, all conditions are precedent; that is, they ought to be performed before the estate becomes absolute; but in law, those only are termed precedent which must be performed before the grantee can enter upon the estate or recover at law.

Conditions subsequent refer to cases where the party may immediately take and enjoy the grant, but perform afterwards, having, in the meantime, a qualified title, (and the right of possession. Is it not a settled and a reasonable rule, that conditions tending to defeat an estate once qualifiedly vested, shall be construed strictly? and also, that courts will hold a condition to be either precedent, or subsequent, according to the intent of the party creating it, whatever be the form of words, and when the same words may constitute either the one or the other, according to the nature of the case.

We are to show that there is a substitute for actual performance; what that substitute is will be a subject of inquiry under the 2d head.

The legislature considered two years as a reasonable time after the date of the warrant, in which to complete the specified improvements in a season of peace. A distant wilderness was to be explored, provisions to be collected and transported; clearing, cultivating and building, where laborers were scarce, were difficult and of slow progress. Actual settlement within two years was of indispensable necessity, in order to obtain full title, unless prevented by the enemies of the United States.

The question then offered itself to the legislature, shall the continuance of the war release the condition, and endeavors be equivalent to performance?

*We contend that the principle of the [*59 proviso is, that if the warrantee does what he can, according to circumstances, he shall not be injured on account of the war, nor thereby be delayed in the acquisition of his title.

The price of the lands, and the terms of purchase, were fixed upon the basis of peace. Twenty dollars per hundred acres, with the condition of settlement and residence was a full consideration in a time of peace. The legislature could not expect to get better terms in a time of war. As the price was to be the same in war and peace, the modification must be in the terms of the condition of settlement and residence.

If with the same price you exact similar conditions of settlement and residence at an indefinite distance of time, and after an intervening war, during the whole of which you require a constant persistence in endeavors to make such settlement, you, in effect, increase, you

double or multiply the sum to be paid as the consideration of the land; and in addition to the original terms of price, settlement and residence, you gain the use of the money, and the co-operation of individuals in forming that barrier, which was one of the great objects of the act; the purchaser loses both the interest of his money and the use of his land. It is impossible. therefore, to require endeavors during, and accomplishment after, the war, and yet say that the purchaser does not pay a higher price for the land on account of the war.

It becomes important to consider whether the endeavors were to be persisted in during the war; for we have been lately told, for the first time, that persist means desist during the war, and after the war it again means persist.

It is admitted that a frontier of hardy inhabitants to oppose against the incursions of the savage enemy was a leading consideration with the legislature; it was natural for them to wish attempts to settle might be made during the 60*] war. It was acknowledged to be *unreasonable that the hazardous experiment should be made at the expense of the adventurers. The event was doubtful. Hopes of success were, however, entertained. The law contemplated the disposal of two millions of acres. What number of persons might be induced to share in its undertaking was uncertain.

But the words of the act admit of no doubt that the persisting was to be in a time of war. If the grantee shall be prevented by the enemy, and shall persist in his endeavors; that is, in his endeavors to surmount the obstacle which prevented the settlement, namely, the force of arms of the enemies of the United States, then, &c.

2d. What is the period of time during which the endeavors were to be continued in order to effect a release of the condition, and amount to a substitute for performance?

As two years from the date of the warrant was the time in which the settlement was to be made, if there had been no prevention, we say that perseverence in endeavors during the same period in a time of war, was all which the legislature required;

Because, without the proviso, the estate of the grantee would then have become absolute at common law, and the proviso, being for the benefit of the grantee, shall not place him in a worse situation that if it had not been inserted;

Because, to adopt the principle which is urged against us, that we ought to commence in a reasonable time after the removal of the force, is worse than forfeiture, as it introduces infinite confusion and endless controversy;

Because, taking possession, clearing, fencing, cultivating and building, are nowhere in the law required of the warrantee after two years from the date of the warrant, and persistence must relate to the act of taking and maintaining possession;

61*] *Because, the law does not provide for cases of interruption by war for more than two years; and to require longer efforts would be lengthening the persistence to the end of the war, and five years afterwards; which would be inconsistent with the last clause of the proviso, giving absolute estates after certain persistence had failed; And,

Because, if the persistence had been construed to be indefinite, no man of any prudence among ourselves, and no foreigner or individual would have advanced a dollar on those lands.

No man could, on that idea, conjecture when he might get a title; the war might continue ten years; the country might be restored to the Indians for a stipulated time; or settlements might have been prohibited by the United States; and in all these events the purchaser would have lost his money and labor.

The legislature departed from the common law in requiring a persistence during the war. For what purpose? To carry a favorite point. An establishment of settlers from Presqu'isle to the Ohio. What do they promise for this extra requisition? An absolute title, if the exertions for two years should be ineffectual.

But he is to "persist in his endeavors to make such actual settlement as aforesaid;" that is, within two years from the date of the warrant. No other kind of settlement, and no other time is prescribed. But he could not persist to make such actual settlement within two years from the date of the warrant, after those two years had expired; and a settlement made after the two years could not have availed.

3d. If the persistence must be for more than two years, when will it end? Where is the term at which the legislature has said the estate shall become absolute? If the grantee get possession at the end of the five years, must he go still further and reside five years? There can be no pretence for persisting five years, because, without a settlement made, there is no epoch from which the five years are to begin to run; and there can be no settlement made but within two years from the date of the warrant. *If no settlement within the two years, no [*62 question can ever arise respecting the five years.

4th. If the proviso has any meaning different from the common law, respecting force of arms of a public enemy, it certainly means to impose a new duty upon the grantee, and to give him an equivalent.

What was the new duty? Persistence for two years, whether the country was at peace or war.

What was the equivalent? Substitution of ineffectual, though sincere persistence in endeavors for actual settlement.

What was the motive for this departure from the common law? A sanguine hope of removing the enemy to a great distance from our old settlements, by blocking up the pass through which they so easily entered.

With this construction of the act, every proceeding of the state, and of the grantees, will perfectly harmonize.

But if the meaning be doubtful, and resort should be had to the common law, such a construction would be made as might confirm the estate, and quiet a bona fide purchaser; and no construction could possibly be adopted which would repeal such an express stipulation in favor of the grantee, as is contained in the last clause of the proviso.

5th. If a forfeiture has incurred, or if the title has reverted to the state, by the default of the grantee, by whom can advantage be taken? By individuals or by the state, and in what method?

We contend by the state only. And we rely upon general principles; on the reason and con-

venience of the thing; on the express provisions of the legislature, and on the decisions of the state judges, without a dissentient voice, or the expression of a doubt.

If any individual may enter upon the tenant of the Holland Company whenever he shall 63*] choose to say that *the settlement is not completed in due time, they may be dispossessed of every foot of land they have taken up. Numbers and strength are against them.

It is a general principle of law, that the commonwealth can only take by inquest of office, of entitling, or of instruction. The title of the sovereign must appear on record.

This rule is founded in good sense and propriety, and is enforced, in this instance, by a further rule, that whoever comes into possession with title, or by law, shall not be dispossessed without process.

If uninformed individuals, under the influence of bias and passion, are to decide the question of forfeiture, and to enter on the lands at their discretion, stay as long as they please before they apply for a warrant, and so in succession, upon the idea either of forfeiture or failure in persistence in endeavors to settle, innumerable mischiefs and endless confusion will indeed ensue.

The legislature foresaw the great inconveniences that would result from constituting every needy adventurer a judge of their meaning in this law, and have, therefore, marked out the mode in which advantage shall be taken of a default in the grantee, by providing that in default of actual settlement and residence, the commonwealth may grant new warrants to other actual settlers. The commonwealth, therefore, is to be satisfied, in the first place, that the default has been made; and, in the second place, that the applicant is such an actual settler as may purchase; and, in the third place, a warrant must issue to the applicant before he can have any right to enter.

By the terms *other actual settlers*, the legislature meant persons who were willing to come under engagements to settle; persons who will purchase the land subject to the condition of settlement; or, in the language of the second section of the act, "who will cultivate, improve, and settle the same," not who have cultivated, improved and settled; or, in the language of the 3rd section, "who are desirous to settle and improve."

64*] *Lewis, on the same side.

The proviso does not relate to the residence. A settlement may be made and not continued. If a man has completed his settlement, and is driven off by the enemy before he has finished the five years' residence, we say the residence is dispensed with; for he is only to persist in endeavors to make the settlement; and if the settlement is already made, he cannot be required to persist in his endeavors to make it. That part of the proviso, therefore, relative to persistence, does not apply to him who has finished his settlement. The proviso as to him will read thus: that if such actual settler shall be driven from his settlement, he shall be entitled to hold in the same manner as if the settlement had been continued. Our construction, therefore, does not involve the consequence which gentlemen have supposed.

There is a passage of the act which has not been noticed, and which strongly implies that residence is not included in settlement. It is this: "And that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so as often as defaults shall be made." If settlement includes the five years' residence, then an actual settler is a person who has made an actual settlement by clearing, fencing, cultivating, building and residing five years on the land. If on default the commonwealth is to grant the land to such an actual settler only, there never can be but one default, because the second warrantee will have complied with all the requisites for a full and absolute title before the warrant is granted. The words, *and so as often as defaults shall be made*, would, in such case, be nugatory and nonsensical.

No argument can be drawn from the 15th section; for it does not follow that because one section requires a particular construction, different words, relative to a different subject in another section, must have a similar construction. It only shows, what we all agree is the fact, that the act is very inaccurately drawn, and cannot be understood according to its strict letter.

*Wednesday, February, 27. MARSHALL, *Ch. J.*, delivered the opinion of the Court as follows: [*65

The questions which occurred in this case, in the circuit court of Pennsylvania, and on which the opinion of this Court is required, grow out of the act passed by the legislature of that state, entitled "An act for the sale of the vacant lands within this commonwealth."

The 9th section of that act, on which the case principally depends, is in these words: "and be it further enacted," &c.

The questions to be considered, relate particularly to the proviso of this section; but to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described therein shall vest in him.

Two classes of purchasers are contemplated. The one has already performed every condition of the sale, and is about to pay the consideration money; the other pays the consideration money in the first instance, and is afterwards to perform the conditions. They are both described in the same sentence, and from each an actual settlement is required as indispensable to the completion of the title.

In describing this actual settlement, it is declared that it shall be made, in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing, and cultivating, at least two acres for every hundred acres contained in one survey erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside, thereon for the space of five years next following his first settling of the same, if he or she shall so long live."

*The manifest impossibility of completing a residence of five years within the space of two years, would lead to an opinion that the [*66

part of the description relative to residence, applied to those only who had performed the condition before the payment of the purchase money; and not to those who were to perform it afterwards. But there are subsequent parts of the act which will not admit of this construction, and, consequently, residence is a condition required from the person who settles under a warrant, as well as from one who entitles himself to a warrant by his settlement.

The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading, suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of "and residing, or causing a family to reside thereon," and *shall reside, &c.* The effect of this correction of language will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that in the view of legislature, the settlement, and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words "such actual settlement and residence," which prove that residence is required from the warrantee, prove also, that settlement and residence are, in contemplation of the law, distinct operations. In the nature of things, and from the usual import of words, 67*] they are also distinct. To make a *settlement no more requires a residence of five, than a residence of five hundred years; and, of consequence, it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms settlement and residence being understood, the court will proceed to consider the proviso.

That part of the act treats of an actual settler, (under which term is intended as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee who had made an actual settlement in performance of the conditions annexed to his purchase,) and of "any grantee in any such original or succeeding warrant;" who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced, are brought together in the same sentence, and terms are used appropriate to the situation of each, but not applicable to both. Thus, the idea of "an actual settler," "prevented from making an actual settlement," and after "being driven therefrom," "persisting in his endeavors," to make it, would be absurd. To apply to each class of purchasers all parts of the proviso, would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is to apply the provisions distributively to the description of persons to whom they are adapted, *reddendo singula singulis.* The proviso then would read thus: "Provided always, nevertheless, that if any such actual settler shall be driven from his settlement, by force of arms of the enemies of the United States; or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands in the *same manner as if the ac- [*68 tual settlement had been made and continued."

The two cases are, the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavors to make one.

It is perfectly clear, that in each case the proviso substitutes something for the settlement to be made within two years from the date of the warrant, and for the residence to continue five years from the commencement of the settlement, both of which were required in the enacting clause.

What is that something?

The proviso answers, that in the case of an "actual settler," it is his being "driven from his settlement by force of arms of the enemies of the United States," and in case of his being a grantee of a warrant, not having settled, it is "persisting in his endeavors to make such actual settlement" in neither case his residence, or persisting in his endeavors at residence, required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement; for in the same sentence they say, that the person who comes within the proviso shall hold the land, "as if the actual settlement had been made and continued."

It is contended, on the part of the defendant, that as the time during which persistence shall continue is not prescribed, the person claiming the land must persist until he shall have effected both his settlement and residence, as required by the enacting clause of the act. That is, that the proviso dispenses with the time, and only with the time, during which the condition is to be performed.

But the words are not only inapt for the expression of such an intent; they absolutely contradict it.

*If the proviso be read so as to be in- [*69 telligible, it requires nothing from the actual settler who has been driven from his settlement. He is not to persist in his endeavors at residence, or, in other words, to continue his settlement, but is to hold the land. From the warrantee, who has been prevented from making a settlement, no endeavors at residence are required. He is to "persist in his endeavors," not to make and to continue such actual settlement, but "to make such actual settlement as aforesaid." And if he does persist in those endeavors, he is to hold the land "as if the actual settlement had been made and continued." The construction of the defendant would make the leg-

islature say, in substance, that if the warrantee shall persist in endeavoring to accomplish a particular object, until he does accomplish it, he should hold the land as if he had accomplished it. But independent of the improbability that the intention to dispense only with the time in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used which seem to restrict the time during which a persistence in endeavors is required. The warrantee is to persist in his endeavors "to make such actual settlement as aforesaid." Now, "such actual settlement as aforesaid," is an actual settlement within two years from the date of the warrant. As it could only be made within two years, a persistence in endeavoring to make it, could only continue for that time.

If, after being prevented from making an actual settlement and persisting in endeavors, those endeavors should be successful within the two years after which the person should be driven off, it is asked what would be his situation?

The answer is a plain one. By persisting he has become an actual settler; and the part of the proviso which applies to actual settler protects him.

If, after the two years, he should be driven off, he is still protected. The application of external violence dispenses with residence. The 70*] Court feels itself bound *to say so, because the proviso contains a substitute, which, in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause; and of that substitute residence forms no part.

In a great variety of forms, and with great strength, it has been argued that the settlement of the country was the great object of the act; and that the construction of the plaintiff would defeat that object.

That the exclusive object of an act to give lands to settlers, would be the settlement of a country, will be admitted; but that an act to sell lands to settlers, must have for its exclusive object the settlement of the country, cannot be so readily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far those two objects might be consulted, or how far the one yielded to the other, is only to be inferred from the words in which the legislative intention has been expressed. How far the legislature may have supposed the peopling of the district in question to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shown by their own language. At any rate, if the legislature has used words, dispensing with residence, it is not for the court to say they could not intend it, unless there were concomitant expressions, which should explain those words in a manner different from their ordinary import. There are other considerations in favor of the construction to which the court is inclined.

This is a contract; and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally.

The state is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property.

*If he should couch his propositions in [*71 such ambiguous terms that they might be understood differently, in consequence of which sales were to be made, and the purchase money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity, and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

It being understood that the opinion of the Court on the two first questions has rendered a decision of the third unnecessary, no determination respecting it has been made.

It is directed that the following opinion be certified to the circuit court.

Certificate of the opinion.

1st. That it is the opinion of this Court, that under the act of the legislature of Pennsylvania, passed the 3d day of April, A. D., 1792, entitled "An act for the sale of the vacant lands within this commonwealth," the grantee, by a warrant of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the 10th of April, 1793, the date of the said warrant, until the 1st of January, 1796; but who, during the said period persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 9th section of the said law prescribes to vest a title in the said grantee.

2d. That it is the opinion of this Court, that a warrant of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, granted in the year 1793, under and by virtue of an act of the legislature of Pennsylvania entitled "An act for selling the vacant lands in this commonwealth," to a person, who, by force of arms of the enemies of the United States, was *prevented from [*72 settling and improving the said land and from residing thereon from the date of the said warrant until the 1st of January, 1796, but who, during the said period, persisted in his endeavors to make such settlement and residence, vests in such grantee a fee-simple in the said land, although, after the said prevention ceased, he did not commence, and, within the space of two years thereafter, clear, fence and cultivate, at least two acres for every hundred acres contained in his survey for the said land, and erect thereon a messuage for the habitation of man, and reside, or cause a family to reside, thereon for the space of five years next following his first settling of the same, the said grantee being yet in full life.

JOHNSTON, *J.* I concur in the decision given by the Court in this case; but there was a question suggested and commented on in the argument which has not been noticed by the court, but which appears to me to merit some consideration.

It was inquired by the counsel for the defendant, should the court adopt the principle that persistence for two years is to be substituted for an actual settlement and residence, what is to be the effect of a partial prevention? Is the

warrantee to be subjected to the necessity of making good his settlement, should the prevention cease or commence at any point of time during the two years without any, or under what limitation?

It is undoubtedly true, that any construction of a statute which will produce absurdities, or consequences in direct violation of its own provisions, is to be avoided. It were better not to depart from their literal signification than to involve consequences so inconsistent with the nature and very idea of legislation. But it does not appear to me that any embarrassment will attend the construction of this act which the court has adopted; that the case of a partial duration of the existence of the preventing cause is not within the view of the proviso; that it is not excepted from the operation of the enacting clause. It would be absurd to impose upon the warrantee the necessity of performing in a few months, perhaps at the most inconvenient season of the year, a condition for which the act proposes to hold out to him an indulgence 73*] *of two years; when prevented too by a cause not within his control, and against which the state was bound to protect him. If such were the case now before the court, I should be of opinion that we must resort to general principles for a decision. With regard to the performance of conditions, it is a well known rule, that obstructions interposed by the act of God, or a public enemy, shall excuse from performance, so far as the effect of such preventing cause necessarily extends.

In cases of partial prevention I should therefore be of opinion, that it would be incumbent upon the warrantee to satisfy the court that he had complied with the conditions imposed by the act, so far as he was not necessarily prevented by the public enemy.

It may appear singular that a deficiency, of a single day perhaps, should produce so material an alteration in the rights or situation of the warrantee. But the legislature of Pennsylvania were fully competent to make what statutory provisions they thought proper upon the subject; and the court is no further responsible for the effect of the words which they have used to express their intent, than to endeavor to give a sensible and consistent operation to them in every case that can occur.

THE UNITED STATES
v.
HOOE *et al.*[1]

Saturday, February 23.

The United States have no lien on the real estate of their debtor until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has made a voluntary assignment of all his property; or the debtor having absconded, concealed, or absented himself, his property has been attached by process of law.

A mortgage of part of his property made by a collector of the revenue to his surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgageor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew at the time of taking the mortgage that the mortgageor was largely indebted to the United States.

Costs are not to be awarded against the United States.

ERROR to the circuit court of the District of Columbia.

Mason, Attorney of the United States for that district, on the 17th of August, 1801, filed a bill in equity against Robert T. Hooe, W. Herbert, John C. Herbert, and the executors, widow and heirs of Col. John Fitzgerald, late collector of the customs for the port of Alexandria, and obtained an injunction to prevent the sale of certain real *estate in Alexandria, adver- [*74 tised for sale by W. and J. C. Herbert, under a deed of trust made by Fitzgerald for the indemnification of Hooe.

The material facts appearing upon the record are, that Fitzgerald, upon being appointed collector, executed a bond to the United States, on the 10th of April, 1794, with Hooe as surety, in the penalty of 10,000 dollars, for the faithful performance of the duties of his office. In April, 1798, he was found to be greatly in arrears, and upon a final adjustment of his accounts, on the 15th of August, 1799, the balance against him was 57,157 dollars. On the 16th of January, 1799, Hooe having knowledge that Fitzgerald was largely indebted to the United States, but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the bank of Alexandria to meet the drafts of the treasury of the United States, and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety for Fitzgerald in the bond to the United States, and Fitzgerald proposing, when he should wish to obtain a loan of money from the bank of Alexandria, to draw notes to be indorsed by Hooe, whereby the latter might be liable and compelled to pay the same, and the former being desirous of securing and indemnifying Hooe from all damages, costs and charges which he might at any time thereafter be subject and liable to by reason of any misconduct of Fitzgerald in the discharge of his duty as collector, or for or on account of any notes drawn by him for his particular use and accommodation, and indorsed by Hooe, and negotiated at the bank of Alexandria. The indenture then witnessed, that for those purposes, and in consideration of the trusts and confidences thereinafter expressed, &c., and of one dollar, &c., Fitzgerald bargained and sold, &c., to the trustees, W. and J. C. Herbert, the real estate therein described, to have and to hold the same to them, and the survivor of them, &c., "in trust, to and for the uses and purposes hereinafter mentioned, and to and for no other use and purpose whatsoever; that is to say, in case he the said John Fitzgerald shall neglect any part of his duty as collector of the said port of Alexandria," &c., "or in case any note or notes so drawn, indorsed and negotiated at the bank of Alexandria, for the particular use and *accomodation of him the said John Fitz- [*75 gerald, shall not be taken up and discharged by him when the same shall become payable; that in either case, as soon as any demand shall be

1.—Present, Marshall, *Ch. J.;* Cushing, Paterson, Washington and Johnson, *Justices.*

made upon him, the said R. T. Hooe," &c., "for the payment of any sum or sums of money which ought to be paid by the said John Fitzgerald," &c., then the trustees should, upon notice given them by Hooe of such demand, proceed to sell the property for ready money, and, after paying the expenses of sale, should pay and satisfy the sum or sums of money so demanded of Hooe, either as security for Fitzgerald's due and faithful execution of the office of collector of the said port of Alexandria, or as indorser of any note or notes so drawn by Fitzgerald, "and negotiated at the bank of Alexandria for the particular accommodation of the said John Fitzgerald; and lastly, to pay over to him the surplus. And in further trust, that if Fitzgerald should duly keep Hooe indemnified, &c., and should duly pay the several notes which should be so drawn by him and indorsed by Hooe, and negotiated at the said bank, "for the particular accommodation of him the said John Fitzgerald, as the same shall become payable," then the trustees should reconvey, &c.

Hooe had indorsed Fitzgerald's notes at the bank to a large amount, and at the time of his death there were unpaid two notes of 1,000 dollars each, and one of 1,800 dollars; one of which, for 1,000 dollars, together with interest upon the whole, amounting to 288 dollars and 94 cents, was afterwards paid by Mr. Keith, one of the executors, in order to prevent a sale of the property under the trust. There was also evidence tending to show that the money borrowed from the bank upon Hooe's indorsement was applied in discharge of warrants drawn by the treasury upon Fitzgerald.

Fitzgerald died in December, 1799, having by his will directed his real estate to be sold for the payment of his debts. There was no positive evidence of his insolvency.

The bill charged that he died insolvent, and that the United States had a right, in preference to all others, to apply his property to the discharge of the debt, and if there should be a deficiency, to resort to the surtey for the balance, as far as the penalty of the bond would 76*] justify; *and that the deed of trust was fraudulent as to the United States.

On the 1st of May, 1802, the injunction was dissolved by consent, and an interlocutory decree entered, ordering the trustees to pay the proceeds of the sale into court, subject to future order touching the contending claims of the United States and Hooe.

At November term, 1802, the court passed the following decree.

"The objects of the bill filed in this cause were to set aside a deed executed on the 16th of January, 1799, by John Fitzgerald to William Herbert and John Carlyle Herbert, conveying certain property therein mentioned, in trust, for the purpose of indemnifying Robert Townsend Hooe, as indorser of certain notes negotiable in the bank of Alexandria, and as surety of John Fitzgerald, in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to compel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him; and further to restrain and enjoin the said trustees from making the sale of the said real property."

An injunction for the said purpose was granted by one of the judges of this court, in vacation; and afterwards, viz., at April term, 1802, after the appearance of the defendants, who were of full age, an agreement was made, and entered on the records and proceedings of this court, to the following effect, viz., that so much of the former order of this court as restrained the defendants, W. Herbert and John C. Herbert, from selling the property in the deed of trust, in the bill mentioned, be discharged; and it was further decreed and ordered, that the said trustees should pay the proceeds arising from the sale of the said property, or of any part thereof, into this court, subject to the future order of the court touching the contending claims of the United States and of R. T. Hooe, one of the defendants to the said bill; and now, at November term, 1802, the said cause came *on by consent of parties, [*77 and by order of the court, on the bill, and on the answers of the defendants, (those of the infants being taken by their guardians, appointed for that purpose), and on the exhibits in the said bill and answers referred to, and on those afterwards admitted, and the arguments of counsel being heard in the said cause, and the same being by the court fully considered; it is the opinion of the court, that the deed of trust, in the said bill mentioned, was made bona fide, and for a valuable consideration, and was fairly executed by the said John Fitzgerald, to indemnify and save harmless the said R. T. Hooe from all loss and damage, by reason of his indorsement of several notes, negotiated at the bank of Alexandria, amounting to the sum of 3,800 dollars, to enable the said John Fitzgerald to pay that sum to the United States; which appears to have been paid accordingly; and also, to indemnify and save harmless the said R. T. Hooe against all loss and damage, by reason of his having become bound in a bond, in the penalty of 10,000 dollars, payable to the United States, as security for the said John Fitzgerald's faithful performance and due discharge of the office of collector of the customs in the district of Alexandria. That there does not appear to have been any fraud in the said parties, or either of them, and that the said deed is not invalidated by any law of the United States.

It is thereupon, by this court, decreed and ordered, that the bill in this cause, as to all the defendants, except R. T. Hooe, W. Herbert, and J. C. Herbert, be retained for the further order and decree of this court, and that as to the said defendants, R. T. Hooe, W. Herbert, and J. C. Herbert, the said bill be dismissed with costs to the said defendants. And as to the money which has arisen from the sale of the said real property, the net amount of which is 14,318 dollars and 66 cents, after deducting the charges of the sale, and which has been, by the order of this court, deposited by the clerk thereof in the bank of Alexandria; this court doth decree and order, that the said clerk do pay the sum of 4,318 dollars and 66 cents, part thereof, to the said trustees, W. Herbert and J. C. Herbert, to be by them applied to the discharge *of the sum of 3,127 dollars, due [*78 upon certain notes negotiated in the bank of

Alexandria, on which the said R. T. Hooe was an indorser for the said John Fitzgerald; and also to the repayment to the executors of the said John Fitzgerald, of the sum of 1,185 dollars, advanced and paid by them to the bank of Alexandria, for and on behalf of the said R. T. Hooe, in part payment of the notes negotiated in the said bank for the said John Fitzgerald, and indorsed by the said R. T. Hooe, which it was intended the said R. T. Hooe should be indemnified against by the said deed; and the residue, if any there should be, of the said sum of 4,318 dollars and 66 cents, to be paid by the said clerk into the treasury of the United States, in discharge of so much of the balance due from the estate of the said John Fitzgerald; and that as to the residue of the proceeds of the said sale, being the sum of 10,000 dollars, the said clerk do pay the same into the treasury of the United States, expressly in discharge of the said sum of 10,000 dollars, for which the said R. T. Hooe is bound in the bond, which, in the said bill and answers is referred to, and to go also in discharge of so much of the claim of the United States against the said John Fitzgerald, and the same is decreed and ordered accordingly.

To reverse this decree a writ of error issued returnable to February term, 1803, which was dismissed for want of a statement of the facts upon which the decree was founded.[1]

The November term, 1802, of the circuit court, at which the original decree was entered, being continued by adjournment, to April, 1803, Mason, after the dismission of the writ of error, moved the court below to make a statement of the facts upon which the decree was founded, to be sent up with a new writ of error; and urged, that as it was, in contemplation of law, the same term in which the decree was made, it was competent for the court to open it for that purpose. But the court, being of opinion that by the writ of error the record was completely 79*] removed, *and the decree thereby made absolute, refused to make the statement.

A new writ of error was sued out by the United States, returnable to February term, 1804; upon the return of which,

Swann, for the defendants in error,

Contended, that the late act of Congress of 3d March, 1803, vol. 6, p. 315, c. 93, s. 2, did not apply to this case, because it was passed after the final decree rendered; and that the court was still precluded from looking into this case, and correcting the errors in the decree, if any such existed, without a statement of the facts upon which the decree was founded; but,

BY THE COURT. The words of the act are, "that from all final judgments or decrees, rendered, or to be rendered, in any circuit court," "in any cases of equity," &c. "an appeal shall be allowed," "subject to the same rules, regulations and restrictions as are prescribed in case of writ of error."

A perfect analogy exists between the cases of appeals and of writs of error, as to the time in which they may be granted, and the judge who can grant the one may allow the other. The act of Congress comprehends past cases as well as future.

1.—See *ante*, vol. 1, p. 318.

The cause was continued for argument, and at this term was argued by Mason, for the United States, and by C. Lee and Swann, for the defendants in error.

Mason, after observing that the evidence did not support the allegation that the money borrowed of the bank, upon Hooe's indorsements, was applied to the use of the United States, contended,

1. That the deed was fraudulent as to all the world, because it empowered Fitzgerald to borrow money *upon it for his own use, [*80 while it protected the property from his creditors.

2. That Hooe has no preference to the United States; and even if the deed was not fraudulent as to all the world, yet Hooe stands in such a situation that he must be postponed to the United States and all other creditors.

1. Hooe admits that he had notice of Fitzgerald's default to at least the amount of 30,000 dollars, but the exact amount is unimportant. And although, in his answer, he gives an opinion as to the value of Fitzgerald's estate, at the date of the deed, yet he admits that such as it then was it now is, excepting any depreciation which it may have suffered.

The deed, inasmuch as it contains a power to raise money upon it, in future, for his own use, is a deed in trust for himself, and, therefore, fraudulent upon general principles of law. His power to borrow money upon it is unlimited by any thing but the value of the property and the good will of Hooe; and the money thus raised upon it might have been applied exclusively to his own use.

The words of the statute of 13 Eliz. c. 5, which have, in substance, been inserted into the Virginia code of laws, are large enough to take in this case; and the cases decided under it clearly apply to the present deed. Indeed, that part of the statute which makes such deeds void as to creditors, is no more than a declaration of the pre-existing rule of the common law. 2 Bac. Abr. tit. Fraud; 2 Com. Dig. tit. Covin.

The 5th sign of fraud mentioned in *Twyne's Case*, 3 Co. 81, b. is, that there "was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always appareled and clad with a trust, and a trust is the cover of fraud." And it is unimportant whether the trust be expressed or implied. Every gift made on a tract is out of the proviso of the act. Here it was part of *the [*81 trust that Fitzgerald should raise money upon the deed to his own use; and a deed which covers the property from his creditors, and gives the grantor the whole benefit and use of it, is the very kind of deed which the statute meant to avoid. If, then, the deed is void as to creditors, Fitzgerald is dead, and the United States must be preferred in payment.

2. Hooe cannot be preferred to the United States, in consequence of this deed, even supposing it not to be fraudulent under the statute of Elizabeth, but must be postponed to the United States and all other creditors.

This case stands on the same ground as a bond given for duties, in which case it is enacted by the act of 4th of August, 1790, c. 35, s. 45, vol. 1, p. 169, that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all

the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied." The insolvency here mentioned means an inability to pay all his debts, and is so expounded by the act of 2d of May, 1792, c. 27, s. 18, vol. 2, p. 79, in which it is "declared that the cases of insolvency in the said 44th" (45th) "section mentioned, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

A voluntary assignment, for the benefit of his creditors, made by a debtor, unable to pay all his debts, is one of the cases in which the United States are to have a preference. The word "voluntary" does not mean without consideration, but without compulsion of law, as in cases under a bankrupt law. A deed made to secure a just debt may, in this sense of the word, be a voluntary deed of assignment. The 82*] instant a man *makes such a voluntary assignment, the preference of the United States attaches, if, upon subsequent inquiry, it shall appear that he is unable to pay all his debts. The act of 2d of March, 1799, c. 128, s. 65, vol. 4, p. 387, has the same words, explanatory of the term insolvency, with those of the 18th section of the act of 1792, vol. 2, p. 79. The legislature did not mean to confine it to cases of insolvency, under a bankrupt or insolvent law of any of the states, or of the United States, nor to voluntary conveyances of all the property of a debtor, for the benefit of his creditors.

In the present case, all the property remains in the same state in which it was at the time of the deed, and it is not contended that it is sufficient to pay all the debts; for if it is, Hooe can receive no injury; but if it is insufficient, then he can derive no benefit until the United States are first satisfied.

We do not contend that the United States had a lien upon the property. That is a distinct question, and has been decided by this court, at the present term, in the case of *The United States v. Fisher et al.*

But it is right that the interest of all should prevail over that of an individual.

We admit that Fitzgerald had the right to sell and alien the property, but it does not follow that he could, by a mortgage, or an assignment, prefer a particular creditor to the United States.

The object of the legislature was, that if a man is unable to pay all his debts, and attempts to give a particular preference, his hand shall be stopped until the debt due to the United States shall be satisfied. If it turns out that he was actually insolvent, the United States, and not the individual creditor, shall have the preference.

The object of the deed is, that if Fitzgerald's estate should be insufficient to pay all his debts, Hooe shall be preferred.

83*] *But the act of Congress says, that in that event the United States shall be preferred. The deed and the act are inconsistent with each other, and the deed must yield to the act.

Among individual creditors he had a right to prefer one over another, and such deeds would have been effectual, saving the priority of the United States.

This question is the same as if it had arisen upon a bond given for duties; for by the act of 3d of March, 1797, c. 74, s. 5, vol. 3, p. 421, it is enacted, "that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," &c., "the debt due to the United States shall be first satisfied; and the priority hereby established, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof," &c., "as to cases in which an act of legal bankruptcy shall be committed."

This is a voluntary assignment, and Fitzgerald died insolvent. It is not necessary that he should have been so at the time of executing the deed. If he become so afterwards, and before the trust is executed, it is sufficient. It is the intention of the law, if there is an actual insolvency, that all priorities should yield to that of the United States.

The United States, therefore, have a right to the whole of Fitzgerald's estate, in the first place; and if that is insufficient to pay the debt, they may resort to Hooe for the whole penalty of the bond, if necessary.

C. Lee and Swann, contra, contended,

1st. That the deed was made bona fide, and for a valuable and good consideration, and, therefore, valid upon general principles both of law and equity.

2d. That it was not invalidated by any statute of the United States.

*1. Indemnity is a good consideration [*84 within the statute of Eliz. 1 Burr. 474, *Worseley v. Demattos*, to the whole of which case the attention of the Court is requested, because, in almost every part, it is applicable to the present.

The deed was also bona fide. There is no evidence that Hooe knew of Fitzgerald's inability to pay his debts at the date of the deed. Indeed, there is no positive evidence of the insolvency of the estate, even at this moment. It has none of the marks of fraud mentioned in Twyne's case. First, it is only for a part, perhaps not a third part, of his estate. Secondly, although Fitzgerald remained in possession, yet, it being real estate, possession was no mark of fraud, and could not deceive and defraud others, because the deed must of necessity be upon record. Thirdly, it was not made secretly. Fourthly, it was not made pending any process against Fitzgerald. Fifthly, here was no secret trust for the benefit of the grantor; and, Sixthly, it contains no unusual clauses in support of its honest and fair intentions, which, Lord Coke says, always induce suspicion.

The whole evidence in the case shows, that the only intention of the parties was that which is expressed fully and fairly in the deed. He had a right to indemnify Hooe at the time of giving the bond, and it can make no difference whether he executed the deed at that time or afterwards; the consideration was equally good at one time as at the other. It could be no fraud in Hooe to wait for security as long as he thought himself safe; and it could be no fraud

in Fitzgerald to give a security, which he was bound in honor and conscience to give whenever it should be demanded.

Mason, in answer to a question from the Chief Justice, whether there was any act of Congress which subjected the lands of the debtors of the United States to a specific lien, said he knew of none, unless it was the act of 11th July, 1798, c. 88, s. 15, vol. 4, p. 197. But in the present case, Fitzgerald, by his will, charged his lands with the payment of his debts; and if he had not, they would have been liable to an *elegit*.

85*] *CHIEF JUSTICE. I have considered the act of 1798; it only creates a lien when a suit is commenced.

Monday, February 25. MARSHALL, *Ch. J.* I am directed by the Court to inform the counsel in this case, that they do not wish to hear any argument from the counsel of the defendants in error, upon the general question of fraud, being satisfied on that point.

The Court also wishes to draw the attention of the counsel to the question, whether there is any evidence of Fitzgerald's insolvency in the record.

Mason, for the United States.

The deed in this case is contingent; the power to the trustees to sell is contingent. They can only sell to indemnify Hooe. Until he is damnified they have no power to sell. The rents, issues and profits, are to be taken by Fitzgerald only; and the legal estate being in the trustees, the property is protected from the *elegit* of the creditors. Suppose the property conveyed to be double the value of Hooe's claim, the residue would be protected from creditors, and would still be a fund from which Fitzgerald might draw supplies to himself.

But the insolvency, mentioned in the act of Congress, means an inability to pay his debts, in contradistinction to an insolvency under a bankrupt law, or an insolvent act.

A voluntary deed, in the act, means a deed by a person unable to pay all his debts, made without coercion of law, to give a preference to some of his creditors. It is not necessary that it should be a conveyance of all his effects. Suppose he should make three separate deeds; one to one of his creditors for one-third of his estate; a second to another creditor for another third of his estate; and a third deed to a third creditor for the residue. The two first deeds would not be less fraudulent than the third, because they conveyed only a part of the estate.

86*] *The decree of the court below is erroneous, because the answers and evidence specified the estate and effects of Fitzgerald, and the court ought to have ascertained the value, and from thence inferred his insolvency. An insolvency so ascertained would have been such an insolvency as would have given the United States a preference.

As to the question whether the insolvency appears upon the record, the bill charges the fact, and none of the answers or depositions denies it. A comparison of the balance due with the effects and estate disclosed in the answers, affords the strongest corroboration; and even Hooe, in his answer, does not deny a knowledge of it. But whether he knew it or not, it is sufficient if we establish the existence of the fact; for in all cases "where any revenue officer," "indebted to the United States," "shall become insolvent," "the debt due to the United States shall be first paid."

C. Lee and Swann, *contra*.

The insolvency contemplated by Congress means a legal insolvency, not a mere incapacity to pay, unattested by some notorious act of failure, such as a voluntary assignment of all the effects for the benefit of creditors, or the closing of doors to prevent process being served, &c.

The cases provided for by the act are,

1. If the debtor "shall become insolvent."
2. Where the estate of a deceased debtor "shall be insufficient to pay all the debts."
3. Where "a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof."
4. Where "the estate and effects of an absconding, concealed, or absent debtor, shall be attached."

The 1st case is that of legal and public insolvency, where the estate and effects are assigned by law. If it *meant every case where [*87 a man was actually incapable of paying all his debts, it would frequently look back and undo all the negotiations of an extensive trade, for many years; for it often happens that a merchant continues in business and credit long after his capacity to pay all his debts has ceased. Besides, it would have been unnecessary for the legislature to add expressly the case of a voluntary assignment, where there was an inability to pay all the debts, if such inability alone was within the meaning of the words "shall become insolvent."

2. The case of a deceased debtor, whose estate shall be insufficient to pay all the debts, would also have been included in the term insolvent, if it is to have so large and loose a construction as is contended for by the counsel for the United States.

3. And so would be the case of a voluntary assignment. But it is said that the present deed is such a voluntary assignment as is contemplated in the act.

The words of the act are, "a debtor not having sufficient property to pay all his debts," that is to say, the whole of whose property shall be insufficient to pay all his debts, "shall make a voluntary assignment thereof," that is, of the whole of his property. The assignment contemplated in the law must, therefore, mean an assignment of the whole; but this is only an assignment of a part, certainly not so much as half of his property, and is, therefore, a complete answer as to that point.

4. The fourth case is of an attachment of the estate and effects of an absconding, concealed, or absent debtor, and does not absolutely require an insolvency, or even an inability to pay all the debts; but is a case of suspicion, in which a public act has been done and suffered, giving notice of the insolvency, if it really exists.

Even supposing, then, that Fitzgerald was actually unable to pay all his debts at the time of executing this deed of trust, (which fact, however, does not appear,) yet, as his property was not divested by act of law, nor by such a voluntary assignment as is contemplated by the act of Congress, the priority of the United States had not attached, *so as by any [*88 possibility to avoid the deed of trust.

This construction of the act of Congress is warranted by the decision of a very respectable circuit court of the United States, in the case of *The United States v. King*, Wallace's Rep. p. 13.

The United States are plaintiffs in equity for an injunction, and the burden is on them to prove all the material allegations of their bill. It is on them to prove the insolvency, not on us to disprove it.

If, then, the deed is not fraudulent in itself, nor made void by any act of Congress, the judgment of the court below was correct, and ought to be affirmed.

Wednesday, February 27. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The first point made in this case, by the attorney for the United States, is, that the deed of the 16th of January, 1799, is fraudulent as to creditors generally.

It is not alleged that the consideration was feigned, or that there was any secret trust between the parties. The transaction is admitted to have been, in truth, what it purports to be; but it is contended that the deed, on its face, is fraudulent as to creditors.

The deed is made to save Hooe harmless on account of his having become the security of Fitzgerald to the United States, and on account of notes to be indorsed by Hooe for the accommodation of Fitzgerald, in the bank of Alexandria.

These are purposes for which it is supposed this deed of trust could not lawfully have been executed; and the deed has been pronounced fraudulent under the statute of 13th of Elizabeth.

That statutes contains a proviso, that it shall not extend to conveyances made upon good 89*] consideration, and bona *fide. The goodness of the consideration, in the case at bar, has been admitted; but it is alleged that the conveyance is not bona fide; and for this, *Twyne's Case* has been principally relied on. But in that case the intent was believed by the court to be fraudulent, and in this case it is admitted not to have been fraudulent. It is contended, that all the circumstances from which fraud was inferred in that case, are to be found in this; but the Court can find between them no trait of similitude. In that case the deed was of all the property; was secret; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case the deed is of part of the property; is of record; is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor. In the case of *Hamilton v. Russel*, this court declared an absolute bill of sale of a personal chattel, of which the vendor retained the possession, to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right. That the grantor is to receive the rents and profits till the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant.

That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due. All the covenants in this deed appear to the court to be fair, legitimate, and consistent with common usage. It will barely be observed, that the validity of this conveyance is to be tested by the statutes of Virginia, which embrace this subject. But this is not mentioned as having any influence in this case.

*The second point for which the plain- [*90 tiffs contend is, that this is a case in which the priority of payment claimed by the United States in cases of insolvency, intervenes and avoids the deed.

This claim is opposed on two grounds. It is contended,

1st. That at the time of making this deed, Fitzgerald was not insolvent in point of fact; and,

2d. That this deed was not a transaction which evidences insolvency under the act of Congress.

In construing the statute on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected.

In the case at bar, it will be observed on the first objection made by the defendants, that the insolvency, which is the foundation of the claim, must certainly be proved by the United States. It must appear that at the time of making the conveyance, Fitzgerald was "a debtor not having sufficient property to pay all his debts." The abstract from the books of the treasury is undoubtedly complete evidence as far as it goes; but it is not intended to show the state of Fitzgerald's accounts in January, 1799. If that had been its object, it would have credited him for the bonds then reported to be on hand. If the case turned entirely on this point, the court would probably send it back for further explanation respecting it. But this would be unnecessary, as it is the opinion of the court that the decree is right, however this fact may stand.

If a debtor of the United States, who makes a bona fide conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the nature of a lien from the instant he became indebted; the inconvenience of which, where the debtor continued to transact business with the world, would certainly be very great.

*The words of the act extend the [*91 meaning of the word insolvency to cases where "a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors." The word "property" is unquestionably all the property which the debtor possesses; and the word "thereof" refers to the

word "property" as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words "or part thereof," or others of similar import, would have been added.

If a trivial portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a bona fide conveyance of part is made not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act.

It is observable, that the term insolvency was originally used, and the subsequent sentence is designed to explain the meaning and intent of the term. The whole explanation relates to such a general devestment of property, as would, in fact, be equivalent to insolvency in its technical sense.

It is the opinion of the Court that there is no error in the decree of the circuit court, and that it be affirmed.

After the opinion was given, it was stated, that the court below had decreed the United States to pay costs, and it was suggested that that circumstance might have escaped the notice of this court, in affirming the decree generally.

Mason observed, that costs were only given by statute, and that the United States are not bound by a statute, unless they are expressly named in it. That there was no means of compelling the United States to pay them.

MARSHALL, *Ch. J.* That would make no difference, because we are to presume they would pay them if bound by law so to do.

92*] *Mason. There is no precedent of a judgment against the United States for costs. In the case of *The United States v. La Vengeance*, 3 Dall. 301, the decree of the circuit court was affirmed with costs. But the next day the Chief Justice directed the words "with costs" to be struck out, as there appeared to have been some cause for the prosecution. But he observed in doing this, the Court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States, but left it entirely open for future discussion.

March 6th. The Court directed the decree of the court below to be affirmed, except as to costs, and reversed so much of the decree as awarded the United States to pay costs, and directed that no costs be allowed to either party in this court.

PEYTON *v.* BROOKE.

Wednesday, February 27.

In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both.

THIS case came before the court, upon a bill of exceptions to the opinion of the circuit court of the District of Columbia, for the county of Alexandria, upon a motion for execution on a forthcoming bond, taken under the act of assembly of Virginia. Rev. Code, p. 309.

The bond, upon which the motion was made, recites a *ca. sa.* against Peyton, in favor of Brooke, for 525 dollars, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight, and marshal's fees and commissions, and all costs, 19 dollars and 96 cents, amounting in the whole to 578 dollars and 82 cents.

The execution on which the bond was taken was for 525 dollars, and 20 dollars, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight.

*The whole amount of costs taxed on [*93 the original judgment was 20 dollars and 12 cents, and 602 pounds of tobacco, including the costs of issuing an execution.

The bond was taken upon an *alias ca. sa.* the first having been returned *non est*. The first execution was for 525 dollars, and 20 dollars and 12 cents, and 602 pounds of tobacco.

The execution upon which the bond was taken included 22 pounds of tobacco, (the clerk's fees for issuing the *alias ca. sa.*) and did not include 12 cents, part of the costs taxed upon the original judgment.

The plaintiff, in the court below, released 44 pounds of tobacco, the costs of issuing both executions, and the court below gave judgment for the plaintiff. The defendant brought his writ of error.

The court called for statements of the case agreeable to the rule of the court.

Swann, for the defendant in error, said he had supposed the rule to extend only to plaintiffs in error. The court said they expected them from both sides. No statements were prepared.

MARSHALL, *Ch. J.* We wish to give general notice to the gentlemen of the bar, that unless statements of the case are furnished according to the rule, the causes must either be dismissed or continued.

Jones, for the plaintiff in error. There are two objections to the proceedings of the court below.

1st. That the *alias capias* and the bond include 22 pounds of tobacco for the clerk's fee, in issuing the *alias capias*.

2d. That the *alias capias* does not include 12 cents, taxed as part of the costs on the original judgment.

For this variance between the bond and the original judgment, the court below ought not to have awarded *execution upon the [*94 bond, but ought to have quashed both the bond and the execution upon which it was founded.

Every execution must pursue the judgment, or it is void.

The judgment having included all the costs, a ministerial officer cannot add anything, unless warranted by statute.

No fee is given by statute for issuing an *alias capias*. The execution was therefore void, and no subsequent release of the fee by the plaintiff can make it good. The plaintiff, if he takes out an *alias ca. sa.* must do it at his own cost. The words of the act of assembly (Rev. Code, p. 308, s. 2,) are, "when any writ of execution shall issue, and the party, at whose suit the same is issued, shall afterwards desire to take

out another writ of execution at his own proper costs and charges, the clerk may issue the same, if the first writ be not returned and executed."

MARSHALL, *Ch. J.* Does not that relate to an *alias* taken out before the return day of the first execution?

Jones. No *alias* execution can issue until after the return day of the first. If the first execution be returned not executed; or if it be executed and not returned, the plaintiff may have an *alias*, but it must be at his own expense.

MARSHALL, *Ch. J.* Would not an action at common law lie on the bond, even if the execution was quashed upon which the bond was founded?

C. Lee. If the bond was erroneous, the court would quash it as well as the execution. (*Simm v. Johnson*, in the Court of Appeals of Virginia, reported in Washington's or Call's Reports.)

MARSHALL, *Ch. J.* The plaintiff may quash the bond, and proceed on the original judgment; but the defendant can only quash the 95*] execution. A difference *was taken between a bond on a *ca. sa.* and a bond on a *fi. fa.* under the construction of the statute of Hen. VIII. respecting sheriff's taking bonds *colore officii*. The case is reported. I was counsel and argued the case. I believe it was that of *Simm v. Johnson*.

Simms, for the defendant in error. At common law, a creditor might have an *alias capias* if the first was returned *non est*. The statute provides, that he may also have an *alias* if the first be not returned executed. If the first be not returned, the *alias* must be at the plaintiff's costs; if it be returned, the *alias* is to be at the costs of the defendant.

In no case is judgment given for the costs of an execution. The clerk never taxes it until he issues the execution. The constant and uniform practice of the courts of Virginia is to add the cost of the *alias*, if the first be returned and not executed.

But if the clerk had not a right to insert the cost of the *alias ca. sa.* that does not vitiate the bond. It is but the act of a ministerial officer, and the court have a right to correct it.

The sheriff is to take the bond for the amount mentioned in the execution. It is not right that the error of the clerk should deprive the plaintiff of his security; especially, as the bond is given for the benefit of the debtor, and the creditor has released the whole amount in dispute. It is no cause to quash the bond; nor to render it void at common law.

Swann, on the same side. The judgment is for costs; all the costs which have accrued or shall accrue. It is admitted that we have a right to recover the costs of the first execution; and even if the clerk has mistaken the law in adding the costs of the second, yet, that error is cured by the plaintiff's release. In the case of *Scott v. Hornsby*, 1 Call, 41, the court of appeals of Virginia decided, that if a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment. 96*] *Jones, in reply. The awarding of execution on a forthcoming bond, upon motion, is a summary remedy given by statute, in derogation of the common law, and, therefore, the provisions of the statute must be strictly pursued. Cranch 3.

The release cannot aid an error in the exercise of this summary jurisdiction. I admit the practice to be, that if the bond be for more than the judgment, and the plaintiff releases the excess, it will support a judgment. So if the bond be for too small a sum, it is still good as a bond at common law. But in neither case will it support the summary proceeding by motion.

The taking a forthcoming bond is one mode of executing the writ. If the defendant be arrested, the quashing of the execution releases his body. So, if goods be taken on a *fi. fa.* and the *fi. fa.* be quashed, the goods are discharged. So in this case, the bond (being taken in lieu of the goods or of the body) would be discharged by the quashing of the execution.

It is true the judgment is for costs; but it cannot be in the alternative; that is, if one execution, then for 22 pounds of tobacco; and if two executions, then for 44 pounds of tobacco.

MARSHALL, *Ch. J.* The Court is of opinion that the act of assembly contemplates the case where the first execution is not returned nor executed; that is, where it is out and may be served.

The clerk was right is adding the costs of the *alias ca. sa.* The judgment is for costs, generally; which includes all the costs belonging to the suit, whether prior, or subsequent to the rendition of judgment. If new costs accrue, the judgment opens to receive them.

Judgment affirmed with costs.

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*LAMBERT'S LESSEE v. PAINE. [*97

A devise of "all the estate called Marrowbone, in the county of Henry, containing by estimation 2,585 acres of land," carries the fee.

Quære, whether a British subject, born in England in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia by descent, or by devise?

THIS was an ejectment brought in the circuit court of the United States, for the middle circuit in Virginia district; in which John Doe, a subject of the King of Great Britain, residing without the state of Virginia, lessee of John Lambert, another subject of the King of Great Britain, complains of Richard Roe, a citizen of Virginia, residing within the said state, and claims possession of a messuage and tenement, containing 156 acres of land in the county of Henry, being a part of a tract of land called Marrowbone.

The Jury found the following special verdict, viz.: "That George Harmer, being seized in fee of the lands in the declaration mentioned, on the 25th of June, 1782, made a paper writing, purporting to be his last will and testament, all written with his proper hand, and signed by him; which will we find in these words: "In the name of God, Amen. I, George Harmer, of the commonwealth of Virginia, being perfectly well and of sound mind and memory, do make and ordain my last will and testament in manner and form following, that is to say, all the estate, both real and personal, that I possess or am entitled to, in the commonwealth of Vir-

ginia, I hereby give and devise unto my friend, Thomas Mann Randolph, of Tuckabo, and Henry Tazewell, of the city of Williamsburgh, in trust, upon these conditions, that when John Harmer, my brother, now a subject of the King of Great Britain, shall be capable of acquiring property in this country, that they, or the survivor of them, do convey, or cause to be conveyed, to him in fee-simple, a good and indefeasible title in the said estate; and in case the said John Harmer should not be capable of acquiring such right before his death, then that my said trustees, or the survivor of them, do convey the said estate in manner aforesaid, to John Lambert, son of my sister, Hannah Lambert, when he shall be capable of acquiring property in this country; and in case John Lambert should not, before his death, be capable of acquiring a title to the said estate, then I direct 98*] the same to be conveyed *to my sister, Hannah Lambert, if she, in her lifetime, can acquire property in this country.

"But if the said John Harmer, John Lambert and Hannah Lambert, should all die before they can acquire property legally in this country, then I desire that my trustees aforesaid may cause the said estate of every kind to be sold, and the money arising from such sale, together with the intermediate profits of the said estate, shall be by them remitted to the mayor and corporation of the city of Bristol, in England, to be by them distributed, according to the laws of England, to the right heirs of my said sister, Hannah Lambert, to whom I hereby give all such money, excepting the sum of 100*l.* lawful money to each of the aforementioned trustees, which shall be paid out of the first money arising from the sales aforementioned, or from the profits arising to my heirs. In witness whereof, I have hereunto set my hand and affixed my seal this 25th of June, 1782."

We find that on the 12th day of September, 1786, the said George Harmer, being seized as aforesaid, duly executed another writing testamentary, which we find in these words: "In the name of God, Amen. I, George Harmer, being sick and weak in body, but in perfect mind and memory, do give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2,585 acres of land; likewise, one other tract of land in said county, called Horse-pasture, containing by estimation, 2,500 acres; also, one other tract, in the county aforesaid, containing, by estimation, 667 1-2 acres of land, called the Poison-field. It is my desire that all my negroes, horses and other property, be sold, and after paying my debts, the balance, if any, be remitted to my nephew, John Lambert, out of which he shall pay his mother five hundred pounds," &c.

Afterwards, on the 12th or 13th day of September, 1786, he departed this life without revoking the will or writing testamentary last mentioned; and without any other revocation of the will first mentioned, than the said writing testamentary of the 12th of September, 1786. We find that John Harmer, mentioned in the paper writing of June, 1782, departed this life about the year 1793. We find that John Lam- 99*] bert, named in the paperwritings *aforesaid, the lessor of the plaintiff, and, if capable of inheriting lands in Virginia, heir at law to the said George Harmer; that he was born in England on or before the year 1750; that he has never resided in any of the United States of America, and is, and ever has been, from the time of his birth, a subject of the King of Great Britain. We find that George Gilmer aforesaid, under whose heir and devisees the defendant holds, died in the month of November, 1793. We find that in the December session, 1798, the general assembly of Virginia passed an act, which we find at large in these words: "An act vesting in the children of George Gilmer, deceased, certain lands therein mentioned. (Passed January 12, 1799.)

"*Section 1.* Be it enacted by the general assembly, that all the right, title and interest, which the commonwealth hath, or may have, in or to the following lands, lying in the county of Henry, which George Harmer, by his last will and testament, devised to a certain George Gilmer, and which, since the death of the said George Gilmer, it is supposed have become escheatable to the commonwealth, to-wit, one tract called Marrowbone, containing, by estimation, 2,585 acres; one other tract called Horse-pasture, containing, by estimation, 2,500 acres; and one other tract called the Poison-field, containing, by estimation, 667 1-2 acres, shall be, and the same are hereby released to, and vested in, the children, whether heirs or devisees, of the said George Gilmer, deceased; to be by them held and enjoyed, according to their respective rights of inheritance, or devise under his will, as the case may be, in the same manner as if the said George Gilmer had died seized of the lands in fee-simple, and an office had actually been found thereof, saving, however, to a certain John Lambert, who, as heir at law to the said George Harmer, claims the said lands, and to all and every other person or persons, bodies politic and corporate, (other than the commonwealth,) any right, title or interest, which he or they might or would have had in or to the said lands, or any part thereof, against the said children and devisees, if this act had never been made.

"*Section 2.* This act shall commence in force from the passing thereof." We find that George Harmer was, at the time of his death, seized in fee of the lands in the *declaration men- [*100 tioned, which are of the value of 3,000 dollars, and that George Gilmer, at the time of his death, was seized of the same under the devise to him from the said George Harmer. We find the lease, entry and ouster in the declaration mentioned. On the whole matter, if the court shall be of opinion that the law is for the plaintiff, we find for the plaintiff the lands and tenements in the declaration mentioned, and 20 cents damages; and if the court shall be of opinion that the law is for the defendant, we find for the defendant."

Upon this verdict the judgment of the court below was for the defendant.

The transcript of the record contains a bill of exceptions by the defendant to the refusal of the court to the admission of testimony to prove that George Harmer, at the time he made the will in favor of Gilmer, declared to the person who wrote it that it was his intention to give Gilmer the fee-simple.

There was also an agreement of counsel, that if the court should be of opinion that the first

will ought not to have been admitted in evidence, because not proved before a court of probate, then so much of the verdict as relates to that will should not be considered as forming any part of this case.

The writ of error was sued out by the plaintiff, and general errors assigned. The case was argued at February term, 1803, by Minor and Mason, for the plaintiff in error, and by Key, for the defendant.

Minor, for the plaintiff, insisted on the following points, viz.:

1st. That the devise from George Harmer to George Gilmer, dated 12th of September, 1786, of all the estate called Marrowbone, is only a devise for life.

2d. That John Lambert, heir at law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent.

101*] *3d. That the will of 12th September, 1786, is only a partial, and not a total revocation of the will of 25th June, 1782; and that this will passes and disposes of the reversionary interest of the testator's estate according to the legal import of that will.

4th. That by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert.

5th. That John Lambert, if an alien, is capable of taking by devise, and is protected by the treaty of 1794 between the United States and Great Britain.

6th. Or that, if not, the property remains in him until office found for the commonwealth.

1st. That the devise to Gilmer is only for life.

In the first will of 1782, which is wholly written with the testators own hand, he evinces not only a knowledge of the import, but of the necessity of technical words of limitation, or perpetuity; yet, in the will of 1786, he uses expressions which convey a life estate only, and uses no words which can be construed into an intention wholly to revoke the will of 1782. The first will disposes of the fee to his near relations; and hence results a strong presumption that he meant to give only a life estate by the will of 1786. The will of 1782 makes use of strong terms of limitation, or perpetuity, and clearly shows his intention of securing the fee-simple to his brother and heir, John Harmer, who had, in fact, given him this very land. In the last will he does not notice his former will, nor mention his brother and heir, but devises "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2,585 acres of land," &c., to Doctor George Gilmer.

It is generally true that a devise of real property without words of limitation, conveys only an estate for life. This is the general rule and must prevail, unless such circumstances appear as are sufficient to satisfy the conscience of the 102*] court, that the testator *intended to convey a fee. Cowp. 235, *Bowes v. Blackett*. So in the case of *Hogan v. Jackson*, Cowp. 306. Lord Mansfield said, "if the words of the testator denote only a description of the specific estate, or lands devised; in that case, if no words of limitation are added, the devisee has only an estate for life. But if the words denote the quantum of interest or property that the testator has in the lands devised, there the whole extent of his interest passes, by the gift, to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator. It is now clearly settled that the words "all his estate," will pass every thing a man has; but, if the word "all" is coupled with the word "personal," or a local description, there the gift will pass only personalty, or the specific estate particularly described." And in the case of *Loveacres v. Blight*, Cowp. 355, Lord Mansfield said, "in general, wherever there are words and expressions, either general or particular, or clauses, in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place; so if the court cannot find words in the will sufficient to carry a fee, though they themselves should be satisfied, beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law. Now, though the introduction of a will, declaring that a man means to make a disposition of all his worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do alone. And all the cases cited in the argument, to show that the introductory words in this case would alone be sufficient, fall short of the mark; because they contained other words, clearly manifesting the intention of the testator to pass a fee." The case of *Right v. Sidebotham*, Doug. 759, is also very strong. There the introductory clause testifies the intention of the testator to dispose of all his worldly goods and estates, and also a disinheriting legacy to the heir. The devise, then, in question, is coupled by the word "and" with another devise to *the same devisee,[*103 her heirs and assigns, yet it was held not sufficient to carry the fee. Lord Mansfield says, "the rule of law is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. All my estate, or all my interest, will do; but "all my lands lying in such" a place, is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life." The same principle is laid down in Gilbert on Devises, 24. Thus, we find that the intention of the testator must be sought by fixed rules, and when found, it must not only be sufficiently proved to satisfy the conscience of the court, but must be coupled with apt and sufficient words to pass a fee. See the case of *Frogmorton v. Wright*, 3 Wils. 418, which is a strong case for the plaintiff. So is also the case of *Chester v. Painter*, 2 P. Wms. 335. In the case of *Fletcher v. Smiton*, 2 T. R. 656, the words were, "all my estates," and the decision was upon the ground of an intention clearly appearing to dispose of his whole interest. There is nothing in the present case to show an intention of conveying a fee, unless it be the words "all the estate called Marrowbone, in the county of Henry, containing 2,585 acres of land." The testator does not, in the beginning of his will, as in most of the cases cited, declare an intention of disposing of all his estate and interest. There is a difference between the terms "all the estate" and "all my

estate." The latter is certainly a more evident allusion to the degree of interest than the former. The expressions "all the estate called Marrowbone," are clearly words of locality, and not of interest. What idea would a lawyer have of an estate called Marrowbone, containing 2,585 acres? Could he ascertain whether it was an estate for years, for life, or in fee? Besides, the expression is coupled with two others which are most clearly descriptive of the thing, and not of the degree of interest. "Likewise one other tract of land, called Horse-pasture; also one other tract, called the Poison-field." Here, by the word "likewise," is implied that the testator meant to devise the same degree of interest in each of the tracts; and by the word "other," it is evident that he intended the former description as a description of a tract of 104*] land *as to locality only, and not of his degree of interest in it. Having, in the first part of the sentence, used an equivocal word, and having, in the subsequent clause of the sentence, used synonymously a word which is certain in its meaning, and clearly descriptive of the thing, and not of the interest, it is fair to conclude that the equivocal meaning of the former is explained and rendered certain by the latter; and that he meant no more by the word "estate" than by the expression "tract of land." It is a rule, that where words are used synonymously, the word most frequently used shall govern the sense. Here the term "tract of land" is twice used as synonymous to "estate;" the former, therefore, ought to control the sense of the latter. It is true, that "all my estate" has sometimes carried the fee; but to induce a departure from the general rule, the intention must be clear to pass a fee. The word "all" is coupled with a local description; it relates to the number of acres, and not to the degree of the testator's interest in the land. The word estate, as used in Virginia, is generally understood to mean a description of the property or thing, and not of the interest; and this court will respect the provincial meaning, to come at the true intention of the testator. It is not probable, and, therefore, is not to be presumed, that he would give his estate to a stranger, and disinherit his heir, who had given him this very estate; and it is to be observed, too, that he does not in his last will, even mention his brother John, to whom, by the first will, he had given all his estate.

2. The second point is, that John Lambert, heir at law of George Harmer, is not an alien as to the citizens of this county, and is capable of taking the reversion by descent.

If he is incapable of holding lands in this country, it must be because he is an alien born. Is he such under the legal acceptation of the word alien? A definition of an alien is thus given in *Calvin's Case*, 7 Co. 16, a: "An alien is a subject that is born out of the ligeance of the king, and under the ligeance of another." Wood's Inst. 23; 1 Inst. 198, b; 1 Woodd. 386. John Lambert, the lessor of the plaintiff, was 105*] born in England in *the year 1750, under the allegiance of the King of Great Britain. At his birth he had inheritable qualities of which he can be deprived by one mode only, and that is the commission of a crime sufficient to work corruption of blood. 1 Bl. Com. 371. This is not pretended. Lambert was born within the ligeance of the King, the then common sovereign of this country and England; and, therefore, is not an alien born.

Those born under common allegiance may acquire and hold lands; and, in time of war, they may join the one, but must render service to the other, for the land. Bracton, b. 5, c. 24, fol. 427, b; 1 Hale's P. C. 68; *Calvin's Case*, 7 Co. 27, b. The words of Bracton are: "*Est etiam et alia exceptio quæ tenenti competit ex persona petentis propter defectionem nationis, quæ dilatoria est, et non perimit actionem, ut si quis alienigena qui* [non] *fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes, nec etiam sive rex ei concesserit placitare, quia sicut Anglicus non auditur in placitando aliquem de terris et tenementis in Francia, ita nec debet Francigena, et alienigena, qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia. Sed tamen sunt aliqui Francigenæ, in Francia, qui sunt ad fidem utrius que, et semper fuerunt ante Normanniam deperditam, et post, et qui placitant hic et ibi, ea ratione qua sunt ad fidem utriusque, sicut fuit W. comes Marreschallus et manens in Anglia, et M. de Feynes manens in Francia, et alii plures; et ita tamen si contingat guerram moveri inter reges, remaneat personaliter quilibet eorum cum eo cui fecerit ligeantiam, et faciat servitium debitum ei cum quo non steterit in persona.* See also *Calvin's Case*, 7 Co. a. and b. fol. 25. A man born in the English plantations is a subject. Wood's Inst. 23. He that is born in the mother country must, *a fortiori*, be a subject, and capable of all the rights of a subject in the colonies. One of these rights is that of acquiring property. "All persons may convey, as well as purchase, except men attainted of treason," &c. "aliens born," &c. Wood's Inst. 233, 1 Inst. 42, b. But it has been proved that the lessor of the plaintiff is not an alien born; he, therefore, may purchase or take. If he once had an inheritable quality, or a capacity to take, and has not forfeited it by any crime, it follows that he has it yet. The separation of the colonies from England could not, in law or *reason, deprive him of [*106 this right. *Calvin's Case*, fol. 27, a. and b. Calvin's Case was shortly this: Calvin was born in Scotland, after the crowns of England and Scotland were united on the head of James I. The question was, whether he could maintain an assize of *novel disseisin* of lands in England. The plea was, "that he was an alien, born at Edinburgh, within the kingdom of Scotland, and within the ligeance of the King of Scotland, and out of the ligeance of the King of England." One of the objections on the part of the defendants was, that if *postnati* were, by law legitimated in England, great inconvenience and confusion would follow, if the King's issue should fail, whereby those kingdoms might again be divided. But to this it was answered by the judges, that "it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth: For as the *antenati* remain aliens as to the crown of England, because they were born when there were several Kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent, cannot make him a subject to that crown to which he was an alien at the

time of his birth, so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several kings; yet it was resolved, that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was, by judgment of law, a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque regis*, as Bracton saith, in the aforementioned place, fol. 427." The present case is stronger than Calvin's. There the question was whether he had gained a right; but here it is whether he has lost one. The same rule prevailed when the Saxon heptarchy became united under the King of the West Saxons. *Calvin's Case*, 23 b. And also with regard to the possessions held by the Kings of England in France at various times, such as the Dukedom of Acquitain, and the Earldoms of Poitiers, Normandy and Anjou. So with regard to the islands of Jersey, Guern-107*] sey, *Man, Ireland, &c. *Calvin's Case*, 19, &c., 1 Hale's P. C. 68, 69. Suppose a division of these states, it would follow, from the doctrine contended for by the opposite counsel, that people born in the same country, and under one common allegiance, would be aliens to each other.

The Kings of England themselves did homage to the Kings of France for provinces which they held, such as Normandy, Guienne, Brittany, &c. This was also the case with many of their subjects; as in the case of the Duke of Richmond, Duke D'Aubigny, &c. Hale's P. C. 68, *Calvin's Case*, 27, b. In this country the personal services are dispensed with, but the land pays the common tax or duty.

Alienage is incident to birth only. 4 T. R. 308, *Doe, ex. dem. Duroure v. Jones*.

It is not just or reasonable that a man should be punished without committing a crime, or for an act committed by a superior power which he could not control. Suppose a secession of one of these states; would it be just that the citizens of the other states, holding property in that state, should forfeit it or lose their rights?

The reasons of policy for prohibiting aliens from holding lands are stated in *Calvin's Case*. 18, b. to be three: 1. The secrets of the realm might thereby be discovered; 2. The revenues of the realm should be taken and enjoyed by strangers born; 3. It should tend to the destruction of the realm. But none of these apply to the present case. Lambert lives out of the realm, and, therefore, cannot betray its secrets. The land will continue to pay the taxes, which, being the sinews of war, will preserve the realm. Besides, the case applying only to the *antenati*, is limited in extent, and its operation will be constantly diminishing by failure of heirs, by alienations, by naturalization, &c. The English, who understand the principles of the common law at least as well as we do, have allowed our citizens to inherit in similar cases. The cases of the Chichester estate, and an estate recovered by Mr. Boyd, and the Earl of Cassel's estate, are examples. A liberal policy should dictate a reciprocation of the same principle.

*The third point, viz., that the will [*108 of 12th Sept. 1786, is only a partial, and not a total, revocation of the will of 25th June, 1782; and that this will passes and disposes of the reversionary interest of the testator's estate, according to the legal import of that will, was admitted by the opposite counsel, in case the second will devised a life estate only.

The fourth point, that by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert, was also admitted, if he is not to be considered as an alien.

The fifth point is, that John Lambert, if an alien, is yet capable of taking by devise, and is protected by the treaty of 1794, between the United States and Great Britain.

By the 9th article of the treaty "it is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

The only doubt which can be raised upon this article arises from the word hold. But treaties ought to be liberally expounded, so as to meet the full intention of the contracting parties. There can be no doubt but the intention was to secure, not only actual possession, but rights which would have vested but for the alienage of the parties. This is apparent from the provision made for legal remedies, which would be wholly useless if the former expressions were meant to comprehend only lands in actual possession. If, therefore, Lambert is to be considered as an alien, yet the treaty destroys that bar to his recovery.

*The sixth point is, that although [*109 Lambert should be considered as an alien, and is not protected by the treaty, yet he is capable of taking by devise, and of holding the land until office found for the commonwealth.

He certainly has a good right against all the world except the sovereign. In England, land purchased by an alien does not vest in the king until office found. Co. Lit. 2, b, Hargrave's note, (3;) 5 Co. 52, b, *Page's Case;* 1 Jones, 78, 79; More, 325, *Englefield's Case;* 2 Bl. Com. 293. If he had been tenant in tail, he might have barred the remainder. Gouldsb. 102, 4 Leon, 84. An alien may take by devise. Powell on Devises, 316, 317, 318; 2 Vez. 362, *Knight v. Duplessis*, and may hold until office found. "For," says Powell, "when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in to all intents and purposes, as any other devisee would have been, until something further be done to take the estate devised out of him again; for as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land until office found; but if he die before office, the law casts the freehold and inheritance upon the

king for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, has no retrospect to the time of its being consummate, nor does it affect the land in the hands of the devisee, until another thing is done to entitle the king, not under the devise, but by right of his prerogative, viz., office found; the tenant being an alien, and, consequently, though of capacity to take lands in his own right, yet not of capacity to hold them."

Key, contra, contended.

1st. That George Harmer, by the will of 1786, devised a fee to Gilmer.

2d. That if he did not, yet the lessor of the plaintiff cannot recover.

1st. The word estate, in the devising clause of a will, where it refers to land, denotes and carries the testator's interest in the land. And 110*] there is no difference in construction *of law, whether the words are "all my estate," or "all the estate." Both carry the whole interest of the testator. In the present case there are no words of locality that operate as description, and prevent the fee from passing. It is admitted that the word estate, where it is coupled with personalty, shall be restrained, and will not carry the fee of lands; upon the principle *noscitur ex sociis*. This case is not within this distinction, because the word estate refers wholly to the land, and the whole personal estate is disposed of by a subsequent, independent clause. Consequently, no cases can apply but where the expressions are similar to those of the present will, and refer to lands. In the case of *Wilson v. Robinson*, 2 Lev. 91, 1 Mod. 100, 25 Car. II. ann. 1672, the words were, "all my tenant right estate at Brigisend in Underbarrow," and it was held that they passed the fee. This is the general rule of law, and is uniformly supported by the authorities from the year 1672 to the present time; except the case cited by the plaintiff's counsel, from 2 P. Wms.

The case in 2 Lev. 91, is exactly like the present; the word lands is used in the same sentence, and in the same manner as in the present case.

The word estate, in wills, always means the interest, unless controlled by words of restriction. Words of locality will not restrain the force of the word estate. In the case of *The Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236, 6 Mod. 106, S. C., the words were, "all other my estate real and personal not otherwise disposed of by this my will, for to be given by him to his children as he shall think convenient, I solely trusting to his honor and discretion that he will give them such provision as will be necessary. "Et per Holt, Ch. J., who delivered the resolution of the court, the rents pass by these words "all my real and personal estate," for the word estate is *genus generalissimum*, and includes all things real and personal, and the fee of the rents passes, at least the whole estate of the devisor; for all his estate is a description of his fee. In pleading a fee-simple, you say no more than *seisitus in dominico suo ut de feodo;* and in *formedon*, or other action, if a fee-simple be alleged, you say *cujus statum* the demandant now has." And he 111*]held "that devising all his estate, and *all his estate in such a house, was the same, and that all his estate in the thing passed in either case."

The next case is that of *Barry v. Edgeworth*, 2 P. Wms. 323, anno 1729, which overrules the case of *Chester v. Painter*, cited by the plaintiff's counsel from 2 P. Wms. 235, anno 1725. In this case of *Chester v. Painter*, the court probably took the whole will together, and from the testator's having used the word heirs in some of the devises, and omitted it in the devise in question, concluded that it was not his intention to pass the fee. In the case of *Barry v. Edgeworth*, the words were, "all her land and estate in upper Catesby, with all their appurtenances," and the Master of the Rolls held it to be decided by the case of *The Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236, and said, "the word estate naturally signifies the interest rather than the subject, and its primary signification refers thereto; and although the devise be of all her land and estate in upper Catesby, this is not restrictive with respect to the estate intended to pass by the will, but only as to the land." "And as the word estate has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it; for then none could give any opinion there upon." This case refers to that of *Murry v. Wyse*, 2 Vern, 564, anno 1706, where the words "all the rest and residue of his real and personal estate whatsoever," were held to pass a fee. Precedents in Chan. 264, S. C. In the case of *Ibbetson v. Beckwith*, Cas. temp. Talbot, 157, the words were, "as touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in the manner following." Then followed two devises of "estates," burdened with the payment of debts and legacies, which were admitted to carry a fee; after which came the devise in question: "Item, I give unto my loving mother all my estate at Northwith close, North closes. and my farm held at Roomer, with all my goods and chattels as they now stand, for her natural life, and to my nephew Thomas Dodson, after her death, if he will but change his name to Beckwith; if he does not, I give him only 20*l.*, to be paid him for his life out of Northwith close, North close, and the farm held at Roomer; which I give her upon my nephew's refusing to change *his name, to her and [*112 her heirs for ever." The question was, whether Thomas Dodson took an estate for life or in fee. The Lord Chancellor decreed that he took the fee; and said, that the word estate carries the fee, and that no case had been cited "to warrant the altering the known legal signification of it." See also Gilb. Devises, 25. So in the case of *Bailis v. Gale*, 2 Vez. 48, anno 1750, testator devised to his wife all that estate he bought of Mead for so long as she shall live; and in another clause said, "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." The Lord Chancellor said, that the word estate is admitted to be sufficient to make a description not only of the land, but the interest in the land; and he held that the fee passed to Charles.

The case of *Hogan v. Jackson*, Cowp. 306, shows that the word estate is sufficient to pass all the interest of the testator in the thing devised. So in the case of *Loveacres v. Blight*, cited from Cowp. 355, Lord Mansfield says, "the words estate comprehends not only

the land or property a man has, but also the interest he has in it." And in *Denn v. Gaskin*, Cowp. 659, he puts the words, "all my estate," as an example of an expression tantamount to words of limitation. See also the case of *Hodges v. Middleton*, Doug. 434, where the argument of counsel is strong to the same effect. All the subsequent cases refer to that of *Barry v. Edgeworth*, 2 P. Wms. 523, and none of them refer to that of *Chester* v. *Painter*, in 2 P. Wms. 335. The case of *Right v. Sidebotham*, cited from Doug. 763, does not apply to the present case, as the words of that devise were, "all my lands, tenements and houses," and not all the estate, as in our case. The authority from Gilb. on Devises, p. 24, is answered by p. 25, and a reason why a fee did not pass in the case in p. 24, is, because the words estate was coupled with personalty. The case of *Frogmorton v. Wright*, cited from 3 Wilson, 418, had no words descriptive of the testator's interest, and the case of *Fletcher v. Smiton*, cited from 2 T. R. 660, is a strong case to show that the word estates will carry the fee, unless restrained by other words, clearly showing a contrary intention. A description of the place cannot, in reason, restrict 113*] the operation of the word *estate, because, unless the place be named, you cannot tell either what land, or what estate the testator meant to pass.

But, it is said, there is a difference between the expressions, "all my estate," and "all the estate," and that the former more clearly indicates the interest than the latter. Nothing but the refinement of ingenious men could find a diversity in these expressions. When a testator is disposing of his worldly affairs, it is his own property that he means to dispose of, and not that of another person. When, therefore, he uses the expression, the estate, it means the same as his estate. But this subtlety of construction was soon exploded in express terms. It was suggested by the counsel, in the case of *Bailis v. Gale*, 2 Vez. 48, but Lord Hardwicke held, that it makes no difference which mode of expression is used.

So there was once an attempt made to distinguish between the words "at" and "in," such a place; but this was overruled by Lord Talbot, in the case of *Ibbetson v. Beckwith*, Cas. tempt. Talbot, 157. The word "at" was used in the case in 2 Lev. 91, and in the case before Lord Talbot. But the word "in" was used in the case of *Barry v. Edgworth*, 2 P. Wms. 523, yet the decisions in those cases were all the same way.

From this chronological view of cases, it seems clear that the word estate, in a will, carries the whole interest of the testator, unless there are other words clearly indicating an intention to give a less estate. No such words appear in the present will; hence it follows, that the whole interest of the testator was devised to the defendant.

But, 2d. If Doctor Gilmer took only a life-estate, yet the lessor of the plaintiff is not entitled to recover.

1st. Because John Harmer stands before him in the first will; and if the doctrine of *antenati* is correct it applies to him as much as to Lambert, and, therefore, upon the death of Doctor Gilmer, the estate vested in John Harmer, who 114*] was the person last seized. But *the special verdict does not find Lambert to be the heir of John Harmer, but of George Harmer, which is wholly immaterial. If Lambert is not the heir of the person last seized, he cannot recover. For if the first devise to John Harmer took effect, the contingent devise to Lambert could not; and, therefore, if the latter is entitled at all, it must be as heir of John Harmer, and not as devisee of George Harmer.

Equitable estates are governed by the same rules as estates at law. George Harmer died in 1786; John Harmer died in 1793. Either John Harmer was an alien, or he was not. If he was not an alien, then he took under the devise, and it is not stated who was his heir. If he was an alien, then he was or was not competent to take as devisee. If competent to take, then the record does not state Lambert to be his heir. If he was not competent to take under the devise, neither is Lambert, for the same reason. But if Lambert can take as devisee, so could John Harmer, and the lessor of the plaintiff must then show a title under him. The will states John Harmer to be the testator's brother, and Lambert to be his sister's son; but it does not thence follow that he was heir at law of John Harmer; for the sister might be of the half blood. Everything must appear in the special verdict to complete the plaintiff's title; and upon the strength of his own title only can he recover.

But the doctrine of *antenati* is not correct. The king, under whose allegiance the two were born, is the common bond which connects the inheritable blood. The English doctrine is, that a man can never expatriate himself, and hence they have allowed our citizens, born before the revolution to inherit to British subjects. But, by the revolution of 1776, and the declaration of independence, new relations took place. A new sovereignty was created, to which British subjects, not in this country at that time, never owed allegiance, and, therefore, they can have no inheritable blood as to lands in this country.

But it is said that Lambert, if an alien, could take and hold until office found.

*If Lambert, as an alien, could take, [*115 so could John Harmer, and, therefore, upon his death the inheritance devolved upon the commonwealth, without office. Co. Lit. 2, b; 1 Bac. Abr. 81. An alien can never take by operation of law, and, therefore, a feme alien cannot be endowed, nor can an alien be tenant by the courtesy. 1 Bac. Abr. 83. An alien purchaser may take and hold till office found; and may protect himself against an ejectment, because no one who has not a better title, can recover against the possessor. But he cannot maintain an ejectment. If John Harmer took any thing, it was the reversion in fee, subject to the life-estate of Gilmer. If John Harmer died before Gilmer, then, upon the death of John Harmer, this reversion vested in the commonwealth. If Gilmer died before John Harmer, then, upon the death of the latter, the whole estate vested in the commonwealth.

Then, as to the treaty of 1794. John Harmer having died in 1793, and the inheritance being, by his death, cast upon the commonwealth, it was not a subject within the meaning of the treaty. John Lambert did not, at that time, hold the land, for it had gone to the common-

wealth of Virginia. The treaty did not intend to devest a right actually vested in the commonwealth.

Mason, in reply. The word estate may mean the interest as well as the thing; but whether it is to have that sense annexed to it or not, depends upon the intention of the testator, collected from the whole circumstances of the case. All the facts found by the verdict are to be taken into consideration, to form a correct idea of the testator's intention. By the first he clearly meant to give the fee to his brother and his heirs. The second will does not expressly revoke the first, and contains nothing which can be construed into an implied total revocation, unless the word estate conveys a fee to Doctor Gilmer. All the cases which have been cited are governed entirely by the intention of the testator. Where the intention was to pass a fee, there the word estate has been adjudged sufficient to carry the intention into effect. The words "the estate called Marrowbone," in common acceptation, mean the tract of land called Marrowbone. They cannot necessarily 116*] *mean the fee-simple, because the estate would still be called Marrowbone, whether the interest was for life or for years.

Th case of *Chester v. Painter*, 2 P. Wms. 336, has not been overruled. It is consistent with all the other cases. It did not appear to be the intention of the testator to give the fee, and, therefore, although the word estate was used, it was held that the fee did not pass. This shows that the word estate is not alone sufficient. Where words may be used in a large or in a contracted sense, the true construction is to be sought only by the intention of the person using them.

In the present will of 1786 there is no preamble stating it to be the intention of the testator to dispose of all his estate by that will; nor is there any residuary devise. As the first will is not expressly revoked, the two wills are to be considered as forming but one will. In such a case, the rule of construction is, that every clause shall be carried into effect if possible. No repugnance shall be presumed, if the whole can stand together; and if one construction will reconcile the various parts, and another will make them repugnant, the former is to be adopted. To suppose that the word estate, in the last will, conveyed the fee, would be to create a repugnance to the first will, and, therefore, that construction is not to be given to the word if it will bear another. It must be admitted, that it may be used in two senses. In one it means the thing and the interest; in the other it means the thing only. The one may be termed the technical, and the other the common sense of the word. By giving it the latter construction, the two parts of the will can be reconciled, and, therefore, that construction ought to be adopted.

It is conceded that the legal estate in the trustees cannot be set up against the *cestui que trust*. It ought also to be admitted, that this doctrine holds between those parties only; but as to every body else, the trust and the legal estate remain separate to support the trust. In such a case the commonwealth cannot take by office found, but must sue in chancery to have the trust executed for its benefit.

It will not be contended that the trustees were not competent to take and hold the property in trust. The *devises to John [*117 Harmer and John Lambert were contingent. If the contingency has not happened, the trustees still hold for the purpose of executing the trust when the contingency shall happen. John Harmer died in 1793, before the contingency happened upon which his devise depended. Upon his death, John Lambert's right under the will accrued. He had a title under the trust; and the treaty of 1794 protects it. The treaty is a nullity unless it protects such rights as this. If it protects only good and indefeasible titles, it is wholly useless, for such titles can protect themselves.

But if any right vested in John Harmer, then the title of Lambert is good as his heir at law. For the jury have found him to be heir at law of George Harmer; but he could not be the heir of George, if John left any children; and if John left no children, then is Lambert heir to John. The conclusion is irresistible; as much so as if the jury had found it. As to the objection that Lambert's mother might be sister of the half blood, it would prevent him from being heir to George as well as to John.

February 18, This cause was again argued at this term by the same counsel, before Cushing, Paterson, Washington, and Johnson, *Justices*. Marshall, *Ch. J.*, having formerly been of counsel for one of the parties, did not sit, and Chase, *J.*, was absent.

The argument took nearly the same course as before.

Minor, for the plaintiff in error, in addition to his argument as already reported, contended, that the rule of the common law, which requires words of limitation to create a fee-simple, was never departed from until after the statute of wills; and even then the courts did not depart from, but only softened, the rule; and that only in cases where the intention was clear to pass the fee. 2 Atk. 103, *Timewell v. Perkins*.

He then went into a minute examination of the following cases, viz.: Cowp. 240, *Beawes v. Blackett;* 2 Vez. 48, *Bailis v. Gale;* 2 Lev. 91, *Wilson v. Robertson;* 1 Mod. 100, S. C.; 1 Salk. 236, *Countess of Bridgewater v. Duke* *of[*118 *Bolton;* 1 Vez. 228, *Goodwin v. Goodwin;* Cas. temp. Talbot, 284, *Tanner v. Morse;* 3 P. Wms. 295, *Tanner v. Wyse;* 2 Vern. 690, *Beachcroft v. Beachcroft;* and Cas. temp. Talbot, 157, *Ibbetson v. Beckwith;* and from the whole deduced this principle, that the intention of the testator must be so clear as not to admit of a doubt; for if there is the smallest ground of doubt, the court will not disinherit the heir.

He also cited the case of *Markant and Twisden*, from Cas. Eq. Abr. 211, pl. 22, where it was held, that the words "all the rest and residue of my estate, chattels real and personal," carried only a life estate; and the case of *Bowman v. Milbanke*, 1 Lev. 130, in which the words were, "I give all to my mother, *all to my mother*." Yet there, although every feeling of the heart is engaged in support of that filial piety which could so fervently speak its intention of giving his whole estate to his mother, it was held that the land did not pass. In our case, the feelings are all thrown into the opposite scale: the devise is to a stranger in exclusion of

the heir; and that heir the very brother to whose bounty the testator was indebted for this very estate.

"Uncertain words in a will must never be carried so far as to disinherit the heir at law. And though there be words which of themselves would disinherit him, yet, if they come in company with other words which render their import less forcible, they ought to be construed favorably for the heir." 12 Mod. 594, *Shaw v. Bull*, in which case the words of the devise were, "and all the overplus of my estate to be at my wife's disposal, and make her my executrix."

In the case of *Moore v. Denn*, 2 Bos. & Pull. 247, the words of the will were, "First, I give and devise unto my kinsman, Nicholas Lister, all that my customary or copyhold messuage or tenement, with the appurtenances, situate and being in Ecclesfield aforesaid, as the same is now in the tenure or occupation of Valentine Sykes; all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever or wheresoever, and also all my goods, chattels, and personal estate, of what na-
119*] ture or kind soever, after payment *of my just debts and funeral expenses, I give, devise and bequeath the same unto my loving wife, Sissily Carr, and I do hereby nominate and appoint her sole executrix of this my last will and testament." Upon this devise it was decided by the house of lords, on a writ of error, that the wife took only an estate for life.

In the present case, it is sufficient for us if the words of the will are doubtful; for if the intention to devise the fee is not clear beyond all doubt, the presumption is in favor of the heir at law.

2. Upon the question of alienage, in addition to the authorities produced on the former argument, he cited Vaughan, 279, s. 5, and 286, s. 3, that a person born in the plantations may inherit lands in England; and 2 Tuck. edit. of Bl. Com. App. p. 53, 54, 61, 62, that the *antenati* of England, who remained British subjects, after the declaration of independence, were still capable of inheriting lands in America, or holding those which they already possessed.[1]

Key, for the defendant in error, upon the question of the devise, took the same ground as in his former argument.[2]

There is a difference in the effect of the word estate, when used in the preamble of a will, or
120*] in the residuary *clause, and when used in a specific devise. When used in the devising clause, it always carries the whole interest of the testator in the thing devised.

An argument has been drawn from the manner in which the two other estates are described, and it is said that because they are not called estates, but tracts of land, the devise clearly gives only a life estate in those two tracts, and therefore it is to be presumed that the testator only meant to give a life estate in the Marrowbone tract; because he has coupled them all together by the words "likewise" and "also."

But we say that he meant to give the fee of all the tracts to George Gilmer, and that the words are sufficiently large to carry that intention into effect.

In the case of *Cole v. Rawlinson*, 1 Salk. 234, the words of the devise were, "I give, ratify and confirm, all my estate, right, title and interest, which I now have, and all the term and terms of, years which I now have, or may have, in my power to dispose of, after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsley," and it was adjudged that the fee of the Bell Tavern passed, by force of the words "and also," which caused the preposition "in" to be understood, so as to read "and also in the Bell Tavern." So, in the present case, the three specific objects of the devise are connected by the words "likewise" and "also," and you must apply the first part of the devising clause to each subject, and read it thus: "likewise I give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate in one other tract of land called Horse-pasture." The word "likewise" shows that he meant to give the same interest in the two other tracts, which he had given in Marrowbone.

Upon the question of alienage, he contended, that by the common law, every man is an alien to that government under whose allegiance he was not born. The capacity to inherit results from the fact that the heir and ancestor both owe allegiance to the sovereign of the country where the lands lie. The right of inheritance is *derived only through one common [*121 sovereign. The allegiance due to that sovereign is the *commune vinculum* which connects the heir with his ancestor as to the tenure of lands. This common allegiance must exist at the time of the birth of the heir, and continue unbroken till the time of the descent. If this allegiance is not to be confined to the sovereign of the country where the lands lie, it would follow, that where the ancestor and heir were both natural born subjects of a foreign state, (for instance, subjects of France,) and the ancestor should be naturalized in this country, and become a purchaser of lands here, the heir, although not naturalized, would still have a right to inherit those lands, because they both owed allegiance to France, their common and natural sovereign.

The American *antenati* may inherit lands in England, because the ancestor and heir both owed a common allegiance to the sovereign of that country where the lands lie. But the British *antenati* never owed allegiance to the government of this country, and, therefore, the British heir cannot inherit the American lands of his American ancestor.

If, then, the capacity to inherit depends upon a common allegiance to the sovereign of that country where the lands are, it will follow that when that common allegiance ceases to exist,

1.—JOHNSON, J. Does not the last clause of the will of 1786 show that the testator meant, by that will, to dispose of his whole estate?

Mason. That clause relates only to personal estate. The word property is coupled with negroes and horses, which shows in what sense he meant to use it. But if it comprehends the reversion of the real estate, yet, as he appointed no person to make the sale, the reversion would descend to the heir at law, until some person should be appointed by proper authority, to carry that clause of the will into effect.

2.—WASHINGTON, J. Is the will of 1782 so executed and recorded as to pass lands?

Key. The jury have found that he executed it, and it is not necessary that a will of lands should be recorded under the laws of England, and the law is considered the same in Maryland. I do not object to the will on that account.

the capacity to inherit must cease also. The common allegiance to the sovereign of this country ceased by the declaration of independence, or, at least, when that independence was acknowledged by the King of Great Britain, at the treaty of peace, whereby he assented to the withdrawing of our allegiance; and the principle of the common law, that natural allegiance must be perpetual, is not so rigid but that it may be shaken off with the assent of the sovereign to whom it was due. For in 1 H. H. P. C. 68, Lord Hale says, "that though there may be due from the same person, subordinate allegiances," "yet there cannot, or, at least, should not, be two or more co-ordinate absolute allegiances by one person to several independent or absolute princes; for that lawful prince that hath the prior obligation of allegiance from his subject, cannot lose that interest without his 122*] own consent *by his subject's resigning himself to the subjection of another; and hence it is, that the natural born subject of one prince cannot, by swearing allegiance to another prince, put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due. Indeed, the subject of a prince, to whom he owes allegiance, may entangle himself, by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot, by such a subjection, devest the right of subjection and allegiance that he first owed to his lawful prince."

Hence, it is clearly the opinion of Lord Hale, that natural allegiance may be devested and dissolved, with the concurrent act of that prince to whom it was due; and by a note of the editor, in the same page, it seems that the doctrine of perpetual allegiance refers only to a private subject's swearing allegiance to a foreign prince, and has no relation to a national withdrawing of allegiance.

If the American revolution is to be considered as such a national withdrawing of allegiance, then that withdrawing was complete and perfect, even before the assent of the King of England was obtained, and the American *antenati* are as totally absolved from all allegiance to the British King, as if they had been natural born aliens.

There being, then, no common allegiance between the British and the American *antenati* at the time of the descent cast, there can be no capacity to inherit the one to the other, even were it not necessary that the common allegiance should be to the sovereign of the country where the lands lie.

Lord Hale, also, in the same page, shows in what sense Lord Coke, in *Calvin's Case*, and Bracton, before him, have used the expression, "*ad fidem utriusque regis.*" He says, "it appears by Bracton, that there were very many that had been anciently *ad fidem regis Angliæ* 123*] **et Franciæ*, especially before the loss of Normandy; such were the *comes mareschallus* that usually lived in England, and *M. de Faynes, manens in Francia*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties, so that they swore or professed ligeance, or lige homage only to one; and the homage they performed to the other, was not purely lige homage, but rather feudal, as shall be shown more hereafter; and, therefore, when war happened between the two crowns, *remaneat personaliter quilibet eorum cum ei, cuifecerat ligeantiam, et faciat servitium debitum ei cum quo non steterat in persona*, namely the service due from the feud or fee he holds."

The opinion of the court in *Calvin's Case*, 27, that if the kingdoms of England and Scotland "should be, by descent, again divided and governed by several kings," "those born under one natural obedience, while the realms were united under one sovereign, would remain natural born subjects, and not aliens," was at least an extrajudicial opinion; and it is not very clear what is the meaning of it. Does it mean that they would be natural born subjects of both kingdoms, or only of that which should remain governed by the same king? If the former, yet the case is not parallel to ours. Ours is a case where a new sovereignty has sprung up, and no person could be born under its allegiance before its existence. According to Calvin's Case, allegiance does not depend upon the country in which the person is born, but upon the obedience and subjection of that country at the time of the birth. A person, therefore, born before the independence of the United States, cannot be called a natural born subject of the United States; and if he was not here at the time of the revolution, he cannot maintain a suit, as to lands in this country, but by virtue of some express stipulation in a treaty.

Mason, in reply. If the declaration of independence, and the treaty, totally devested all allegiance, so that the British *antenati* are aliens to us, it would equally make American *antenati* aliens to the British. But we all know that cases have happened, in which American *antenati* have been adjudged capable of inheriting *lands in Great Britain; and if [*124 those British decisions were correct, they must have been grounded upon the principle that our *antenati* were not aliens to the King of Great Britain; and if the declaration of independence did not make us aliens to them, it could not make them aliens to us.

The American revolution only discharged the political relation which subsisted between us and the crown of England. It did not destroy individual rights or capacities. The revolution was to accomplish a great national object. No one individual can be charged with it. It was a national act to maintain national rights, and only such rights were affected by it. It only absolved our allegiance, but did not *ex necessitate* take away the capacity to inherit.

CUSHING, *J.* Are not allegiance, and the capacity to inherit, connected together?

Mason. Yes; and therefore the common law will not consider the allegiance so totally absolved as to make him an alien who was born a subject, and thereby deprive him of the right of inheritance.

Although, by the act of Virginia, in 1779 Lambert was to be considered as an alien, and incapable to sue, &c., yet that act was repealed by the treaties, and therefore he stands just where he did before the revolution.

The private rights of individuals were not affected by the revolution, except by the laws of the several states.

The object of the treaties was to put individuals as nearly as possible on the same footing as before the revolution; and the words of the treaties are sufficiently large to accomplish that purpose. They are, "and that no person shall, on that account, suffer any future loss or damage." If Lambert is on that account to be deprived of his right of inheritance, it will be such a loss and damage as will be a violation of the treaty of 1783.

125*] *What is common law in England is common law in Virginia; what is law and justice there is law and justice here.

Policy, justice, and magnanimity require that we should apply the same beneficial rule to them which they have extended to us.

PATERSON, J. Would n otthe decisions have been the same in England, if there had been no such article in the treaty?

Mason. Yes, if there are no British statutes to prevent it; and the decisions would have been similar in Virginia, if there were no act of assembly on the subject.

In this position, I am supported by a very learned judge in Virginia, (Judge Tucker,) who is not suspected of any improper partiality to Great Britain, or her subjects. In his notes to Blackstone's Commentaries, vol. 2, Appendix, p. 53 & 54, he says, "all persons born within the United States, whilst colonies of Great Britain, were natural born subjects of the crown of Great Britain." "The natives of the colonies, and the natives of the parent state, were, in consequence thereof, of equal capacity to inherit or hold lands in the different parts of the British Empire, as if they had been born, and their lands situated in the same country. And in fact, many native Americans did hold estates in England, and, on the other hand, great numbers of natives of Great Britain, who had never been in America, possessed estates in lands in the colonies.

"By the declaration of independence, the colonies became a separate nation from Great Britain; yet, according to the principles of the laws of England, which are still retained, the natives of both countries, born before the separation, retained all the rights of birth; or, in other words, American natives were still capable of inheriting lands in England, and the natives of England, who remained subjects of the Crown of Great Britain, were still capable 126*] of inheriting lands in America, *or of holding those which they already possessed." And again, in p. 61, he says, "by the common law, upon the separation between America and Great Britain taking place, the natives of Great Britain were constructively natural born in America, and, notwithstanding that separation, might hold lands here, as if they had been residents in America." After mentioning the act of assembly of Virginia of May, 1779, c. 55, by which they were declared aliens, he says, "by the treaty of peace, the common law principle that the *antenati* of both countries were natural born to both, and as such, capable of holding, or inheriting in both, seems to have been revived; in consequence of which, they are now capable of holding, purchasing, or inheriting, in the same manner as if they were citizens."

As to the question of the devise, it is not denied that the word estate is sufficiently large to carry the fee; nor, that the intention of the testator is to govern the construction of the will.

But, we contend, that the word estate is not alone sufficient to carry the fee. It is only a word which courts will lay hold of to effectuate the intention of the testator; but then the intention to pass a fee must be clear beyond all manner of doubt, before the court will disinherit the heir at law.

March 1. The judges now delivered their opinions *seriatim*.

JOHNSON, J. This is a writ of error from the circuit court of Virginia to reverse a judgment in ejectment given for the defendant.

The circumstances of the case come out on a special verdict, from which it appears that George Harmer, under whom both parties claim, was a citizen of the state of Virginia. That on the 25th June, 1782, he made a will, by which he devised "all the estate both real and personal which (he) possessed, or was entitled to, in the commonwealth of Virginia," to certain trustees, *"in trust and upon these [*127 conditions: that when John Harmer, (his) brother, (then) a subject of Great Britain, shall be capable of acquiring property in this country, then they, or the survivor of them, do convey, or cause to be conveyed, to him, in fee-simple, a good and indefeasible title in the said estate;" and in case John Harmer should not be capable of acquiring such right before his death, he then directs the conveyance to be executed to his nephew, the plaintiff; and in case of his not being capable of acquiring lands before his death, he directs the estate to be sold and the proceeds paid over to other relations.

In the year 1786 George Harmer executes another will, which, as every part of it is material to the case before us, I will peruse at length. (Here he read the will of 1786.) The testator died soon after executing the last mentioned will. His brother, John Harmer, died in 1793, having never become a citizen.

The jury further find that John Lambert, the plaintiff, is a British subject, was born before the revolution, viz., in the year 1752, and is heir at law to the testator. The treaties with Great Britain, and an act of Virginia, vesting in George Gilmer any interest that may have escheated, are also found in the verdict. The land sued for is a part of the Marrowbone tract. The questions suggested are,

1. What estate is conveyed to George Gilmer by the will of 1786?

2. If but an estate for life, does the will of 1782 remain unrevoked as to the remainder, so as to convey it to the plaintiff?

3. And last. Is John Lambert disqualified to inherit as an alien; or, if incapable, generally as such, is he not protected by the treaties existing between this government and Great Britain, particularly the 4th article of the treaty of London?

To form a judgment on the first point, it is necessary to consider,

*1. The general import and effect of [*128 the word estate, as applied to a devise of realty.

2. Whether its general import is controlled or altered by the subsequent words used in a similar sense in the will of 1786.

I consider the doctrine as well established,

that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by *my* or *the*, or followed by *at* or *in*, or in the singular or plural number. The intent with which it is used is the decisive consideration; and I should not feel myself sanctioned in refining away the operation of that intent, by discriminations so minute as those which have been attempted at different stages of English jurisprudence.

The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true, that its meaning may be restricted by circumstances or expressions indicative of its being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject. To one not accustomed to the discriminations of technical refinement, it would seem that no doubt could be entertained as to the interest devised to Gilmer. The plain, ordinary import of the words would convey the idea of an absolute disposition of every article of property disposed of by the will. That words of inheritance are necessary to convey a fee, is certainly a good general rule of the common law; but, in the case of wills, it is entirely subordinate to expressions of the testator's intention.

In the case before us, there is no necessity for extending the decision of the court beyond the words made use of in disposing of the Marrowbone tract. But it is contended that the words adopted by the testator, in devising the two other tracts, are used in the same sense as those in the first devising clause, and being of 129*] a *more restricted signification, ought to limit the word estate to a description of the mere locality. I think otherwise. When a word is made use of to which a clear legal signification has been attached by successive adjudications, it ought rather, in my estimation, to control the meaning of those of a more equivocal purport. But the construction of a will ought to depend much more upon the evident intent of the testator, than upon the strict import of any term that he may make use of. Too critical an examination of the diction of a will is rather calculated to mislead the court, than to conduct it to a just conclusion.

I infer the intent of the testator, in the case before us, from the following circumstances, extracted from the special verdict.

1. In the first clause of the will of 1782, the testator makes use of the expression "all the estate both real and personal which I possess, or am entitled to, in the commonwealth of Virginia," evidently under an impression that the word estate is sufficient to convey a fee; because, out of the estate, thus devised to his trustees, he instructs them to convey to his brother, or nephew, in the alternative stated, a good and indefeasible title in fee-simple.

2. There is no reason to infer, from anything in this case, that the testator intended only to make a partial disposition of his property; that he intended to die intestate as to any part of it. The fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of everything that he possesses. That such was the particular intention of this testator, I think fairly inferable from the general nature of the residuary bequest. The word *other*, in my opinion, is referable to the whole preceding part of the will, and excludes, as well the lands devised to Gilmer, as the negroes and horses which he directs to be sold. We must give it this construction, or else suppose, either that the word *property*, here used is confined to personalty, or, that it includes everything that he possessed, both real and personal; in which latter case it would comprise even the lands previously disposed *of. It fol- [*130 lows, therefore, that in the clause in which he proposes to dispose of the whole residue of his property, he omits making any disposition of any interest in the lands in question; evidently as it impresses me upon the supposition that he had already disposed of his whole interest in them. What object could the testator propose to himself by dying intestate as to the remainder in fee, in the lands in question? He knew that his heir at law was an alien, and, as such, incapable of holding lands under a government to which he did not owe allegiance. This circumstance is evident from the will of 1782; and it is equally evident from the same will, that he felt that repugnance, which is common to all men, at the idea of suffering his lands to *escheat*, and knew the means of preventing it.

I am therefore of opinion, upon the first point, that George Gilmer took a fee in the land which is the subject of this suit, and this opinion disposes also of the second point, and renders it unnecessary for me to consider the third.

WASHINGTON, *J.* The only question in this cause which I mean to consider is, whether the will of George Harmer, made in 1786, passes to George Gilmer an estate in fee, or for life, in the Marrowbone land. The words of the clause containing the bequest are, "I give to Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, lying in Henry county, containing, by estimation, 2,585 acres, and likewise, one other tract called Horsepasture, containing, by estimation, 2,500 acres; also one other tract containing, by estimation, 667½ acres, called the Poison-field.

The rule of law most certainly is, that where, in a devise of real estate, there are no words of limitation superadded to the general words of bequest, nothing passes but an estate for life; but since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean a disposition of his whole interest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which, from their legal import, comprehend the whole interest *of the testator in the thing [*131 devised. But if other words be used, restraining the meaning of the general expressions, so as to render it doubtful whether the testator intended to pass his whole interest or not, the rule of law which favors the right of the heir must prevail. Thus, it has been determined, that the words "all my estate at or in such a place," unless limited and restrained by other words, may be resorted to as evidence of an intention to pass, not only the land itself, but also the interest which the testator had in it. But

words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike, and in the present instance, I do not recollect that a single one was read at the bar which bears an analogy to it. The case of *Wilson v Robinson*, which comes the nearest to it, is of doubtful authority. No reasons are given by the court for their opinion, and, consequently, it is impossible to know whether it was or was not influenced by other parts of the will. *Ibbetson v. Beckwith* was decided upon a manifest intent to pass the inheritance arising out of the different parts of the will taken together, amongst which is to be found an introductory clause which, the Chancellor says, affords evidence that the testator had in view his whole estate. The cases of *The Countess of Bridgewater v. The Duke of Bolton*, and *Bailis v. Gale*, only lay down the general principle, which is not denied, that the word "estate" in a will, standing alone, and unqualified by other words, is sufficient to pass the whole of the testator's interest. The words "all my land and estate," in the case of *Barry v. Edgeworth*, express so plainly an intention to give a fee, that I only wonder a question could have been made of it. They are quite as strong as if the testator had given the land, and all his interest in the land, where the word *estate* or *interest*, unless construed, as was done in that case, would have been perfectly nugatory. In *Goodwin v. Goodwin*, the Chancellor doubted whether the word estate was not so limited and restrained by strong words of locality and description as to deprive it of the interpretation generally given to it.

132*] *In the case now under consideration, there is no introductory clause declaratory of an intention in the testator to dispose of the whole of his estate; yet, I admit that if he had devised all his estate called Marrowbone, without using other words calculated to limit the technical meaning of the word *estate*, the cases cited by the defendant's counsel would establish, beyond a doubt, that a fee passed. But I cannot read this clause of the will without feeling satisfied that the testator did not mean to use the word *estate* in its technical sense. For he not only varies the description of the tracts of land called Horse-pasture and the Poison-field, so as to show that, with respect to them, he only meant to describe their situation and quantity; but, by using the word "other," it is plain, that with respect to the Marrowbone estate, his design was the same. Unless, in the disposition of this latter estate, he had described, or intended to describe it as so much *land*, he could not, with any propriety, speak of the Horse-pasture estate as *another tract of land*. It will hardly be said that the devise of the last tracts passes more than an estate for life, unless the word *estate*, before used, can be transferred to those tracts, so as to impart to the expressions there used, the technical meaning given to the word *estate* where it stands alone. But I cannot perceive how this is to be done without supplying words not used by the testator, and which there is no necessity for doing in order to make sense of the clause as it stands. It would, I think, be going too far to supply more than is necessary to make each devise a complete sentence, and then to introduce the preposition "in" for the purpose of making sense of the whole. Yet, if this be not done, the word estate cannot, in respect to the Horse-pasture and the Poison-field tracts, be pressed into the service, and made in any manner to fit the sentence.

If only an estate for life in the Horse-pasture and the Poison-field tracts passed to George Gilmer, it will, I think, be very difficult to maintain that the word *estate*, in the same sentence, governed by the same verb, and coupled with the words which describe those tracts of land, can be construed to pass a fee.

The testator certainly uses the words *estate* and *tract of land* as synonymous expressions, and then the question will be, whether the generality of the first shall enlarge *the [*133 plain and usual import of the latter words, or the latter restrain the technical meaning of the former? I know of no case where the word estate is used at all, in which its general import is limited and restrained by so many and such strong expressions descriptive of the land, and totally inapplicable to the interest of the testator, as in the present. The words, *the estate called Marrow-bone*, lying in Henry county, containing, by estimation, so many acres, excite, at first, no other ideas than such as respect the name and situation of the land, with the number of acres contained in it. The description would be equally accurate, whether the interest of the testator were a fee, or a term for years.

If, then, we are to search after and to effectuate the intentions of men supposed to be unacquainted with legal phrases, and are, on that account, to construe the words they use with indulgence, I think we shall be more likely to fulfill this duty by limiting the general import of a technical word, which, in its common use, is entirely equivocal, and is rendered particularly ambiguous in this case by the words which immediately attend it, than by giving to the words *tract of land*, a meaning which they do not, in themselves, import, and are seldom, if ever, used to express more than a local description of the thing itself.

As the opinion of a majority of the court is in favor of the defendant upon the construction of the will, I do not think it necessary to say anything upon the doctrine of alienage, as that question may possibly come on in some other case, in which it must be decided.

PATERSON, *J*. The devise in the will of George Harmer was intended to convey some interest in the Marrowbone farm to George Gilmer; and the quantity of interest, whether for life or in fee, is the question now to be considered. It is a fundamental maxim, upon which the construction of every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect, if it be not in contradiction to some established rule of law. In such case the intention must yield to the rule. This intention is to be collected from the instrument itself, and

not from extrinsic circumstances; and, there-
134*] fore, the *will of A. can afford little or no aid in discovering the intention and expounding the will of B. Indeed, the number of cases which are usually cited in arguments on devises, tend to obscure rather than to illuminate. When, however, a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property. It cannot be questioned, that the word "estate" will carry everything, both the land and the interest in it, unless it be restrained by particular expressions; for estate is *genus generalissimum*, and comprehends both the land and the inheritance. 1 Salk. 236; 6 Mod. 106; Pr. Ch. 264; 2 P. Wms. 524; Cas temp. Talbot, 157; 1 Vez. 226; 2 Vez. 179; 3 Atk. 486; 5 Burr. 2638; 1 Term Rep. 411. The word "estate" is the most general, significant, and operative, that can be used in a will, and according to all the cases, may embrace every degree and species of interest. If the word "estate" stand by itself, as if a man devise "all his estate to A," it carries a fee from its established and legal import and operation. Standing thus *per se*, it marks the intention of the testator, passes the inheritance to the devisee, and controls the rule in favor of the heir at law. It is true, that this word, when coupled with things that are personal only, shall be restrained to the personalty. *Noscitur a sociis.* The word "estate" may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. Here uncommon particularity of description is requisite, so as to leave the mind perfectly satised, that the thing only was in contemplation, and nothing more. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words; and thus making, instead of construing, the will of the testator. But when no words are made use of to manifest the intention of the testator that the term "estate" should be taken, not in a general, but in a limited signification, then it will pass a fee; because, the law declares, that it designates and comprehends both the subject and the interest. Nay, such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed. To illustrate this position by appo-
135*] site and adjudged *cases: If a man in his will, says, "I give all my estate in A," it has been held, that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. 2 P. Wms. 524. So the word "estate" was held to carry a fee, though it denoted locality, "as my estate at Kirby Hall." 2 Atk. 37, *Tuffnel v. Page*, S. C. Barn. Cha. Rep. 9. On which Lord Hardwicke observed, that though this is a locality, yet the question is, whether it is such a locality as is sufficient to show the testator's intention merely to be to convey the lands themselves, and not the interest in them. He was of opinion, that the words were descriptive both of the local situation, and the quantity of interest. And in *Ibbetson v. Beckwith*, Lord Talbot observed, that the word "estate," in its proper, legal sense, means the inherit-
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ance, and carries a fee. Why, indeed, may not locality and interest be connected, and the same words express and convey both? To exclude interest in the subject, the expressions coupled with the word "estate" must be so restrictive and local in their nature, as to convey solely the idea of locality, and not to comprehend the quantum of interest, without doing violence to the words and intention of the testator. Besides, it is a just remark, repeatedly made by Lord Hardwicke and Lord Mansfield, that where a general devise of land is narrowed down to an estate for life, the intention of the testator is commonly defeated, because people do not distinguish between real and personal property; and, indeed, "common sense would never teach a man the difference;" and, therefore, judges have endeavored to make the word "estate," in a will, amount to a devise of the whole interest, unless unequivocal and strong expressions are added to restrict its general signification. It would be a laborious and useless task, to enter into a minute and critical investigation of the great variety of cases which bear on this subject. They are collected in a note by the editor of Willes's Rep. 296.

From the whole scope and complexion of the will of George Harmer, it is evident to my mind, that the testator intended to dispose of all his property, both with regard to the quantity and quality thereof. He did not mean to die intestate as to any part of his estate; but, on the contrary, it was his manifest intention to leave nothing undisposed by his will. He directs that all his negroes, *horses, and other [*136 property be sold, &c., which plainly indicates what his intention was in regard to the lands which he had previously devised. This last clause evinces and illustrates the meaning of the testator, and removes every particle of doubt from my mind, as to the true construction which ought to be put on the word "estate." To effectuate this intention, the term "estate" is to be taken in its largest signification, as comprehending both the subject and the interest, the land and the inheritance.

Amidst the great mass of cases arising on wills, it is impossible to select any two that are exactly similar. The variety of expressions is infinite; and it is from the language that we are to discover the intent. The same word, indeed, may be taken in a different sense in different wills, and even in different parts of the same will, owing to its juxtaposition, its associations, and the manner in which it is placed and used. The case of *Bailis v. Gale*, in 2 Vez. 48, may serve to elucidate the devise under review, in more points than one. "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." These expressions seem strongly to mark locality in contradistinction to interests. But, what says my Lord Hardwicke? "I am of opinion, that both the thing itself, and the estate, property, and interest the testator had, pass by the devise. Several questions have arisen in courts of law and equity on devises of this kind; but, all the latter determinations have extended and leaned as much as possible to make words of this kind comprehend, not only the thing given, but the estate and interest the testator had therein. But, it is objected, the pronoun "my" is not added; there was no occasion for it. It was

necessary he should use such words as point out the whole interest in the land, which is sufficiently done by the other words; for he bought of Mead, the land and the fee-simple in the land; which is agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest, as it is in the case of all my estate." So, in the present will, the words, "I give all the estate called Marrowbone," contain a description of the land, and the interest in it. The case in *Vezey* is particularly 137*] *applicable, and worthy of attention in another respect, as it affords a complete answer to the distinction which was ingeniously raised, and attempted to be sustained between the import of the word "my" and "the" in devises like the present. The counsel for Lambert contended, that the word *the*, "all the estate," was descriptive of the thing; whereas, the word *my*, "all my estate," was descriptive of the interest as well as of the thing. But, in the case of *Bailis v. Gale*, Lord Hardwicke held, with great clearness, that there was no difference between a devise of all my estate at N., and a devise of all the estate at N.; and that a fee passed in either case. Nor ought this opinion to be considered as extrajudicial; for the counsel in *Bailis v. Gale* insisted, that the pronoun *my* was necessary to make the devise carry a fee; and, therefore, it claimed, very properly, the notice and decision of the court. According to this opinion, a devise of *the* estate called Marrowbone, in the county of Henry, must have precisely the same construction and effect, as a devise of all *my* estate called Marrowbone, in the county of Henry; which, it appears to me, would unquestionably give a fee.

Some expressions in a will, as, "I give my farm, my plantation, my house, my land," do, of themselves, contain no more than a description of the thing, and carry only an estate for life, because unconnected with words of inheritance, or other words of a similar import. For we are not permitted to enlarge the estate of a devise, unless the words of the devise itself be sufficient for that purpose. In the present devise, the words, "all the estate called Marrowbone," are competent to carry the degree of interest contended for on the part of the defendant; and this construction accords with the intention of the testator, as disclosed by his will. Whether it would not have been more beneficial to society to have observed, from the first, the same technical phraseology and strictness of legal terms in devises, as in conveyances of landed property, is a question which may amuse the theoretical jurist; but which, as judges, we cannot seriously discuss; for it is a leading axiom in our system of jurisprudence, not to be 138*] shaken by judicial authority; *that the intent of the testator, so far as it is consistent with the principles of law, must be attended to, and control the decision. I am, therefore, of opinion, that the words, "I give to George Gilmer all the estate called Marrowbone, in the county of Henry," give a fee, being descriptive equally of the quantity of interest, and locality of the thing devised.

CUSHING, *J*. The first question in this case is, whether the devise to George Gilmer, in the will of George Harmer, made in 1786, carries a fee by the words, "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2,585 acres of land," &c.

Wills are expounded more favorably, to carry the intent of the testator into effect, than conveyances at common law, which take effect in the lifetime of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of counsel learned in the law. Therefore, words not so technical for the purpose, have, in a great variety of cases, for above a hundred years, been construed by the judges, to carry a fee, which would not do so in a deed.

In a number of cases, the word "estate" has been determined to comprehend the whole interest in the land. Among those adduced, there are several which appear to me essentially in point to the present case.

In the case, 2 Lev. 91, (a case which has since been held, by good judges, to be good law,) a devise of "all my tenant right estate, at B. in Underbarrow," was determined to import a fee.

I see no essential difference between that case and this; except the article "the" instead of the pronoun "my," which, in common sense, and in the opinion of Lord Hardwicke, makes no difference. "All the estate," is, at least, as extensive and comprehensive as "all my estate."

In 2 P. Wms. 523, the words, "all my lands and estate in upper Catesby, in Northamptonshire," were adjudged *to carry a fee. [*139 That agrees with the case at bar, except that the word "lands" precedes "estate," which I think immaterial. "Estate" is the most operative word.

In the case of *Bailis v. Gale*, 2 Vez. 48, a devise of "all that estate that I bought of Mead," was determined by Lord Hardwicke to be of a fee. This, I think, is substantially like the case at bar; and by him, *that*, *the* or *my*, makes no material difference. Add to this, what seems to make the point conclusive, the testator appears to have a design to dispose of his whole estate.

The other cases cited do not appear to contradict these; but, varying in some circumstances, seem not so directly applicable; yet, by the spirit and reasonings attending them, they tend to confirm the rectitude of the other decisions which are more directly in point.

The latter part of the devise in question, of several tracts of land immediately succeeding the devise of "all the estate called Marrowbone, in the county of Henry," &c., if considered as not carrying a fee, I conceive, would not, however, control or restrict the prior part of the devise of "all the estate called Marrowbone," &c. Rather than that, I should suppose the former part would carry spirit and meaning to the latter. But that is not necessary now to be determined.

The first point being determined in favor of the defendant, the former judgment must be affirmed.

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*HODGSON *v.* BUTTS. [*140

A mortgage of chattels in Virginia is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three wit-

nesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded.

ERROR to the circuit court for the District of Columbia, sitting at Alexandria, in an action for money had and received, to recover from the defendant, who was master of the schooner Mississippi, the amount of freight received by him subsequent to the mortgage of the said schooner, by R. & J. Hamilton (the former owners) to the plaintiff.

On the trial of the general issue, the plaintiff took two bills of exception, and the verdict was for the defendant.

The first bill of exceptions stated the following facts:

That the plaintiff, to support his claim, produced a deed from R. & J. Hamilton, by which they bargained and sold to the plaintiff the schooner Mississippi, then in the port of Alexandria, and the cargo of the ship Hannah, then at sea, as security to indemnify and save harmless the plaintiff, as indorser of their notes, to the amount of 10,000 dollars. If they should indemnify him within days after the arrival of the cargo of the ship Hannah, if it should arrive before the return of the schooner Mississippi from her then intended voyage to New Orleans; or, if the cargo of the Hannah should not arrive before the return of the schooner, then within days after her return, then the deed should be void; but, if they should fail to indemnify the plaintiff within the periods mentioned, then he was to sell the cargo of the Hannah, and the schooner and cargo. The deed also contained the following covenant: "And we do moreover bind ourselves, our executors, and administrators, and also the freight and inward cargo of the said schooner Mississippi, to exonerate the said William Hodgson from," &c. "It being the true intent and meaning of these presents, to bind ourselves, our schooner called the Missis-
141*] sippi, her tackle, *apparel and furniture, her freight and inward cargo, and the cargo of the ship Hannah, to exonerate," &c.

The execution of the deed was in the following form:

"In witness whereof, the said Robert and James Hamilton have hereunto set their hands and affixed their seals, this fourth day of May, 1800. ROBT. & JAS. HAMILTON, (seal.)
Signed, sealed and delivered, in the presence of
CH. SIMMS,
JAMES D. LOWRY."

"At a court of hustings, held for the town of Alexandria, the 6th of October, 1800, this bill of sale, from Robert and James Hamilton to William Hodgson, was proved to be the act and deed of the said Robert Hamilton for self and for James Hamilton, by the oaths of Charles Simms and James D. Lowry, witnesses thereto, and ordered to be recorded.

"G. DENEALE, *Clerk.*"

The plaintiff also produced in evidence the register of the schooner, with an indorsement thereon in these words, "At the request of the within named Robert and James Hamilton and William Hodgson, merchants, of the town of Alexandria, I hereby certify, that the within mentioned vessel is mortgaged by the said Robert and James Hamilton to the said William Hodgson, to secure the payment of the sum of ten thousand dollars, as witness my hand, this thirteenth day of May, one thousand eight hundred. CHAS. PAGE, *Dy. Collr.*"

It was proved that the said register, with the indorsement thereon as aforesaid, was delivered to the defendant previous to the sailing of the said schooner. That *she sailed from [*142 Alexandria to New Orleans about the 14th of May, 1800, from New Orleans to Jamaica, and from Jamaica she arrived at Alexandria about the 27th of November, 1800; at which time, and not before, she was put into the actual possession of the plaintiff, under a new and absolute bill of sale, executed by Robert and James Hamilton to the plaintiff, at that time. That the defendant received the freight of the cargo, carried from New Orleans, at Jamaica. No evidence was adduced to show that the plaintiff had ever given notice to the defendant that he should look to him for the freight (other than the indorsement on the register).

On the part of the defendant, evidence was adduced to prove that R. & J. Hamilton, on the 12th May, 1800, were indebted to a certain John Haynes, in the sum of 384 dollars, for wages as a seaman, previously earned; 184 dollars of which were earned on board the said schooner, and 200 on board another of their vessels. That being so indebted, R. Hamilton, on the 13th of May, 1800, gave the said Haynes an order on his brother James, then in New Orleans, stating a balance of 384 dollars to be due to him, with some interest, and requesting his brother to pay it. That on the same day, they were indebted to the defendant, in the sum of 800 dollars, for wages due him, as master of, and disbursements on account of, the schooner, on a previous voyage, which sum R. Hamilton requested his brother James, at New Orleans, to pay, by letter of that date. That the defendant received his sailing orders and instructions from R. Hamilton, in the name of R. & J. Hamilton, on the 14th of May, 1800, before he sailed from Alexandria. That the vessel was conducted entirely under the directions of R. & J. Hamilton, from the date of the mortgage, on the 4th of May, 1800, until the 27th of November, 1800, when she was delivered to the plaintiff.

That on the voyage from Alexandria to New Orleans, the defendant met James Hamilton, in the river Mississippi, and showed him the orders in favor of the defendant and of John Haynes, and requested payment. That James Hamilton replied, that he had no money to satisfy the said orders; that the defendant *must wait until the vessel earned [*143 enough to pay them, and desired the defendant to pay them out of the first money the vessel should earn, by freight or otherwise. That the vessel proceeded to New Orleans, and from thence with a cargo to Jamaica, where the freight was received, and out of the same the defendant paid Haynes the 384 dollars, and applied 800 dollars to the discharge of his own claim. That the vessel then sailed from Jamaica, and arrived at Alexandria on the 27th of November, 1800. That after her arrival, and after possession delivered to the plaintiff, the latter paid the expenses and disbursements of the voyage, which became due on her ar-

rival, by the orders of the defendant. The plaintiff also insured the vessel for the said voyage, and paid the premium thereon, after her departure for New Orleans. It was also proved, that on the defendant's return to Alexandria with the vessel, and before the plaintiff took possession of her, and received his absolute bill of sale as aforesaid, the defendant rendered to, and settled with, R. and J. Hamilton, an account current of the expenses and profits on the said voyage, in which they gave credit for the order in favor of himself, and that in favor of Haynes.

Upon this statement of the evidence, the plaintiff prayed the court to instruct the jury, that he was entitled to recover of the defendant the sum of 1,184 dollars, thus admitted to have been received for freight, and applied to the discharge of the two orders; which the court refused to do, and directed the jury to find a verdict for the defendant, if they found the facts to be as stated.

The 2d bill of exceptions stated that the plaintiff prayed the court to instruct the jury, that if they should be of opinion, from the evidence aforesaid, that the defendant received information of the mortgage from Robert Hamilton, before the schooner sailed upon the said voyage, the plaintiff was entitled to recover the said 1,184 dollars, which the court also refused to do, and directed the jury, as before, that their verdict ought to be for the defendant.

This case was first argued at February term, 1804.

144*] *February 27, 1804. E. J. Lee, for the plaintiff in error.

The law of mortgages is the same both as to land and personal property.

The case is to be considered, first, upon common law principles; and, second, upon the statute law of Virginia.

First point. That the mortgagee is the legal proprietor of the mortgaged subject; and as such, he is entitled to receive the rents and profits after notice of the mortgage, unless the contrary be stipulated.

The mortgagee of lands leased becomes entitled to the rent from the time of executing the conveyance; for the rents and profits, as well as the land, are liable for the debt.

As soon as the conveyance is executed, the estate is, in law, vested in the mortgagee, and his power to take actual possession exists from that moment. For these principles, see Powell on Mortgages, 79, 80, 81.

The mortgagee is the absolute proprietor and the true owner. 1 Vez. 361, *Ryall v. Rowles.*

If lands be mortgaged to one, the interest in them is in the mortgagee before forfeiture; for he has purchased the lands upon a valuable consideration, as the law will intend; and though the mortgageor may redeem by means of an agreement between the parties, if he does not, the estate, in law, is absolute, without any other act to be done, to pass the estate; although the mortgageor has in him the equity of redemption. 15 Vin. Abr. 44.

A mortgage is defined to be the appropriation of a specific thing to certain purposes. It does not, in the case of a mortgage, require the delivery of the article, in order to transfer the right and title to it.

145*] *A mortgagee of real property may bring an ejectment to get possession against any person in possession; and may also bring an action for the mesne profits; so he may bring trover for personal property, and in the estimation of his damages, a charge for the intermediate produce or profits of the article converted would not be rejected, but would be taken into the account. So he may bring detinue, without any proof of possession in the mortgagee.

2d. Possession, upon common law principles, is not necessary in order to give title in the transference of property. It is true, that possession in the vendor after the transfer, is prima facie evidence of fraud, and this is the only effect of such possession; but as to the proof of fraud, it is not conclusive. It may be rebutted by testimony showing the transaction bona fide.

The only use in delivering possession, is to prevent strangers being deceived by a false credit, which the possession in the vendor is calculated to produce. This reason cannot be applicable in this case to Butts; 1. Because Butts knew of the mortgage; 2. Because the debt due to him from the Hamiltons was an antecedent debt.

If the Hamiltons had been declared bankrupts, their assignees could not have claimed the vessel or the freight; because both were pledged as a security to Hodgson. See the bankrupt law of the United States.

Upon common law principles, the mortgagee must be considered as the legal proprietor of the vessel.

3d. But the act of the legislature of Virginia places the question beyond a doubt, and proves that possession is not necessary to constitute the ownership. See Virginia Laws, 157, Revised Code of 1802, 1 Wash. 177.

The legal owner of the vessel is entitled to receive the freight. Marshall on Insurance, 93.

*The mortgagee of a vessel in a late [*146 case has been considered as the owner, and as such, liable for repairs done to her before he received actual possession. 7 Term Rep. 306. In this case the decision in *Chinnery v. Blackburne*, 1 H. Bl. Rep. 117, is not considered as correct.

The two cases of *Jackson v. Vernon*, 1 H. Bl. 114, and *Chinnery v. Blackburne*, which will be relied on by the defendant, will, upon examination, be found not to meet the question which arises in this case.

In the case of *Jackson v. Vernon*, the question was, whether the mortgagee was liable for the repairs to the ship; it was decided he was not, because, the mortgageor himself ordered the repairs; as the person who makes repairs on a ship, has a claim on the person ordering them, it was supposed the credit was given to him, and upon this ground it was held the mortgagee was not liable.

In the case of *Chinnery v. Blackburne*, Merryfield acted as the owner; he navigated the vessel, and made all contracts about her, from London to Antigua. He was on board of her on the voyage, and at Antigua gave the command of the vessel to another captain; he also insured the vessel; and at Antigua acted personally in command of the ship. This is not like the case at bar; for in this, Hamilton did not furnish the vessel, or man her after the mortgage, nor did he insure her; but Hodgson did the last act. But both cases are doubted in

the case 7 Term Rep. 306, and by Abbott, 16, who says, they do not furnish a case for the decision of the question, who is entitled to the freight, which a case of a contract made by the master in that character will; which is our case.

There is a distinction in a court of equity and a court of law, where the mortgageor acts as the master of the vessel. In the court of equity, he is considered as owner; but not so in a court of law. Marsh. 452, 453. Hamilton never acted as master.

147*] *4th. The contract in words, binds and includes the freight. To which it is objected, that future freight is too remote an interest to be transferred; freight, or a hope, or expectation, is such an interest as may be insured; and, if insurable it may be granted.

Goods, as well as their expected produce, may be granted. Prec. in Chan. 285. It is not competent for Butts, who claims under Hamilton, to object that the freight is not included or passed by the deed. Cowp. 600.

5th. The objection, that Robert Hamilton exercised authority over the vessel, by giving instructions, is not of any weight, in the mouth of Butts; because Butts had a full knowledge of the lien of Hodgson; and also, because it does not appear that Hodgson authorized this interference.

The directions of James Hamilton, that Butts was to wait until the vessel earned enough to pay him, is also without weight; because James Hamilton was ignorant of the arrangement which his partner had made; and of which Butts might have informed him, but not having done so, he is the more culpable.

6th. Hamilton had no right to appropriate the freight to any other person, than that specified in his deed of mortgage. If he had not, Butts, his servant, had not.

Butts must be considered, either as the servant of Hamilton, or of Hodgson; if the servant of the former, and undertakes to act as such, he had no right to apply the money in the manner he did. If he undertook the command as Hodgson's servant, he had no right to apply the freight to the payment of a debt due from Hamilton.

7th. Butts having accepted of the command of the vessel, with a full knowledge of the lien upon her, and her future freight, he tacitly consented to apply the freight according to the agreement between Hamilton and Hodgson; if 148*] he intended otherwise at the *time, he has been guilty of a fraud which ought not to avail him in a court of law.

8th. The captain had no lien for his 800 dollars, due for his own wages on the vessel. The mate had no lien on this vessel for 200 dollars, they being earned on board of a different vessel, and in a different voyage. The balance of the mate's wages was only 184 dollars. The mate, by accepting an order on James Hamilton, for 384 dollars, the whole of the wages due him, agreed to accept payment in a different way from the usual one; which destroys the lien on the vessel for the 184 dollars. Salk. 131.

Besides, for this 184 dollars, Butts, as the captain of the vessel when it was earned, was liable; and the moment he paid that sum, the mate's lien was gone. The captain has no lien on the vessel for the wages he pays the seaman but has on the freight, for the wages of the voyage in which the freight was earned. The mate, by assigning the bill on James Hamilton, could not assign any lien he had on the vessel.

9th. As to the justice of the case. Hodgson has paid the seamen's wages for the voyage which earned the freight; and Butts is to receive the benefit.

Jones, contra. First. As to the validity of the deed; and,

Second. As to its effect, if valid.

1st. The vessel was in port at the time of the deed, and, therefore, (possession not having been delivered,) it is void as to credtors. The possession is dispensed with only when the vessel is at sea. 1 Cooke's B. L. 339, *Stevens v. Cole;* Id. 357, *Hall v. Gurney;* 1 Wils. 260, *Ryall v. Rolle,* and the case of *Russel v. Hamilton,* in this court, *ante,* vol. 1, p. 309.

As to the act of assembly, if the deed would have been bad without recording, there is nothing in the act to make it good. From affirmative words, a negative may sometimes be implied, but not *è converso.* The words of the act, are, "all deeds of trust and mortgages whatsoever *shall be void as to all creditors and [*149 subsequent purchasers, unless they shall be acknowledged or proved, and recorded according to the directions of this act." That is to say, a deed, although good in every other respect, yet if not acknowledged or proved, and recorded, shall be void. It cannot possibly be construed to make good a deed which would have been before fraudulent.

2d. The deed is also void for want of containing the register according to the directions of the act of Congress, vol. 2, p. 147, s. 14. This act is mandatory, and if the construction of the act of assembly contended for is correct, the register is necessary; for the affirmative words of the act of Congress imply a negative as strongly as the act of assembly implies an affirmative.

3d. The plaintiff waived this deed, by taking possession under a new and absolute deed of the same property, before the mortgage was forfeited, and before he had exercised any right of ownership. This new deed implies a new consideration, and that a new bargain was made, by which the old contract was waived.

4th. The consideration of the deed was indemnity. A mere possibility of suffering is not a sufficient consideration against third persons. It is only good between the parties.

Second point. As to the effect of the deed, if valid.

The plaintiff, by the terms of the deed itself, could not meddle with the schooner, until days after her return from her then intended voyage to New Orleans, and a failure on the part of the mortgagors to indemnify him; and his only authority then would be to sell the vessel and cargo, if not previously sold by the mortgageors.

If, then, the defendant did know of the mortgage, he must be presumed to know the whole terms, and that the plaintiff could not interfere till long after his return. He also knew that before a forfeiture of the mortgage, and while the mortgageor holds the possession, the latter is to be considered the owner. 1 H. Bl. 114, *Jackson v. Vernon,* and 1 H. Bl. 117, *Chinnery v. Blackburn.* Even in the case of lands, a mortgageor has been held to *be a free- [*150

holder and entitled to vote at elections. And the mortgagee of a lease-hold estate cannot be sued by the lessor as assignee of the lessee, until the mortgagee is in possession, although the mortgage be forfeited, and he has a right of possession. Doug. 455, *Eaton v. Jacques;* Doug. 22, *Keech v. Hall.*

The mortgageors had a right to receive the freight, and if so, they had a right to appropriate it. The freight is not like rent, which is said to grow out of the land. It depends upon a mere personal contract. If they had received the freight, their receipt would have been good against the plaintiff.

As to the payment of the expenses of the voyage by the plaintiff, it was voluntary. He had his reasons. He made a new contract, and paid the money after he had possession under his absolute purchase of the vessel.

The extra judicial doubts of Lord Kenyon and Abbott cannot control the strong and decisive cases of *Jackson v. Vernon,* and *Chinnery v. Blackburn.*

As to the covenant respecting the freight, it is merely a personal contract, and the plaintiff trusted to the personal security of the mortgageors. Even if they had sold the inward cargo, the plaintiff could not recover against the vendees. But the freight was not even a chose in action. It was only a possibility. It was not in being, and, therefore, not capable of a legal assignment.

Swann, in reply. The vessel was of less value when she returned than when she was mortgaged, by at least the difference of the freight. Hodgson paid the expenses of the voyage. It is equitable, therefore, that he should receive the freight. The defendant had no lien on the vessel or freight.

Two questions seem to arise in this cause.

1. What relation does the mortgageor stand in to the mortgagee?

2. What relation does the defendant stand in to both?

151*] *1. By the English law, possession must accompany the deed, except as to vessels at sea. But here possession is not necessary, if the deed be proved and recorded in a certain manner. It is then as valid, to all intents and purposes, as if possession had been delivered with the deed.

The court said he need not argue that point. It had been settled.[1]

Swann. What, then, are the rights which it conveys? As to mortgages of lands, the law is settled; but not so in the case of a mortgage of a ship. In England it is settled, that a mortgagee of a ship in possession, is entitled to all the rights of property. But if a vessel be mortgaged while at sea, some doubts have arisen. But here, by the statute, the deed has the same effect as if possession had been given. The mortgagee, therefore, has all the right of property; and if in the thing itself, he has it also in its profits.

But this is not a mere mortgage. It is also an assignment of the freight itself. It is said to be the general understanding, that the mortgageor shall enjoy the profits until forfeiture, or possession given to the mortgagee. But if the mortgageor covenants expressly that the mortgagee should receive the profits, this destroys the tacit presumption that the mortgageor should receive them. At best, a mortgageor is only "like a tenant at will," and the mortgagee may put an end to his right of taking the profits, whenever he pleases. He has the legal title to the rent. Doug. 282, *Moss v. Gallimore.* But it is said that the freight was not *in esse,* and, therefore, could not be the subject of an assignment. But if the covenant does not operate as an assignment of the freight, it is sufficient to destroy the tacit understanding that the mortgageors were to receive and might dispose of it as they pleased.

2. In what relation does the defendant stand to the other parties?

Here was no fraud on him. He had notice of the mortgage, and the appropriation of the freight to secure *the plaintiff, before [*152 the vessel sailed. He took an order for his money on James Hamilton; which shows that when he sailed, he did not depend upon the profits of this voyage, as to his claim of 800 dollars. If he had any lien on the freight, it was only for his wages arising during the same voyage. If there was any fraud, it was on his side. He never disclosed his claim to the plaintiff before he sailed, nor after his return, until the plaintiff had paid the expenses of the voyage. The record of the mortgage was notice to him, even if we had not proved actual knowledge on his part. The mortgageors and the defendant, as their agent, were trustees for the plaintiff.

If a mortgagee of lands chooses to lay by, and not demand the rents, and the tenants pay them to the mortgageor, they shall be protected. But why? Because they had not notice. But if they pay the rent to the mortgageor after notice from the mortgagee, they pay in their own wrong. This is the case of the defendant. He knew that the mortgageors had no right to appropriate the freight.

February 28, 1804. MARSHALL, Ch. J., mentioned to the counsel, that the Court had doubts whether the mortgage was not void, for want of three witnesses, under the act of assembly, Revised Code, p. 165, for regulating conveyances. They, therefore, continued the cause, to ascertain whether any, and what decisions, has been made in Virginia upon that point.

February 25, 1805. E. J. Lee, for the plaintiff in error. The question now is, is it necessary that the mortgage should be proved by three witnesses?

By the second member of the second section of the statute to prevent frauds and perjuries, it is declared, "if a conveyance be of goods and chattels, and be not, on consideration, deemed valuable in law, it shall be taken to be fraudulent within that act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged or proved; if the same deed include lands *also, in such manner as [*153 conveyances for lands are directed to be proved and recorded, or if the conveyance be of goods and chattels only, then acknowledged or proved by two witnesses in the general court, or the court of the county in which one of the parties live, within eight months, or unless possession shall really and bona fide remain with the donee," &c.

1.—Probably alluding to the case of *Clairborne v. Hill,* 1 Wash. 177.

By this law, if the conveyance is of goods and chattels for a consideration not deemed valuable in law, and is proved by two witnesses, or possession is with the donee, it gives a title.

From this part of the act, the natural and only inference is, that if a conveyance is for a consideration deemed valuable in law, it must be valid, and transfer property as absolutely as a conveyance for a consideration not deemed valuable, proved by two witnesses.

The latter part of this section includes a mortgage, or any other conveyance with a condition or limitation.

The first branch of the second section declares that all conveyances not made with a view to defraud creditors or purchasers, are good, and does not require its being recorded.

The third section of this act refers to the first branch of the second section, both being taken from the statute of Elizabeth.

The whole of the fourth section of the act regulating conveyances, relates to four different objects: 1st. An estate of freehold in lands; 2d. An estate of inheritance in lands; 3d. An estate for a term of years in lands; 4th. Deeds of settlement upon marriage, wherein lands, slaves, money, or other personal thing, shall be settled or covenanted to be left, or paid at the death of the party, or otherwise, and all deeds of trust or mortgages whatsoever, that is, the consideration of which is marriage, or which relate to lands. These general words are to be construed as referring to the previous subject matter of this section, and of the previous sections.

154*] *If the act against frauds and perjuries include not this deed, then we are to inquire what was necessary at common law to pass a title to property.

Personal property at the common law might be acquired, the books say, in twelve different ways. Among them, one is by grant or contract. A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing.

No particular form is prescribed as to making the contract, whether it must be in writing or otherwise; it is sufficient if the contract is proved.

And all persons who have notice of the contract are bound by it. If A. sell to B. verbally, in the presence of C., a horse, and C. afterwards buy the same horse of A., will it be said C.'s title is good?

No; because the contract with B. transfers the property. 2 Black. 447, 448.

The contract for the freight is good; the law does not require a contract to pay money out of a particular fund to be recorded.

The whole tenor of the act for regulating conveyances shows that it relates to real estate only, except in the single case of marriage settlements, which are specially provided for.

But there is another error apparent in the record.

The plaintiff paid to the defendant the seamen's wages, upon the faith of receiving the freight. If he was not entitled to receive it, he has paid those wages by mistake, and may recover them back in this action against the defendant, to whose orders they were paid.

Swann, on the same side. The fourth section of the act for regulating conveyances says, that all deeds of trust and mortgages whatsoever, shall be void, unless they shall be recorded according to the directions of that act; that is, in the county where the "land conveyed lieth." Where, then, is a deed of mere personal property *to be recorded? This shows, [*155 that the legislature meant only deeds of trust and mortgages of land.

C. Lee, on the same side, contended, that there was no statute respecting conveyances of personal property on valuable consideration. The statute of frauds speaks only of conveyances made on consideration, not deemed valuable in law. The word good consideration, in the 3d section, means valuable consideration, otherwise it would be repugnant.

Jones, contra. It is contended, now, that if the mortgage is void, and the plaintiff had no right to receive the freight, he has paid the expenses of the voyage by mistake, and can recover upon that ground. But there is no evidence that the expectation of the freight was his motive for paying those expenses. On the contrary, he did not pay them until after he had taken possession of the vessel, under a new contract, as an absolute purchaser. The record does not state how much he disbursed, and, therefore, we cannot say how much he is entitled to recover back, even if he is entitled to recover any thing. But the defendant never received the money from the plaintiff for those disbursements. It is true he gave orders to the plaintiff to pay, but those orders were not for his own use, and he never actually received the money.

March 2, 1805. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

This suit was instituted to recover the freight of a vessel of which the plaintiff was a mortgagee. Upon inspecting the deed, which is the foundation of the action, it appears to have been admitted to record, on the oath of only two subscribing witnesses. This suggested the preliminary question, whether a deed of mortgage, so recorded, was not absolutely void as to creditors and subsequent purchasers? This question depends on the construction of two acts of the legislature of Virginia. The first is entitled "An act for regulating conveyances." The 4th section of that act is in these words: *"All bargains, sales," &c. The first [*156 member of the sentence relates to lands only; the second to marriage settlements, wherein either lands or personal estate should be settled; and the third relates to deeds of trust and mortgages. Terms descriptive of personal estate are omitted, but the word "whatsoever" would certainly comprehend a mortgage of a personal chattel, as well as of lands, if not restrained by other words manifesting an intent to restrain them.

It is argued that this intent is clearly manifested. The whole act relates to real estate, except that part of it which respects marriage settlements. Its title is "An act concerning conveyances," and all its provisions are adapted to the conveyance of lands, except in the particular case of marriage settlements; and in that case, the act provides expressly for recording a settlement of chattels. This act, it is said, contains no "directions" for recording a deed of trust or mortgage for a personal thing,

consequently, such deed cannot be with-
t.

he first section of the act respects convey-
es of lands only, and directs, that they
ll be acknowledged or proved by the oath
hree witnesses in the general court, or court
the district, county, city or corporation in
ich the lands lie.

he second respects marriage settlements,
l directs, that if lands be conveyed or cove-
nted to be conveyed, they shall be proved and
orded in the same manner as had been pre-
ribed in the first section; but if only slaves,
oney, or other personal thing be settled, the
ed is to be proved and recorded before the
urt of the district, county or corporation in
hich the party dwells, or as afterwards di-
cted.

The third section relates only to the proving
d recording of livery of seizin.

Then follows the fourth section, which re-
hires, among other enumerated conveyances,
at "all deeds of trust and mortgages whatso-
er" shall be void as to creditors and subse-
uent purchasers, if not acknowledged or proved,
d recorded "according to the directions of
[57*] *the act." There being no "directions"
hich are applied to mortgages, unless lands
e conveyed in them, it has been argued that
such mortgages only as convey lands are com-
prehended within the act.

The act, it must be acknowledged, is very obscurely penned in this particular respect, and there is so much strength in the argument for confining it to mortgages of lands, that, if a mortgage of a personal chattel could be brought within the provisions of any other act, the court would be disposed to adopt the construction contended for.

The plaintiff insists that such a mortgage is comprehended in the 2d section of the "Act to prevent frauds and perjuries."

That act avoids fraudulent conveyances; and declares, that deeds of personal chattels, not upon a valuable consideration, where the possession remains with the donor; or a reservation of interest in the donor, where possession passes to the donee, shall be fraudulent and void, unless proved and recorded according to the directions of the act. A mortgage made on a valuable consideration would be very clearly excluded from the 2d section, although the act contained nothing further on the subject. But to remove the possibility of doubt, the 3d section declares, that the act shall not extend to any conveyance made "upon good consideration and bona fide."

The meaning of the word "good," in the statute of frauds, is settled to be the same with "valuable."

It is, therefore, perfectly clear, that the case is altogether omitted, or is provided for in the act concerning conveyances. In a country where mortgages of a particular kind of personal property are frequent, it can scarcely be supposed that no provision would be made for so important and interesting a subject. The inconvenience resulting from the total want of such a provision would certainly be great; and the court, therefore, ought not to suppose the case to be entirely omitted, if there be any legislative act which may fairly be construed to 158*] *comprehend it. The act concerning conveyances, although not penned with that clearness which is to be wished, does yet contain terms which are sufficient to embrace the case, and the best judicial opinions of that state concur in this exposition of it.

Although the point was not directly decided in the case of *Hill v. Claiborne*, the court of appeals appear to have proceeded on this construction; and Judge Tucker, in discussing this subject, avows the same opinion.

Upon a consideration of the acts on this subject, Butts being a creditor, it is the opinion of the Court, that the deed of mortgage, in the proceedings mentioned, was void as to him.

The counsel for the plaintiff contends, that, although the mortgage deed be void, yet Hodgson is entitled to recover, because he has paid money to the order of Butts, under the mistaken opinion that he was entitled to the freight.

This allegation is not made out in point of fact. Hodgson was in possession of the vessel as the absolute purchaser before he paid for the disbursements he is now endeavoring to recover. It does not appear that he paid these disbursements in the confidence of receiving the freight, or that he was not compellable to pay them as owner of the vessel. The freight had previously been applied by Butts, under the authority of the Hamiltons, to the payment of a debt due to himself. He had a right, as a general creditor, to retain that freight as against the original owners, or their assignee.

The Court is of opinion, that the judgment of the circuit court is to be affirmed with costs.

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*UNITED STATES [*159
v.
BENJAMIN MORE.[1]

No appeal or writ of error lies in a criminal case, from the judgment of the circuit court of the District of Columbia.

Quære, whether the act of Congress, abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission when the act was passed?

ERROR to the circuit court of the District of Columbia, sitting at Washington, upon a judgment in favor of the traverser, on a demurrer to an indictment for taking unlawful fees as a justice of the peace for the county of Washington.

The indictment was as follows, viz.: "United States, District of Columbia and county of Washington, to wit:

"The jurors for the United States, for the District of Columbia, and county of Washington aforesaid, upon their oath present, that Benjamin More, late of the county of Washington aforesaid, gentleman, on the 10th day of December, in the year of our Lord one thousand eight hundred and two, then being one of the justices of the peace of the United States, for the county of Washington aforesaid, at the county of Washington aforesaid, by color of his said office, unlawfully and unjustly did

1.—Present, Marshall, *Ch. J.*; Cushing, Paterson, Chase, Washington, and Johnson, *Justices*.

demand, extort, receive and take, of and from one Richard Spalding, constable, acting for and on behalf of one Joseph Hickman, the sum of twelve cents and a half cent, lawful current money of the United States, for and as his fee, for executing and doing the duties of his said office, to wit, for rendering and giving judgment upon a warrant for a small debt, in a case between the said Joseph Hickman, plaintiff, and one Joseph Dove, defendant, in contempt of the law, to the great damage of them the said Richard Spalding and Joseph Hickman, and against the peace and government of the United States. "JOHN T. MASON,

United States Attorney for the District of Columbia."

160*] *To this indictment there was a general demurrer and joinder, and judgment in the court below for the traverser, at July term, 1803.[1]

*Mason, Attorney for the United [*161 States for the District of Columbia. The act of Congress of February 27, 1801, *vol. [*162 5, p. 271, s. 11, declares, "that there shall be appointed in and for each of the said counties, (in the District of Columbia,) *such [*163 number of discreet persons, to be justices of the peace, as the President of the United States shall, from time to time, think expedient, to continue in office five *years. [*164 And such justices, having taken an oath for the faithful and impartial discharge of the duties of the office, shall, in all matters civil and criminal, and in whatever *relates [*165 to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of the said district for which they shall have been respec-

1.—In the court below, the opinions of the judges were delivered to the following effect:

CRANCH, J. The question to be decided upon this demurrer is, whether the act of Congress, for abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission before, and at the time when that act passed, and who accepted their commissions, while those fees were legally annexed to the office.

The points made in the argument of this cause are important, and some of them not altogether clear of doubt.

It has been contended that Congress, in legislating for the District of Columbia, are not bound by any of the prohibitions of the constitution.

But this is a doctrine to which I can never assent. Can it be said, that Congress may pass a bill of *attainder* for the District of Columbia? That Congress may pass laws *ex post facto* in the district, or order soldiers to be quartered upon us in a time of peace, or make our ports free ports of entry, or lay duties upon our exports, or take away the right of trial by jury in criminal prosecutions?

Yet, all this they may do, if, in legislating for the District of Columbia, they are not restricted by the express prohibitions of the constitution. The words must be positive and strong indeed, to justify such a construction. The only clause from which such an inference can possibly seem to flow, is that which says, "Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district," &c.

But the whole instrument is to be taken together, and every part is to be made consistent with the residue, if possible. That Congress may legislate "in all case whatsoever, over such districts," &c. is the general proposition, and the prohibitions are the exceptions. The true construction is, that Congress may legislate for us, in all cases where they are not prohibited by other parts of the constitution. The express commands of the constitution operate as prohibitions of every thing repugnant to such commands. In every case, therefore, where Congress are not bound, either by the commands or prohibitions of the constitution, they have a discretionary power to legislate over the district.

The constitution was made for the benefit of every citizen of the United States, and there is no such citizen, whatever may be his condition, or wherever he may be situated within the limits of the territory of the United States, who has not a right to the protection it affords.

If Congress are bound by the constitution in legislating for this district, then it becomes proper to test the validity of their legislative acts, respecting the district, by the provisions of the constitution.

The 3d article of the constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, which shall not be diminished during their continuance in office.

The act of Congress of 27th of February, 1801, which constitutes the office of justices of the peace, and empowers them to try personal demands, of the value of 20 dollars, ascertains the compensation which they shall have for their services in holding their courts, and trying those causes. This compensation is given in the form of fees, payable when the services are rendered. The causes of which they have cognizance, are causes arising under the laws of the United States, and, therefore, the power of trying them is part of the judicial power mentioned in the third article of the constitution, which expressly declares, that the judicial power of the United States shall extend to all cases arising under those laws.

It is difficult to conceive how a magistrate can lawfully sit in judgment, exercising judicial powers, and enforcing his judgments by process of law, without holding a court. I consider such a court, thus exercising a part of the judicial power of the United States, as an inferior court, and the justice of the peace as the judge of that court. It is unnecessary in this cause to decide the question whether, as such, he holds his office during good behavior; but that his compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. It has been contended, that the compensation of the justice of the peace is not within this provision of the constitution, because the act of Congress has not appointed the stated times at which it shall be paid. It is true, that the act of Congress has not said that the compensation shall be paid on any particular day and month; but it may, perhaps, be a compliance with the clause of the constitution, which requires that it shall be receivable at stated times, to say that it shall be paid when the service is rendered. And we are rather to incline to this construction, than to suppose the command of the constitution to have been disobeyed.

If, therefore, the constitution of the United States is obligatory upon Congress, when legislating for this district; if a justice of the peace is a judge of an inferior court of the United States; and if his compensation has once been fixed by law, a subsequent law for diminishing that compensation (*a fortiori* for abolishing it) cannot affect that justice of the peace during his continuance in office; whatever effect it may have upon those justices who have been appointed to office since the passing of the act.

MARSHALL, *J.*, concurred.

KILTY, *Ch. J.* This is an indictment at common law, against the defendant, a justice of the peace, for having, under color of his office, exacted and taken an illegal fee, as therein described.

The demurrer admits his being a justice, and the exaction and receipt of the fee, and rests the defense on the legality of such conduct.

The legality of exacting and taking fees, under color of a public office, must depend on the express authority of law, and, therefore, the question must turn upon the acts which have passed on this subject, as it respects the District of Columbia.

The justices of the peace were allowed expressly to receive fees for their services, by the act of February, 1801, section 11, and by the 4th section of the act of March, 1801, they were, as commissioners, entitled to certain fees and emoluments.

It is possible, that if the 11th section had only provided for the appointment of justices, without

tively appointed; and they shall have cognizance in personal demands to the value of 20 dollars, exclusive of costs, which sum they shall not exceed, any law to the contrary notwithstanding; and they shall be entitled to receive for their services, the fees allowed for like services by the laws herein before adopted and continued in the eastern part of said district.

By the 4th section of the act of Congress of 3d March, 1801, vol. 5, p. 288, the magistrates are constituted a board of commissioners, with certain duties and fees annexed to that office. And by the act of 3d of May, 1802, vol. 6, p. 181, s. 8, it is enacted, "that so much of two acts of Congress, the one passed on the 27th of February, 1801, entitled "An act concerning the District of Columbia," the other passed the 3d day of March, 1801, supplementary to the aforesaid act, as provides for the compensation to be made to certain justices of the peace thereby created," "shall be, and the same is hereby repealed." The question for the decision of this court is, whether Congress had a constitutional right thus to abolish the fees.

Jones, contra. By the act of 1801, certain fees were annexed to the office of justice of the peace. The traverser was appointed under that act, and while the fees *were thus an- [*166 nexed.[1] The principle we contend for is, that he was a judge of an inferior court of the United States, and protected by the third article of the constitution, which declares, that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive a compensa-

1.—This fact does not appear in the record, but it was agreed by the counsel on both sides, that the record should be so amended as to bring the whole merits of the cause before the court.

speaking of their fees, the 1st section, adopting the laws of the two states, might have had the effect of giving them the fees provided by the laws of Maryland. But an inquiry into this part of the subject is not important, because, as it has been observed in the course of the argument, so much of those two acts as provides for the compensation to the justices, is repealed by the acts of May, 1802; and it is not material to determine by which of the sections the provision was made.

The act of 1802, section 8, having positively declared that this provision was repealed, and having thereby left no power existing to demand the fees before allowed, it remains only to examine into the ground on which the latter act is alleged to be unconstitutional and void.

According to the course which has been pursued by the Supreme Court, it appears unnecessary to say anything about the power of a court to examine into the constitutionality of a law, until a case has been made out to justify such an inquiry. But, taking the power for granted, we are to inquire how it is called for in the present instance.

In testing an act of the Legislature by the constitution, nothing less than the positive provisions of the latter can be resorted to, and without absolute restriction by the constitution, the legislative power is omnipotent over subjects submitted to it. We must, therefore, reject the idea of judging this act on the principles of a contract, and setting it aside as an infraction of such contract.

In support of the position, that the act of May, 1802, is unconstitutional and void, the following arguments have been urged:

1. That a justice is a judicial officer.
2. That a justice is a court.
3. That a justice shall receive for his services a compensation, which shall not be diminished during his continuance in office; and that, therefore, taking away his fees, by repealing the act which gave them, is diminishing his compensation, and is contrary to the constitution.

The nature of some of the duties confided to a justice of the peace may make him a judicial officer; and he might even be admitted to be a court, without bringing him within the provisions of the constitution. The first section of the third article speaks of the judicial power of the United States. It declares what courts it shall be vested in, and then provides, that the judges of such courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

When we consider this instrument as constituting a general government, and defining, amongst others, its judicial power, we must take it in its most extensive sense, as applying to the whole of the United States, and not to a particular territory.

I consider, therefore, that the judicial power given to the traverser, as a justice of the peace, is not, in the sense of the constitution, the judicial power of the United States; and that such justice is not such a court as is provided for in the article and section in question. The justice does not, according to that article and section, hold his office during good behavior; nor can the power of receiving certain fees, which was given by the act of 1801, be strained to mean "receiving at stated times a compensation for his services."

The second section of the third article declares what subjects the judicial power, given by the first section, shall extend to. And by comparing these subjects with those which are cognizable by the justice in the present case, it will confirm the position, that this judicial power is not that of the United States, and is not provided for by this part of the constitution.

Congress, in organizing the judiciary according to the constitution, have created a Supreme Court, and inferior courts. Some of the latter extend over certain circuits composed of different states, and others are confined to the respective states; but in all of them it is the judicial power of the United States which is carried into effect.

I consider this judicial power as being different in its object and nature from that which may be the effect of the legislative power given to Congress over this territory, or of their power to make rules, &c., for such places as may become their property.

In order to show that the restrictions contained in the first section of the third article of the constitution do not extend to a justice in the District of Columbia, it may be necessary to make some inquiry into the principles on which the district is erected.

Without endeavoring to solve all the difficulties which have been mentioned in the course of the argument, I am persuaded that the following positions are correct: That the District of Columbia, though belonging to the United States, and within their compass, is not, like a state, a component part, and that the provisions of the constitution, which are applicable particularly to the relative situation of the United States and the several states, are not applicable to this district.

That the power of Congress to legislate for the district arises from the positive direction of the constitution, in the 8th section of the first article; and it may be here material to attend to the words "exclusive legislation," and to discover their meaning and origin.

By the constitution, the legislative power of Congress is confined to certain objects, and leaves to the several states a portion of the legislative power which they before possessed. But it was the intention of the framers of the constitution to devest the ten miles square of the privileges of a state, and to give to Congress the whole and exclusive power of legislation, as well on the subjects which had been left to the states, as on those which had been taken from them and given to the general government; that the ten miles square is not in a situation to become a state without an amendment in the constitution, and therein differs from the other territories belonging to the United States; that the word *exclusive* meaning only free from the power exercised by the several states, the legislative power to be exercised by Congress may still be subject to the general restraints contained in the constitution, though it includes subjects both of a general and local nature. Thus they are restrained from suspending the writ of *habeas corpus*, unless in the cases allowed; from passing (within and for the district) a bill of attainder or *ex post facto* law; from laying therein a capitation tax; from granting therein any title of nobility;

tion for their services, which shall not be diminished during their continuance in office."

A law for abolishing the fees can only affect those justices who have been appointed since the passage of that law.

It has been decided in this court, in the case of *Marbury v. Madison*, (*ante*, vol. 1, p. 162,) that a justice of the peace in the District of Columbia does not hold his office at the will of the President.

The power to make laws is expressly given; the power to repeal is not, but necessarily follows. So the power of appointment necessarily implies the power of removal, according to the maxim, *cujus est dare, ejus est disponere*. This principle was settled in Congress in the year 1789, after long debate upon the tenure of office of Secretary of State, and was expressed by means of a clause in the law directing what officer should take charge of the papers in that department, when the Secretary of State should be removed by the President. Congress has no power to limit the tenure of any office to which the President is to appoint, unless in the case of a judge under the constitution. The position for which we contend is justified by principle. The jurisdiction given to a justice of the peace makes him a judge of an inferior court. Lord Coke defines a court to be a place where justice is judicially administered; and this definition is recognized by Blackstone. Certain powers are incident to all courts, as to commit for contempts in court; for there is a difference between courts of record, and courts not of record, as to contempts out of court.

167*] *By the act of 1801, the justices of the peace are to have the same powers, in all matters civil and criminal, as were exercised by the justices of the peace in Maryland. In resorting to the Maryland code of laws, we find a very early act of assembly, which gives to justices of the peace the power of punishing contempts in their presence. Indeed, they possess a vast accumulation of powers. They may inflict whipping, imprisonment, and fine as high as 500 pounds of tobacco. They have a much more extensive jurisdiction than many more regular courts. They have cognizance of civil controversies of the value of 20 dollars. They hold courts, they try causes, they give judgments, and issue executions. Every one who consults the index to the laws of Maryland, must be satisfied that the justices of the peace constitute very important tribunals, and it is immaterial by what name they are called; they administer justice judicially; they have, therefore, the power to hold a court. The traverser was appointed before the repeal. He had a compensation which is taken away by the repeal. It is, therefore, so far unconstitutional. It is no objection that the tenure of office is limited to five years. It is not the tenure, but the essence and nature of the office, which is to decide this question. If the limitation to five years makes a difference, it would be an evasion of the constitution. But it is of no consequence how Congress have determined the tenure. It is established by the constitution.

Mason, in reply. The constitution does not apply to this case. The constitution is a compact between the people of the United States in their individual capacity, and the states in their political capacity.

Unfortunately for the citizens of Columbia, they are not in either of these capacities.

The 2d section of the third article of the constitution declares, "that the judicial power of the United States shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to *controversies between two or more [*168 states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state and the citizens thereof, and foreign states, citizens or subjects."

The judicial power of the United States can only extend to the cases enumerated; but the judicial power exercised in the District of Columbia extends to other cases, and, therefore, is not the judicial power of the United States. It is a power derived from the power given to Congress to legislate exclusively in all cases whatsoever over the district. And it is under this clause of the constitution that Congress have created justices of the peace, and given them power. Congress are under no control in legislating for the District of Columbia. Their power, in this respect, is unlimited. If Congress cannot limit the tenure of the office, but it must be during good behavior, then a law might be passed without the concurrence of the legislative will.

I understand the case of *Marbury v. Madison* to have decided only that the justices held during good behavior for five years under the law; and not generally during good behavior, under the constitution.

The general provisions of the constitution do not apply to our case. We are the people of Congress. They are to legislate for us, and to their laws we must submit.

Jones. The executive power exercised within the District of Columbia is the executive power of the United States. The legislative power exercised in the district is the legislative power of the United States. And what reason can be given why the judicial power exercised in the district should not be the judicial power of the United States? If it be not the judicial power

from making therein a law respecting the establishment of religion, or abridging the freedom of speech, or of the press; and from quartering soldiers therein, contrary to the third amendment.

But when Congress, in exercising exclusive legislation over this territory, enacts laws to give or to take away the fees of the justices of the peace, such laws cannot be tested by a provision in the constitution, evidently applicable to the judicial power of the whole United States, and containing restrictions which cannot, in their nature, affect the situation of the justices, or the nature of the compensation.

However ingeniously the question has been argued, I cannot feel any doubt in my mind on it. Nor can I perceive any legal or justifiable ground under which the direction of the act of 1802 has been disregarded. I am, therefore, of opinion, that the judgment on the demurrer should be for the United States.

But the judgment of the court is for the defendant.

of the United States, of what nation, state or political society is it the judicial power? All the officers in the district are officers of the United States.

169*] *By the 2d section of the third article of the constitution, the judicial power of the United States is to extend to all cases arising under the laws of the United States. All the laws in force in the district are laws of the United States, and no case can arise which is not to be decided by those laws. What judicial power is that which is exercised by the circuit court of the district? They certainly exercise a very respectable part of the judicial power of the United States. Was it ever contended that Congress could limit the tenure of the offices of the judges of that court? or that the judges were not liable to impeachment under the constitution?

February 13. The *Chief Justice* suggested a doubt whether the appellate jurisdiction of this court extends to criminal cases.

February 22. Mason, in support of the appellate jurisdiction of this court in criminal cases.

By the 1st section of the third article of the constitution, the judicial power of the United States is vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.

By the 2d section it is extended to all cases in law and equity arising under the laws of the United States. This is a case in law arising under the laws of the United States, and is, therefore, within that section.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

170*] *Congress has made no exception of criminal cases. I understand it to have been said by this court, that it is necessary that Congress should have made a regulation to enable this court to exercise its appellate jurisdiction. Upon this point I consider myself bound by the case of *Clarke v. Bazadone, ante*, vol. 1, p. 212. It is clear, then, that this court has the jurisdiction, and the only question is, whether Congress has made such a regulation as will enable this court to exercise it.

Such a regulation is contained in the 14th section of the judiciary act of 1789, vol. 1, p. 58, 59, which enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs, not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The writ of error in a criminal case is a writ not provided for by statute, and necessary for the exercise of the appellate jurisdiction given to the Supreme Court by the constitution, and agreeable to the principles and usages of law. This court has, therefore, the power to issue it.

There is no reason why the writ of error should be confined to civil cases. A man's life, his liberty and his good name, are as dear to him as his property; and inferior courts are as liable to err in one case as in the other. There is nothing in the nature of the cases which should make a difference; nor is it a novel doctrine that a writ of error should lie in a criminal case. They have been frequent in that country from which we have drawn almost all our forms of judicial proceedings.

It is true, that it is expressly given by the act of Congress of 1789, in civil cases only, but it does not thence follow that it should be denied in criminal.

MARSHALL, *Ch. J.* If Congress had erected inferior courts, without saying in what cases a writ of error or appeal should lie from such courts to this, your *argument would [*171 be irresistible; but when the constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.

Mason. When legislating over the District of Columbia, Congress are bound by no constitution. If they are, they have violated it by not giving us a republican form of government. The same observation will also apply to Louisiana.

The act of Congress which gives a writ of error to the circuit court of this district, differs, in some respects, from that which gives the writ of error to the other courts of the United States.

The words of the judiciary act of 1789, section 22, are, "and upon a like process (that is, by a writ of error, citation, &c.) may final judgments and decrees in civil actions, and suits in equity in a circuit court," &c., "be reversed or affirmed in the Supreme Court."

But in the law concerning the District of Columbia, s. 8, vol. 5, p. 270, the expressions are, "that any final judgment, order, or decree in said court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be, provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States."

In this section, if the words respecting the value of the matter in dispute were excluded, a writ of error would clearly lie in a criminal case, under the general expression, any final judgment. Then do those words respecting the value, exclude criminal cases? Suppose *the court below had imposed a fine of [*172 more than 100 dollars, the case would have been within the express words of the act. So it would have been, if a penalty of more than 100 dollars had been imposed by law.

But this court has exercised appellate jurisdiction in a criminal case. *United States v. Simms, ante*, vol. 1, p. 252.

MARSHALL, *Ch. J.* No question was made, in that case, as to the jurisdiction. It passed

sub silentio, and the Court does not consider itself as bound by that case.

Mason. But the traverser had able counsel who did not think proper to make the objection.

March 2. MARSHALL, *Ch. J.*,[1] delivered the opinion of the Court as follows:

This is an indictment against the defendant, for taking fees, under color of his office, as a justice of the peace in the District of Columbia.

A doubt has been suggested respecting the jurisdiction of this court, in appeals on writs of error, from the judgments of the circuit court for that district, in criminal cases; and this question is to be decided before the court can inquire into the merits of the case.

In support of the jurisdiction of the court, the Attorney General has adverted to the words of the constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of "all cases in law and equity arising under the laws of the United States," and as the appellate jurisdiction of this court was extended to all enumerated cases, other 173*] than those *which might be brought on originally, "with such exceptions, and under such regulations, as the Congress shall make," that the Supreme Court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the constitution.

This argument would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

Thus the appellate jurisdiction of this court, from the judgments of the circuit courts, is described affirmatively. No restrictive words are used. Yet it has never been supposed that a decision of a circuit court could be reviewed, unless the matter in dispute should exceed the value of 2,000 dollars. There are no words in the act restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the circuit court, where the matter in dispute exceeds the value of 2,000 dollars.

This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which is expressly given by law.

On examining the act "concerning the District of Columbia," the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words "matter in dispute," seem appropriated to civil cases, where the subject in contest has *a value [*174 beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of 100 dollars, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit.

The writ of error, therefore, is to be dismissed, this court having no jurisdiction of the case.[2]

1.—Johnson, *J.*, was absent when this opinion was delivered.

2.—See the case of *The United States v. La Vengeance*, 3 Dall. 297, where it seems to be admitted, that in criminal cases the judgment of the inferior court is final.

FAW
v.
ROBERDEAU'S EXECUTOR.

If an act of limitations have a clause "saving to all persons *non compos mentis, femes covert*, infants, imprisoned, or out of the commonwealth, three years after their several disabilities removed," a creditor, resident of another state, removes his disability by coming into the commonwealth, even for temporary purposes; provided the debtor be at that time within the commonwealth.

THIS was an action in the circuit court of the District of Columbia, for the county of Alexandria; and the question arose upon the construction of the act of assembly of Virginia, for "reducing into one the several acts concerning wills," &c., Rev. Code, p. 169, c. 92, s. 56, which is in these words, viz.: "If any suit shall be brought against any executor or administrator, for the recovery of a debt due upon an open account, it shall be the duty of the court, before whom such suit shall be brought, to cause to be expunged from such account, every item thereof which shall appear to have been due five years before the death of the testator, or intestate. Saving to all persons *non compos mentis, femes covert*, infants, imprisoned, or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed."

The declaration was for plank, scantling, and foundation stone lent by the plaintiff to the defendant. *For the like materials, sold [*175 and delivered, and for money had and received. The defendant pleaded the general issue, and a verdict was taken for the plaintiff, subject to the opinion of the court, upon the following facts:

"That the debt found by the verdict was due by the defendant's testator to the plaintiff, in the year 1786. That the testator died in 1794. The plaintiff was a resident of, and in the state of Maryland, and out of the commonwealth of Virginia, when the articles were delivered for which the suit was brought, and when the debt was contracted; and continued so in Maryland, and out of the said commonwealth, until the month of June, 1795, when he removed to Alexandria to live, and hath lived there ever since. That in the year 1786, after

the cause of action accrued, the plaintiff passed through the town of Alexandria, and was for a short time therein, but not as a resident thereof."

Upon this statement of facts, the judgment of the court below was for the defendant; and the plaintiff brought the present writ of error.

E. J. Lee, for the plaintiff in error. The plaintiff was not a citizen of Virginia, when the debt was contracted. It does not appear that he did not commence his action within the limited time after his becoming a citizen.

WASHINGTON, *J.* Does it not appear that Faw was in Virginia after the cause of action accrued?

E. J. Lee. Only as a traveler. It does not appear that the testator lived in Virginia at that time. The plaintiff had three years to bring his action, after removal into Virginia. The writ is no part of the record, unless made so by a bill of exceptions, and it is not stated when the action was brought.

Swann, contra. The act of limitation begins to run from the time the plaintiff passed through Alexandria, after the cause of action 176*] had accrued. His disability, *(according to the expression of the act of assembly) was then removed, and he ought to have brought his action within three years from that time.

The plaintiff came to reside in Alexandria, in 1795. The suit was tried in 1802; hence the presumption is, that it was commenced at that time, and the plaintiff can only show the contrary by producing his writ. The state of the case negatives the idea of a loan. The claim, therefore, was upon the open account, and the court had a right to expunge all the articles charged five years before the death of the testator.

MARSHALL, *Ch. J.* That act has nothing to do with the lapse of time after the death of the testator. The five years are before his death. The three years are also three years during the life of the testator, and the plaintiff must, therefore, have been in the state three years, during the life of Roberdeau, to make the limitation attach to his claim.

The Court will hear you upon that point if you think this opinion not correct.

Swann said, that no objection occurred to him at present.

MARSHALL, *Ch. J.* The Court is satisfied with that opinion, unless you can gainsay it.

WASHINGTON, *J.* There is another point. Did not the plaintiff's coming into the state in 1786, after the cause of action accrued, cause the limitation to attach?

Swann. The words of the act are, "saving to persons out of this commonwealth," not persons residing out of this commonwealth. Being "out of the commonwealth" is the disability; coming into the commonwealth, therefore, is a removal of that disability. If the saving had been to persons residing out, etc., then possibly, a mere coming in, without residing, would not have been a removal of the disability. 3 Wils. 145, *Strithorst v. Græme.*

177*] *E. J. Lee. Under the British stat. of 1 James, c. 16, § 3, the plaintiff must have been a resident in England; and he then has six years after his return. Here the plaintiff was not a resident of Virginia at any time during the life of the testator. 4 T. R. 516, *Perry v. Jackson.*

MARSHALL, *Ch. J.* Beyond sea, and out of the state, are analogous expressions, and are to have the same construction.

The whole case turns upon the question, whether the plaintiff's being in the state, in 1786, after the cause of action had accrued, takes him out of the saving clause.[1]

E. J. Lee. The casual coming into the state is not within the meaning of the act. It means the coming in to reside. The "act for the limitation of actions," &c., Revised Code p. 116, § 13, speaks of persons residing beyond seas, or out of the country. If, in such case, the plaintiff has a factor in this country, the statute runs against him; but if no factor, then it does not.

Suppose the plaintiffs should be foreign partners, and one of them should be driven by stress of weather into a remote part of the state, he may be ignorant of the place of residence of his debtor. Shall the plaintiffs, in such case, be barred by the act of limitation?

The case in 2 W. Bl. 723, turned upon the question of residence. I can find no positive authority. I believe the point has never been expressly decided.

March 2. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the Court. There being a general verdict for the plaintiff, it is necessary, in order to justify a judgment for the defendant, that the statement of facts, upon which he relies, should contain all the circumstances necessary *to support [*178 such a judgment; otherwise the judgment must be rendered upon the verdict for the plaintiff.

The five years mentioned in the 56th section of the act of assembly, must have elapsed before the death of the testator. If they did not, no lapse of time after his death can bring the case within the purview of this act. In the present case, the five years had elapsed. But there is a saving clause, in the following words: "Saving to all persons *non compos mentis, fem escovert*, infants imprisoned or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed."

It is one of the facts stated, that the plaintiff was within the commonwealth of Virginia, in the year 1786, after the cause of action accrued; and hence it is argued that he is not within the saving clause of the section, and that, to exclude him from the benefit of that clause, it is not necessary that he should have become a resident of that state.

The Court has not been able to find any case in which this question has been decided. We are, therefore, obliged to form an opinion from a consideration of the act itself. The words of the act are, "out of this commonwealth," and such persons may bring their actions within three years after their "disability" removed.

The Court is of opinion, that the disability is removed at the moment when the person comes into the commonwealth; and he must bring his action within three years from that time.

But something further than this was necessary to authorize a judgment for the defend-

1.—See the case of *Duroure v. Jones*, 4 T. R. 300 which seems decisive as to that point.

ant. It ought to have appeared that Roberdeau was a resident of the state of Virginia at the time the plaintiff came into that state in 1786; and that fact is not in the case stated. The judgment, therefore, ought to have been for the plaintiff, and not for the defendant.

Judgment reversed, with costs, and judgment entered for the plaintiff on the verdict.

179*] *RAY v. LAW.

A decree for a sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal will lie.

LAW having a mortgage on real estate in the city of Washington, and Ray having a subsequent mortgage on the same estate, Law had filed his bill in chancery in the circuit court of the District of Columbia, for a foreclosure and sale of the mortgaged property, and made Ray a defendant. The bill having been taken for confessed against Ray, a decree was obtained by Law for a sale. The sale had been made under the decree, and notice given, that on a certain day the sale would be ratified unless cause was shown. On that day Ray appeared, but not showing good cause, in the opinion of the court, the sale was confirmed. Ray prayed an appeal to this court on the decree for the sale, which the court refused, on the ground, as it is understood, that the decree for the sale was not a final decree in the cause.

Ray on this day presented a petition to this court setting forth those facts, among others, praying relief, and that this court would direct the court below to send up the record. At the same time he produced sundry papers, purporting to be the substance of that record, but not properly authenticated.

MARSHALL, *Ch. J.* The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree.

C. Lee, for the petitioner, contended, that this was a final decree as to Ray, and cited 2 Fowler's Exchequer Practice, 195, to show that such a decree would, in England, be considered such a final decree as would authorize an appeal.

March 5, MARSHALL, *Ch. J.* We can do nothing without seeing the record, and the papers offered cannot be considered by us as a record.

*The Court, however, is of opinion,[*180 that a decree for a sale under a mortgage is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies.

LEVY v. GADSBY.

If A lend money to B, who puts it out at usurious interest, and agrees to pay to A the same rate of interest which he is receiving upon A's money, this is usury, between A and B, and an indorser of B's note to A may avail himself of the plea of usury.

If the usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea.

The court has the exclusive power of deciding whether a written contract be usurious.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria.

This was an action of assumpsit, by Levy, the indorsee of a promissory note, against Gadsby, payee and indorser of M'Intosh's note.

The declaration consisted of three counts. The 1st, in addition to the common averments, alleged, that the plaintiff had brought suit upon the note against M'Intosh, in Maryland, and recovered judgment, but that before execution made M'Intosh died insolvent. The 2d count was in the usual form, excepting that it alleged that Gadsby became liable by the custom of merchants. The 3d count was for money had and received. The defendant pleaded, 1st. *Non assumpsit;* 2d. As to the first count, usury

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NOTE.—Usury must be specially and fully pleaded. The material facts constituting the usury must be fully set forth in the plea or answer, and the proof must correspond to the facts alleged, otherwise the defense must fail.
Archer v. Shea, 14 Hun, 493. Morford v. Davis, 28 N. Y. 481.
Bk. of Auburn v. Lewis, 19 Alb. L. J. 178. Fay v. Grimsteed, 10 Barb. 321.
Wheaton v. Voorhis, 53 How. Pr. N. Y. 319.
Griggs v. Howe, 2 Abb. Ct. Ap. Dec. 291.
Manle v. Crawford, 14 Hun, 193. Heywood v. Jones, 10 Hun, 500.
Frank v. Norris, 57 Ill. 138.
Bush v. Bush, 7 Monr. (Ky.) 53.
Murray v. Crocker, 1 Scam. (Ill.) 212.
Newell v. Nixon, 4 Wall. U. S. 583.
Where complaint precludes plea of usury defendant may give it in evidence.
Arnold v. Angell, 62 N. Y. 508.
At common law the plea of usury must set forth, amount of loan, time for which loan was made, amount of the usury paid or agreed to be paid, the parties in full to the usurious agreement, and that the agreement was a corrupt and usurious one.
Cases cited above and
Moody v. Hawkins, 25 Ark. 191.
Where law of another state is relied on to establish usury both law and fact must be pleaded. Court presumes that law of a foreign state is same as its own.
Leake v. Bergen, 27 N. J. Eq. 360.
Merchants B'k v. Griswold, 72 N. Y. 472.
Bowman v. Miller, 25 Gratt. (Va.) 331.
The burden of proof is on the defendant to clearly make out the usury, both the facts and intent.
Guggenheimer v. Geiszler, 81 N. Y. 293.
Thomas v. Murray, 32 N. Y. 605.
Haughtwout v. Garrison, 69 N. Y. 339.
Valentine v. Conner, 40 N. Y. 248.
Conover v. Van Maten, 3 Green, N. J. 481.
Stuart v. Mechs. & Farm. B'k, 19 John. 505.
Strict proof is required.
Griggs v. Howe, cited above.
Taylor v. Morris, 22 N. J. Eq. 606.
Frank v. Morris, 57 Ill. 138.
Grant v. Merrill, 36 Wis. 390.
Churchman v. Lewis, 34 N. Y. 444.
Extrinsic evidence may be introduced to prove; defendant not concluded by face of contract.
Scott v. Lloyd, 9 Pet. 418.
Wetter v. Hendestry, 16 Md. 11.
Where usury is an inference merely from facts proved it is question for jury only.
Train v. Collins, 2 Pick. 145.
Whether contract is a cloak for usury is for the jury.
Stevens v. Davis, 3 Met. 211, 212.

between M'Intosh and Levy, stating the transaction as a loan by the latter to the former; 3d. As to the first count, usury between the same parties, stating the transaction as a forbearance of an antecedent debt. The 4th and 5th were like pleas of usury to the second count. The 3d and 5th pleas, by mistake, alleged the note given, in pursuance of the corrupt agreement, to be a note made by Gadsby to M'Intosh, and by him indorsed to Levy; whereas, the note in the declaration mentioned, was a note made by M'Intosh to Gadsby, and by him indorsed to Levy. To the pleas of usury, there were general replications and issues, and a general verdict for the defendant. 181*] On *the trial three bills of exceptions were taken by the plaintiff.

1st. The first stated that the plaintiff gave in evidence a promissory note in the usual form, dated November 1, 1797, whereby M'Intosh, six months after date, promised to pay to Gadsby, or order, 1,436 dollars and 62 cents, for value received, negotiable at the bank of Alexandria. And it was proved that Levy and M'Intosh carried on trade and commerce in copartnership, under the name and firm of Levy & M'Intosh, at Alexandria, Levy residing at Georgetown, about 8 miles distant from Alexandria. That they so continued to carry on trade and commerce from some time in the year 1796, till the 12th day of November, 1797, on which day the partnership was dissolved; and that the dissolution was advertised in the public papers, on the 19th of October, 1797, to take place on the said 12th day of November, 1797. And the defendant, to support the issues on his part, offered in evidence a paper in the handwriting of the plaintiff, and by him subscribed, as follows:

"Georgetown, November 9th, 1797. Received of Mr. John M'Intosh, his two notes, one payable to John Gadsby for fourteen hundred and thirty-six dollars and sixty-two cents, dated the first instant, negotiable at the bank of Alexandria, at six months after date, indorsed by said Gadsby; the other to Thomas J. Beatty, of same date, at three months after date, for twelve hundred and seventy dollars and eighty-seven cents, negotiable at the bank of Columbia, and indorsed by said Beatty. The two notes making the sum of two thousand seven hundred and seven dollars and forty-nine cents, which, when paid, is on account of money due me from the firm of Levy and M'Intosh, equal to two thousand two hundred and ten dollars and twenty-four cents, as by their account, handed me by the said M'Intosh, dated October 23d, 1797; and as the said M'Intosh agrees he is receiving an interest equal to the difference twixt the sum due me, as per their account current, and the notes payable, he, therefore, allows me the same interest as the one he is receiving for my money. Therefore, on a settle- 182*] ment of accounts, I am *only to stand debited for twenty-two hundred and ten dollars and twenty-four cents (2,210 dollars and twenty-four cents), due as per account current; 497 dollars and 25 cents interest; 2,707 dollars and 49 cents. "N. Levy."

The plaintiff's counsel objected to the said writing being given in evidence by the defendant on the pleas of usury, and the Court refused to permit it to go in evidence on those pleas. The plaintiff's counsel then objected to its going in evidence on the general issue of *non assumpsit*, but upon that issue, the court admitted it.

2d. The 2d bill of exceptions, after repeating the same facts, states, that the plaintiff's counsel prayed the opinion of the court, and their instruction to the jury, whether the circumstances given in evidence as aforesaid, amounted to proof of a usurious contract between Levy & M'Intosh; and the Court, thereupon, instructed the jury, that those circumstances did amount to proof of a usurious contract between those parties.

3d. The 3d bill of exceptions was to the opinion of the court, that the agreement mentioned in the receipt given by Levy to M'Intosh, having been read in evidence, and having been, by the court, declared a usurious agreement, the note given in pursuance thereof is void, and that the plaintiff is not entitled to recover thereon against the defendant in the present action.

Swann and Simms, for plaintiff in error. C. Lee, Mason and Jones, for the defendant.

The questions arising in this case are,

1st. Whether the court below was correct in instructing the jury, that the agreement contained in Levy's receipt was usurious.

2d. Whether that receipt was admissible in evidence upon the issue of *non assumpsit;* and,

3d. Whether it was admissible upon either of the other issues.

*Swann, for the plaintiff in error. [*183

1. As to the usury. The court below undertook to say that the agreement and other circumstances amounted to conclusive proof of usury, when it ought to have been left to the jury, under all the circumstances of the case, to say whether the contract was usurious or not.

There appears to have been a partnership in usury between Levy and M'Intosh. During that partnership, M'Intosh had loaned Levy's money at usury, and on the 23d day of October, 1797, was indebted to Levy in the sum of 2,210 dollars and 24 cents, for money thus lent out at 3 and 6 months. And being satisfied that he should receive that money at those periods, he was willing to bind himself absolutely to pay it over to Levy, whose money it in truth was. This, we say, is the true construction of the receipt. It is no more than the case of an agent binding himself to pay over, at a particular time, the money of his principal which shall at that time be in his hands.

To constitute usury under the act of assembly, Rev. Code of Virginia, p. 37, there must be either a loan of money, or forbearance of a debt already due. In this case there was neither a loan from Levy to M'Intosh, nor a debt due from M'Intosh to Levy. Cowp. 115, *Floyer v. Edwards*. A note given without consideration is not usurious. M'Intosh was to receive the money at a certain time, and pay it over to Levy. This is the whole of the contract. He only bound himself expressly to do what in equity and conscience he ought to do. At the time the notes were given, if Levy had sued M'Intosh for the money, it would have been a sufficient answer to say that M'Intosh had not received it.

If I authorized a man to lend 1,000 dollars of my money on usury, for my benefit, and he

does so, and has received 500 dollars for such usury, can I not compel him to pay it over to me? This is really the only question upon the merits of this case; and this seems to be decided by the case of *Faikney v. Reynous*, 4 Burr. 2069, and that of *Petrie v. Hannay*, 3 T. R. 418, in which it was held that if two be engaged in a transaction illegal, but not *malum in se*, and one of them pay the whole money, he 184*] *may recover a proportion from the other, if this other has expressly promised to pay it. From hence it may be inferred, that although the original transaction between M'Intosh and the person to whom he lent the money on usury was illegal, and although Levy knew all the circumstances, and assented to the transaction, yet, inasmuch as it was not *malum in se*, and M'Intosh agreed to pay over the money to Levy when received, the illegality of the original transaction shall not discharge M'Intosh from such agreement, or render it void.

Simms, on the same side. An objection was made in the court below, to allowing usury to be given in evidence on the plea of *non assumpsit*, but it was overruled by the court. If there had been no other plea, perhaps the question would be doubtful; but when the defendant has pleaded usury in a particular way, he ought not to be permitted to resort to a different kind of usury. *Tate v. Wellings*, 3 T. R. 538. It tends to surprise and entrap the plaintiff.

C. Lee, contra. 1st. Whether usury can be given in evidence on *non assumpsit*.

Everything which goes to show that the contract is void, may be given in evidence on that plea; for if the promise was void when made, then, in law, it was no promise. Str. 498, *Bernard v. Saul*; 2 Str. 733, *Burrowe v. Jemino*; 1 Esp. Rep. 178.

There being two special pleas of usury makes no difference, the court having been of opinion that the evidence did not support those pleas.

2d. As to the construction of the agreement. If the usury is reserved for forbearance of a debt already due, it is the same thing as if reserved on an original loan. 1 Call, 74, 81, *Gibson v. Fristoe*. And it makes no difference whether the usurious interest is stated to be received from others or not. Usury is not to be covered by such devices as that. It is only an indirect way of receiving the usury.

185*] *No argument can make the transaction plainer than it is stated in the receipt itself. *Res ipsa loquitur*.

Mason, on the same side. There can be no ground for the plaintiff to allege surprise in the admission of the receipt as evidence on the general issue. The special pleas set forth precisely the same facts, and nothing but a blunder in copying the pleas, and inserting the name of M'Intosh for Gadsby, prevented the evidence from being admitted on those pleas.

The agreement is, that as M'Intosh is receiving usury from others, therefore he will pay it to the plaintiff. If the debtor receives usury from his debtors, it is no justification of the creditor in demanding from him.

There is no evidence that the partnership of Levy and M'Intosh was a partnership in usury.

The receipt does not directly aver that M'Intosh is receiving the rate of interest mentioned. It only states that he agrees he is receiving it. A man may agree to a false statement of facts; and, indeed, that is always the case, when usury is attempted to be covered.

Jones, on the same side. The evidence offered was not only applicable to the general issue, but to the first special plea of usury. The agreement shows it to be a loan in the sense of the statute.

No precedent can be found of a plea of usury which does not state it as a loan.

The cases cited do not apply. The agreement itself does not state it to be accounting for profits received. But M'Intosh gives an absolute note for the payment of money, although it is agreed that it is outstanding.

The question is upon a written agreement, and the construction of all such agreements is exclusively with the court.

*March 4. MARSHALL, *Ch. J.*, deliv- [*186
ered the opinion of the court.

It was slightly contended by the counsel for the plaintiff in error, that when usury has been specially pleaded, and the evidence adduced to support such plea has been adjudged by the court to be inapplicable to the facts so pleaded, the same evidence cannot be admitted upon the plea of *non assumpsit*. No cases in support of this position have been cited, and it does not appear to be supported by reasoning from analogy. In cases where there are special and general counts in a declaration, and the evidence does not support the special counts, the plaintiff is allowed to apply the same evidence in support of the general counts. On a parity of reasoning, the defendant should be permitted to give in evidence, upon the plea of *non assumpsit*, the same facts which were adjudged inapplicable to the special pleas, but which might have been received on the general plea, if the special pleas had not been pleaded.

The counsel for the plaintiff has also contended, that although the paper writing produced would, on the face of it, import a usurious contract, yet, as the jury might possibly have inferred from it certain extrinsic facts, which would have shown the contract not to have been within the act, the jury ought to have been left at liberty to infer those facts. But in this case the question arises upon a written instrument, and no principle is more clearly settled, than that the construction of a written evidence is exclusively with the court.

This Court is of opinion, that the court below has correctly construed the instrument upon which the question arose, and that, therefore, there is no error in the judgment.

Judgment affirmed, with costs.

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*THE MARINE INSURANCE COMPANY OF ALEXANDRIA [*187
v.
WILSON.[1]

If a policy upon a vessel have a clause "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors, that she was unsound and rotten, but not referring

1.—Present, Marshall, *Ch. J.*; Cushing, Paterson and Washington, *Justices*.

to the commencement of the voyage, is not sufficient to discharge the underwriters.

Quære, whether such report, even if it related to the commencement of the voyage, would be conclusive evidence?

THIS was an action of covenant in the circuit court of the District of Columbia, sitting at Alexandria, brought by Wilson, the defendant in error, against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brig George, from Alexandria to Havre de Grace, &c.

One of the clauses in the policy was in the following words, viz. "If the above vessel, after a regular survey, shall be condemned for being unsound or rotten, the underwriters shall not be bound to pay the subscription on this policy." The declaration was for a total loss, and averred that the brig sailed from Alexandria on the 24th of October, 1802, upon the voyage insured.

The defendants pleaded,

1st. "That on the 24th day of October, 1802, the said brigantine, called the George, was unsound in her timbers, and by reason of the said unsoundness, was not capable of performing the voyage in the policy mentioned, viz., at and from Alexandria aforesaid, across the Atlantic ocean to Havre de Grace, Rotterdam or Bremen, with liberty to call at Falmouth for orders; and this they are ready to verify," &c.

2d. "That after the said brigantine had gone from Alexandria aforesaid, upon the voyage aforesaid, and while she was proceeding upon the voyage aforesaid, upon the high seas, she sprung a leak, viz., on the 31st day of October, in the year aforesaid, in consequence of her not having been tight, staunch and strong enough for performing the voyage aforesaid, on the 188*] said 24th day of *October, in the year aforesaid, at Alexandria aforesaid, and, at the instance of her crew, her voyage was interrupted upon account of her incapacity to perform the same. And the said brigantine was put back and conducted into a convenient port to be examined and repaired, viz., into Norfolk, in Virginia, and that a regular survey of the said brigantine was made at Norfolk on the day of , in the year , and thereupon the said brigantine was condemned for being unsound to that degree as not to be worthy of being repaired, and rendered fit and able to perform the voyage aforesaid, whereof the plaintiff, afterwards, to wit, on the day and year last mentioned, at the county of Alexandria aforesaid, had notice; and this they are ready to verify," &c.

To this last plea there was, at first, a general demurrer, which was afterwards withdrawn, and general replications and issues to both pleas.

On the trial, two bills of exception were taken by the defendants. The first states, that the defendants moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony that the George, on the 24th of October, 1802, after a regular survey, was condemned as being unsound or rotten by the surveyors, whose report is as follows, to wit: "The brig George, of Alexandria, Caspar Hayman, master, having put into this port in distress, we, the subscribers, at the request of said master, did this day attend on board, for the purpose of ascertaining and reporting the situation of the said vessel, and the circumstances of said distress. We found, from the report of said master and others, that they sailed from Alexandria on the 24th of October last past, with a cargo of tobacco, coffee and staves, bound on a voyage to Falmouth, in England; that on the 31st of the same month, in consequence of having met with heavy gales of wind, the vessel sprung a leak, and that with much difficulty and continued labor at the pumps, having seldom less than three feet water in the hold, they gained this port. Considering the foregoing circumstances, and the appearances which, in our minds, confirm the same, we think proper to recommend that the vessel be haled to some convenient wharf, the *cargo landed, and the hull carefully [*189 examined. Given under our hands at Norfolk, Virginia, 17th November, 1802.

"JAMES HUNTER,
"PAUL PROBY."

"The cargo of the brig George, of Alexandria, having been unladen, pursuant to a recommendation contained in a report, dated the 17th instant, and signed by two of the present subscribers, we, the undersigned, at the request of Caspar Hayman, master of said brig, did this day attend on board for the purpose expressed in said report.

"We find, on a minute examination of the hull of said vessel, that without going into an extensive repair, the intended voyage cannot be prosecuted; and considering the heavy expense that must necessarily attend such a measure, and which, in our opinion, would exceed the value of the vessel when completed, we are clearly of opinion that the vessel and materials, in their present state, should be immediately sold on account of those concerned. Given under our hands at Norfolk, Virginia, this 26th Nov. 1802.

"JAMES HUNTER, *Merchant*,
"PAUL PROBY, *Ship Master*,
"JOHN JARVIS, } *Master Car-*
"THOS. NASH, } *penters.*"

But the Court refused to give the instruction as prayed.

The second bill of exceptions stated, that the defendants' counsel moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony, that the brig George, after a regular survey, was condemned as having been unsound or rotten on the 24th day of October, 1802, by the surveyors, whose report is as follows: (here was inserted the same report:) and shall also be satisfied by the evidence, that the said vessel, while she was performing the voyage insured upon the high seas, sprung a leak on the 31st day of October, in the year aforesaid, and at the instance of her crew, the said voyage was interrupted *upon account of her incapacity to per- [*190 form the said voyage; and that the said brigantine was put back, and conducted into a convenient port to be examined, namely, into Norfolk, in Virginia, where the survey herein before mentioned was made; but the court refused to give such instruction.

C. Lee, for the plaintiffs in error. Three points arise in this cause.

1st. That the report of the surveyors is conclusive upon the question of seaworthiness, unless partiality, corruption or misbehavior on the part of the surveyors, in making the survey, can be shown.

2d. That it is competent for the defendant to explain, by parol testimony, the grounds upon which the surveyors condemned the vessel.

3d. That it was not necessary for the insurers to plead specially the report of the surveyors, and their condemnation of the vessel, but that it might be given in evidence.

1st. If the parties have agreed upon a tribunal to decide a particular question, they must be bound by the decision of that tribunal. So in the case of an award. It is binding upon the parties all over the world.

But, it may be said, how are the surveyors to ascertain the condition of the vessel on the 24th of October? The answer is, that they might examine witnesses; they might judge from the universal decay of the timbers, &c.

The covenant in the policy does not say at what time the vessel must be proved to have been unsound. But we admit that she must be proved to have been unsound at the time the voyage commenced.

We pleaded that she was unsound on the 24th of October, when the voyage commenced; and we prayed the court to instruct the jury, that if they should be satisfied by the evidence that 191*] she was condemned *as being unsound and rotten on the 24th of October, after a regular survey, they ought to find a verdict for the defendants. This instruction, we contend, the court ought to have given; for the report of the surveyors is like an award of arbitrators, which cannot be set aside, unless partiality, fraud, or misbehavior, be proved on the part of the arbitrators. In the case of *Shelton* v. *Barbour*, 2 Wash. 64, it was held that a former verdict and judgment between the mother of the plaintiff, who sued for his freedom, and the defendant, by which it was adjudged that the mother was a slave, were conclusive evidence that the plaintiff, her son, was a slave. And this was a question where freedom was concerned, and where the natural leaning of the court is presumed to be in favor of freedom.

The judgment of a court is to be admitted as conclusive evidence, without being specially pleaded. So is an award, and the judgment of a foreign court which has jurisdiction over the subject matter and the parties.

2d. If the report of the surveyors does not refer to the 24th of October, as the time when the vessel was unsound, it was competent for us to explain the report by testimony not inconsistent with it. There is, however, enough in the report to induce a presumption that she was not sound on the 24th. The unsoundness was in the hull, not in the rigging, masts, &c.

To show that parol testimony might be admitted to explain any ambiguity of the report, the following cases were cited: 1 T. R. 701, *Doe, dem. Freeland* v. *Burt;* 1 Dall. 193, *Gregory* v. *Setter;* 2 Dall. 171, *Field* v. *Briddle;* 2 Dall. 173, *M'Minn* v. *Owen;* 1 Wash. 15, *Ross v. Norvell.*

March 5. MARSHALL, *Ch. J.*, declined giving an opinion, conceiving himself to be in a remote degree interested in the stock of the insurance company.

*The other three judges delivered [*192 their opinions *seriatim*, as follows:

WASHINGTON, *J.* It does not appear upon the record that any other evidence was offered to prove the vessel unsound on the 24th of October, than the report of the surveyors. No parol testimony appears to have been offered to explain the report or to apply it to the time of commencing the risk. The bill of exceptions is repugnant. It asks an opinion predicated upon the unsoundness of the vessel on the 24th of October, and relies upon the report of the surveyors, which applies only to the 31st of October. If it was intended to bring before this court the propriety of admitting parol evidence to explain the report, that question does not appear to arise from the record.

I see no reason for reversing the judgment.

I do not, however, mean to be understood, that if parol evidence had been offered, it would have been proper to receive it. I give no opinion upon that point.

PATERSON, *J.* No parol evidence appears upon the record to show that the report of the surveyors referred to the 24th of October. The conclusiveness of the report, therefore, did not come before the court. It is not a point in the cause.

CUSHING, *J.* This is an action on a policy of insurance. The defense set up is, that the vessel was unsound and rotten on the 24th of October, when the risk commenced; and it is alleged that the report of the surveyors is conclusive evidence of that fact. But the report does not apply to that time.

Let the judgment be affirmed with costs.

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*WILSON [*193
v.
CODMAN'S EXECUTOR.[1]

In a declaration, the averment that the assignment of a promissory note was for value received, is an immaterial averment, and need not be proved. If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration which alleges the note to have been given by the defendant for value received.

Claims against the agent cannot be offset against the principal.

Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance. But he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.

ERROR from the circuit court of the District of Columbia, sitting at Alexandria.

It was an action of debt originally brought by John Codman, as assignee of a promissory note made by the defendant, Wilson, to Andrew and William Ramsay.[2] The declaration was as follows, viz.: "John Codman, assignee of

1.—Present, Marshall, *Ch. J.;* Cushing, Paterson and Washington, *Justices.*

2.—An act of assembly of Virginia authorises an assignee of a promissory note to maintain an action of debt in his own name against the maker of the note.

Andrew Ramsay and William Ramsay, complains of William Wilson, in custody, &c. of a plea that he render unto him the sum of 1,038 dollars and 80 cents, which to him he owes, and from him unjustly detains, &c. for this, to wit, that whereas the said defendant, on the 26th day of June, 1799, at Alexandria, in the county aforesaid, by his certain note in writing, subscribed with his proper hand and name, and to the court now here produced, the date whereof, &c. did promise to pay to the said Andrew and William Ramsay, or order, forty-five days after date, 1,038 dollars and 80 cents, for value received, negotiable in the bank of Alexandria; and the said Andrew and William Ramsay, afterwards, to wit, on the 23d day of October, in the year of our Lord 1802, at the county aforesaid, by their certain writing indorsed on the said note, and subscribed with their proper hands and names, assigned the said note to the said plaintiff, for value received, of which assignment the said defendant, afterwards, to wit, &c. had notice; by means whereof, and by force of the act of assembly of Virginia in such case made and provided, before the year 1801, action accrued," &c. There was an office judgment against the defendant and his 194*] appearance bail, *to set aside which the latter pleaded *nil debet* for his principal, at June term, 1803.

At December term, 1803, the suit was entered abated by the plaintiff's death. Afterwards, at the same term, on the motion of Stephen Codman, by his attorney, it was ordered, "That the said Stephen Codman, executor of John Codman, deceased, be made plaintiff in this suit, with leave to prosecute the same."

At June term, 1804, the defendant gave special bail, and "moved the court for a rule upon the plaintiff to grant oyer of his letters testamentary, to enable the defendant to answer the plaintiff, which was opposed by the plaintiff's attorney, and the motion was refused by the court," whereupon the defendant took a bill of exceptions. The plea put in by the appearance bail for the principal was withdrawn, and the latter pleaded, 1st. *Nil debet*, upon which issue was joined; and, 2d. That before the 23d day of October, 1802, the time stated in the declaration, when A. & W. Ramsay are supposed to have assigned the said note to the said John Codman, the said A. & W. Ramsay had been declared bankrupts, &c., and on the day of March, 1802, had duly obtained their final discharge, &c. To this plea the plaintiff replied, that on the 20th of June, 1799, the defendant was justly indebted to John Codman, the testator, in the sum of 1,038 dollars and 80 cents, and in consideration thereof, on that day made and executed the promissory note in the declaration mentioned, for that sum, to A. & W. Ramsey, as the agents of, and in trust for the use of, the said John Codman, the testator; and concluded with a verification. To this replication the defendant demurred specially; 1st. Because it is a departure from, and is inconsistent with, the declaration, in this, that the declaration affirms that the said note was payable to Andrew and William Ramsay, for value received, and was by them assigned for value received, to the said John Codman; and the replication affirms, that the said note was executed and delivered to the said A. & W. Ramsay, as the agents of, and in trust for the use of, the said John Codman; 2d. Because the plaintiff, in his replication, ought to *have traversed the plea, and [*195 tendered an issue thereupon, and ought not to have replied the said special matter, and concluded with a verification; 3d. Because the said replication is informal and insufficient, &c.

Upon this demurrer the court below adjudged the issue in law for the plaintiff.

Upon the issue in fact, the jury found a verdict also for the plaintiff; and on the trial four bills of exceptions were taken by the defendant. The 1st was to the refusal of the court to instruct the jury, that the plaintiff ought to produce in evidence his letters testamentary, to enable him to maintain the issue on his part.

The 2d bill of exceptions stated, "that the defendant produced testimony to the following facts, viz., that A. and W. Ramsay, on the 13th of August, 1799, when the note in the declaration mentioned became due, were indebted to him on their own account in a large sum of money, to wit, in the sum of 8,000 dollars, and continued indebted to him always thereafter, to that or a greater amount, until they became bankrupt, in November, 1801. That they had taken the said note for the use and benefit of John Codman, and not for their own, and were authorized, as his agents, to receive payment of the said note for his use, from the date thereof, until the —— day of May, 1800. That the said John Codman urged payment to be made; and during this period of time, sundry payments in money were made to the said A. & W. Ramsay, by the defendant, who, at the time of making such payments, did not mention any definite purpose, or use for which they were made.

That the said Andrew & William Ramsay, during the period aforesaid, viz., from the 13th of August, 1799, to the time of their bankruptcy, had authority to receive no other debt from the said William Wilson, except the debt due on the note aforesaid, and on another note for about the same sum, due for the use of said John Codman. And the defendant moved the court to direct the jury, that if they shall be of opinion, that at the times respectively when William Wilson, the defendant, made payments in money to *Andrew & William Ram- [*196 say, of sundry sums, after the note became due upon which this action is brought, they, the said A. & W. Ramsay, were indebted to him on their own account, always after the said note became due, to an amount exceeding 8,000 dollars, and were not authorized, during the whole of the time, from the 13th August, 1799, till their bankruptcy, to receive any other debt due from W. Wilson, the defendant, for the use of any other person, except the debt due on the note, which is the ground of this action, and another note for about the same sum, which they held as the agents of John Codman, and in trust for his use; in such case those payments of moneys may be applied to the discharge of those two notes; unless the jury shall be satisfied by testimony, that the said defendant did make those payments, or any of them, for some other purpose or purposes, respectively.

"The plaintiff had offered to prove, by the testimony of Andrew Ramsay, that the payments or advances of money to him and William Ramsay, charged in the account offered by the defendant, William Wilson, in the words

and figures following," [here was inserted an account current made out by the defendant against A. & W. Ramsay, containing, among others, sundry debits and credits of cash, subsequent to the time when the notes became payable, and before the bankruptcy of the Ramsays; by which it appeared that they had paid to the defendant, during that time, more cash than he had paid to them, without specific appropriation; but the balance of the whole account, (which commences in April, 1797, and continues to October 15, 1801,) was against the Ramsays to about the sum of 10,000 dollars,] "were not made on account of the notes due to John Codman, or either of them, and that they were not received by the said A. & W. Ramsay on account of the said notes, or either of them; and had also offered in evidence two letters from the defendant, admitted to be in his handwriting, in the words and figures following," [here were inserted two letters from the defendant to John Codman, the first dated 21st January, 1800, saying, that he had paid a small part of the notes to A. & W. Ramsay, and would gladly settle the remainder, if it was in his 197*] *power; the second is dated 25th February, 1800, offering to pay the notes in real estate or to give a mortgage,] "whereupon the court refused to give the instruction as prayed;" to which refusal the defendant excepted.

The 3d bill of exceptions was to the opinion of the court, that it was necessary for the plaintiff to prove the assignment of the note, but that it is not necessary for him to prove that the same was made for value received, by the said A. & W. Ramsay from the said John Codman.

The 4th bill of exceptions was to the admission of the note and indorsement in evidence to the jury, the indorsement being in these words; "We assign this note to John Codman, without recourse," and signed by A. & W. Ramsay, the payees of the note; inasmuch as the indorsement varied from that set forth in the declaration; the former being "without recourse," and the latter "for value received."

E. J. Lee, for the plaintiff in error, made the following points;

1st. That the defendant below was entitled to oyer of the letters testamentary at the time he demanded it.

2d. That the plaintiff was bound to produce them on the trial, upon the issue of *nil debet*.

3d. That the plaintiff was bound to prove the assignment to have been made for value received, according to the averment in the declaration.

4th. That the defendant below had a right, at any time, to apply the payments of money made to A. & W. Ramsay, to the account of the notes in question; the Ramsays being, at that time, personally his debtors, and having no right to demand of him money upon any other account.

5th. That the replication to the second plea was bad upon special demurrer.

198*] *1st. The executor was bound to produce his letters testamentary, and the defendant was entitled to oyer at any time.

In Virginia, if the plaintiff dies before office judgment, the suit abates, and the executor must proceed *de novo*. If the plaintiff dies after judgment, the executor must take out a *scire facias*, in which he must make a profert of his letters testamentary. When the *scire facias* issues, the cause goes to the rules, and the defendant has a month to plead. In the present case, the change of parties was made in court, and the defendant had not yet appeared; he had, therefore, time till the next term to appear and plead, and had then a right to demand oyer. 6 Mod. 134, *Adams v. Savage;* Idem. 142, *Smith v. Harman.* By the act of Congress, vol. 1, p. 71, s. 31, a *scire facias* is to issue in case of the death of a party before judgment. The law of Virginia, Rev. Code, p. 117, s. 20, is nearly the same.

The act of Congress does not do away the necessity of an executor's showing his letters testamentary, nor deprive the defendant of his right of oyer.

PATERSON, *J.* Under the act of Congress do not the proceedings go on of old? Are there to be any proceedings *de novo?*

E. J. Lee. There is no doubt that the executor must show his letters testamentary on admission to prosecute, and the defendant has a right to demand oyer at some time.

MARSHALL, *Ch. J.* The question is whether, under the act of Congress, a *scire facias* is necessary.

WASHINGTON, *J.* There is another question, whether the defendant did not crave oyer in due time.

E. J. Lee. The plaintiff ought to produce his letters testamentary at the time he is admitted, or when oyer is prayed, or at the trial, to support his title.

*MARSHALL, *Ch. J.* No doubt the [*199 defendant was entitled to oyer, but the question is, has he demanded it in proper time?

E. J. Lee. 3d. The plaintiff ought to have proved that the note was assigned for value received. The assignment on the note is expressed to be "without recourse." There was, therefore, a variance between the assignment on the note and that set forth in the declaration. The court, therefore, ought either to have prevented the assignment from being produced in evidence, or have compelled the plaintiff to prove it was really for value received. By thus admitting the assignment to go in evidence, they have prevented the defendant from his right to offset his payments to A. & W. Ramsay before the assignment.

If there be a variance between the evidence and the declaration it is fatal, how trivial soever it may be. If the plaintiff undertakes to recite an instrument, although he is not bound so to do, and misrecites it, he must fail. Thus, in trover for a debenture, the plaintiff must prove the number of the debenture as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited. But he need not set out the number, (any more than the date of a bond for which trover is brought,) for being out of possession, he may not know the number, and if he should mistake it would be a failure of his suit. Buller's N. P. 37. So in the case of *Bristow v. Wright,* Doug. 665, it was held that in an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit.

MARSHALL, *Ch. J.* You consider the declaration as setting forth the indorsement *in hæc verba.*

E. J. Lee. I do.

MARSHALL, *Ch. J.* The only question upon this point is, whether the plaintiff has undertaken to set forth the indorsement *in hæc verba;* for if so, and there is a variance, there is no doubt it would be fatal.

200*] *E. J. Lee. 4th. The defendant below had a right to apply all the cash paid by him to A. & W. Ramsay, to the discharge of the notes. They had no right to say it was a gift or a loan, and they had no other right to demand money of him than for those notes. If the appropriation was not made at the time of the payment, yet it could not be applied to the single debt due.

5th. As to the demurrer. 1st. The declaration states the assignment to be for value received. The replication, instead of fortifying the declaration, states, that it was not for value received, which, being repugnant, is a departure in pleading. Thus, if the plea be conditions performed, and the rejoinder shows matter in excuse for not performing, it is a departure. 4 Bac. Abr. 123, Departure in Pleading, L. If a note is given to me as agent for another, it is not given to me for value received; 2d. There is no traverse, denial, or confession of the matter of the plea. 4 Bac. Abr. H. 70.

C. Lee, on the same side. If the plaintiff is not the true executor, a judgment in this suit would be no bar to an action by the rightful executor. Hence it is necessary that he should produce his letters testamentary. It does not appear that he ever produced them in the court below at any time. He ought to have been compelled to produce them at the trial, on the issue of *nil debet*, to support his title. The plea of *nil debet* put the plaintiff on the proof of every thing necessary to entitle him to recover. It has been considered as law in Virginia, that on that plea the defendant may give in evidence the statute of limitations, which he could not do on *non assumpsit;* because the latter plea is in the past tense, and the statute does not prove that he never promised. But the plea of *nil debet* is in the present tense, that he does not now owe, and, therefore, if the debt is barred by the statute, the plea is well supported. If an executor bring an action of assumpsit, the defendant pleads *non assumpsit* in manner and form as the plaintiff has declared, that is, he did not assume to pay to the testator in his lifetime. The plaintiff, in such case, is only bound to prove that the defendant promised to pay the testator, and his own title as executor does not come in question. But if an executor bring an action of debt, and the defendant pleads 201*] **nil debet*, he says that he owes nothing to the present plaintiff, who sues as executor, and if the plaintiff be not the true executor, the plea is supported; the defendant, in truth, owes him nothing. Hence arises the difference between the necessity of producing letters testamentary in evidence on the trial in actions of assumpsit, and in those of debt on simple contract.

Simms, contra. In this case there was an office judgment against Wilson and his appearance bail. The bail came in and set aside the office judgment, by pleading for his principal (as he had a right to do under the act of assembly of Virginia,) in the lifetime of John Codman, and the issue was made up. Afterwards John Codman died, and Stephen Codman, his executor, appeared, and had leave to prosecute the action.

We differ from the opposite counsel as to the construction of the act of Congress. They seem to think that the pleadings must be *de novo.*

But it is in the discretion of the court what pleas to admit after the issue had been made up.

It is said Wilson was not in court. But it was his own fault to suffer judgment to go against him. No man can take advantage of his own neglect. It was a matter of discretion with the court to admit the principal to appear and plead after the issue had been made up by the bail. It is to be presumed that the executor produced his letters testamentary, and that the court was satisfied when they admitted him to prosecute as plaintiff. If the defendant did not then pray oyer, it was his own neglect. He can only demand oyer at the term when the letters were produced. 5 Co. 74, b, *Wymark's Case.* But letters testamentary need not remain in court even during the whole of that term. 2 Salk. 497, *Roberts v. Arthur.*

As to the demurrer, two causes are assigned. First, that the replication is a departure; and, second, that it does not traverse the matter of the plea.

*1st. Unquestionably, if it is a de- [*202 parture, it is bad. But if it is the only fortification of the declaration against the plea, it must be good. Co. Litt. 304, *a.* The replication is not repugnant to, nor inconsistent with, the declaration. It is the same in substance with that in the case of *Winch v. Keely,* 1 T. R. 619, which was adjudged good on demurrer.

2d. It is said that the replication ought to have traversed the matter of the plea.

What part could the plaintiff have traversed? The bankruptcy is impliedly admitted in the replication.

WASHINGTON, *J.* Part of the objection is, that the replication does not confess the matter of the plea.

Simms. That is not set down as a cause of demurrer, and it is but matter of form. But it is no cause for demurrer even if it had been specially shown. In a plea of the statute of limitations, the defendant does not confess that he ever promised at all. So in a replication to such a plea, that the plaintiff was out of the country, he does not confess that the five years have elapsed. So in pleading a release, it is not necessary to admit the execution of the bond, &c.

No authorities can be produced in support of such an objection.

As to payments of money, it appears from the account itself, that Wilson, after the notes became due, received more cash from A. and W. Ramsay than they received from him; and it is evident, that the cash transactions were mere matters of mutual accommodation, by loans of small sums for short periods of time.

As to the first bill of exceptions, it is said, that the plaintiff ought to have produced his letters testamentary on the trial; and that a judgment, in this suit, would not be a bar to an action by the rightful executor.

This we deny. In a suit brought by the name of John, it is not necessary on the trial 203*] of the general issue *to prove that the plaintiff was baptized by that name. So if the plaintiff sue, as executor, when he is only administrator, and no advantage taken by plea in abatement, it is not necessary, on the trial, to produce letters testamentary.

The 3d and 4th bills of exception raise two questions.

1. Whether the assignment ought to have been proved, on the trial, to be for value received.

2. Whether the assignment on the note varies from that stated in the declaration.

It is said, that the *probata* and the *allegata* must precisely agree. This is not the law. It is sufficient if they agree in substance. In an action of assault and battery, the declaration, alleging it to be done with sticks, staves and swords, is sufficiently supported by evidence that the defendant pulled the plaintiff's nose. So if the declaration allege that goods were sold and delivered at the request of the defendant, it is sufficient to prove that the defendant reluctantly received them at the solicitation of the plaintiff. It is only necessary to prove the material averments to be substantially true.

The substance, in the present case, is the note and the assignment. The manner is totally immaterial. No form of assignment is prescribed by the act of assembly; and it is not necessary, under the act, to state the precise words of the assignment. If the assignment had been in consideration of a horse received, it would have been sufficient to have stated, generally, that it was for value received. The words without recourse do not imply without value, nor do they alter the effect of the assignment as it regards the defendant. The declaration does not pretend to set forth the assignment *in hæc verba;* and, therefore, the case from Doug. 665, does not apply. 2 Salk. 658, *Holman* v. *Borough;* Doug. 193, *The King v. May.*

204*] *MARSHALL, *Ch. J.* Does not your defense rely on there being no value received?

Simms. I contend not. I shall presently take the distinction.

WASHINGTON, *J.* The departure is alleged upon that ground.

Simms. A moral obligation on the part of A. & W. Ramsay is a sufficient consideration for the assignment. They were bound in honesty and good faith to assign, and that is sufficient to support the allegation of value received.

The maker of the note has no right to inquire into the consideration which passed between the assignor and assignee.

If the note had not been, from the first, held in trust for Codman, the defendant might have offset all his claims against the Ramsays, which were due before notice of the assignment.

No offset against the trustee can be set up against *cestui que trust.* The authorities cited in Winch and Keely can be produced if the court should require it.

MARSHALL, *Ch. J.* There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot offset, against the debt due from him to the principal, claims against the agent. It cannot be contested. No man ever thought that a person who employs an agent to collect his debts, by this agrees to take on his hands the debts owing by his agent to his debtors, instead of looking to the original debtors themselves.

C. Lee, in reply.

1st. As to the letters testamentary.

*The act of Congress does not take [*205 away the necessity of giving notice to the other party. It does not essentially alter the law on that subject. By that law a *scire facias* must have issued, and would have been returnable to the next term. One of the clauses of each act is in the same words. The act of Congress is equally applicable to the death of plaintiffs and defendants. A *scire facias* must issue in both cases. And if it had issued, the defendant would have been in time.

2d. The plaintiff ought to have produced his letters testamentary at the trial, to support his title, on the issue of *nil debet.*

This has been spoken to before.

3d. As to the demurrer.

It is an answer to the case of *Winch v. Keely,* 1 T. Rep. 619, that in our case the demurrer is special, in the other it was general. It will also appear that in that case the facts of the pleas were expressly admitted in the replication. The demurrer there was for the purpose of bringing into consideration an important question of law.

The 1st cause of demurrer assigned is, that the replication is a departure. It is only necessary to know what the declaration is.

The expression, for value received, means value received by the defendant of the Ramsays, and by them of the plaintiff. The declaration states it to be Ramsay's debt; the replication alleges it to be Codman's debt.

4th. The variance between the declaration and the note offered in evidence is material. If they had produced a note assigned for value received, the plea of bankruptcy of the Ramsays would have been good. If they had proved their declaration, they would have defeated their action It is admitted, however, that it would be a question of some doubt, whether the variance would be absolutely fatal if the action were on a *parol agreement, upon the authority [*206 of the note at the end of the case of *Bristow v. Wright,* Doug. 669, (3d edition,) which confines this strictness of pleading to records and written contracts. But the present action is upon a written contract, and, therefore, according to all the authorities, a misrecital is fatal.

5th. As to the bill of exceptions respecting the testimony, it is only necessary to read the prayer of the defendant to the court, (without intermixing the testimony offered by the plaintiff, which only confuses the question,) to show the impropriety of the court's decision.

The amount of the prayer is, that the payments ought to be presumed to be made on the notes, unless it is proved that they were made for some other purpose, or on some other account; it having been proved that the Ramsays had no right to demand money from the defendant except on account of those notes.

March 6. MARSHALL, *Ch. J.,* delivered the opinion of the court.

The first question which presents itself in this case is, was the defendant entitled to oyer of the letters testamentary at the term succeed-

ing that at which the executor was admitted a plaintiff in the cause?

It is contended, on the part of the defendant, that on the suggestion of the death of either plaintiff or defendant, a *scire facias* ought to issue, in order to bring in his representative; or, if a *scire facias* should not be required, yet, that the opposite party should have the same time to plead and make a proper defense as if such process had been actually sued.

The words of the act of Congress do not seem to countenance this opinion. They contemplate the coming in of the executor as a voluntary act, and give the *scire facias* to bring him in, if it shall be necessary, and to enable the court "to render such judgment against the estate of 207*] the *deceased party," "as if the executor or administrator had voluntarily made himself a party to the suit." From the language of the act this may be done *instanter*. The opinion that it is to be done on motion, and that the party may immediately proceed to trial, derives strength from the provision, that the executor or administrator, so becoming a party, may have one continuance. This provision shows that the legislature supposed the circumstance of making the executor a party to the suit, to be no cause of delay. But as the executor might require time to inform himself of the proper defense, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him.

There is, then, nothing in the act, nor is there any thing in the nature of the provision, which should induce an opinion that any delay is to be occasioned where the executor makes himself a party, and is ready to go to trial. Unquestionably he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary before he shall be permitted to prosecute; but if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor.

If the court has unguardedly permitted a person to prosecute who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means.

The second point in the case is the demurrer of the defendant to the plaintiff's replication.

Two causes of demurrer are assigned. 1st. That it is a departure from the declaration; 2d. That the plea ought to have been traversed, and an issue tendered thereon.

On the first cause of demurrer, some difference has existed in the court, but the majority of the judges concur in the opinion, that the replication fortifies, and does not depart from the declaration.

208*] *The averment, that the assignment was for value received, is an immaterial averment. The assignee, without value, can as well maintain his action as the assignee on a valuable consideration. It is, therefore, mere surplusage, and does not require to be proved; nor does it affect the substantial part of the declaration. It is also the opinion of a part of the court, that the duty created by the trust, and which was discharged by the assignment, may be considered as constituting a valuable consideration to support the averment, and prevent the replication from being a departure from the declaration.

2d. The second cause of demurrer is clearly not maintainable. The matter of the replication does not deny, but avoids the allegations of the plea, and, consequently, the conclusion to the court is proper.

It has, indeed, been argued, that the replication is faulty, because it does not confess the matter alleged in the plea; but this is not assigned as a cause of demurrer, and it is, therefore, not noticed by the court.

The demurrer having been overruled, several exceptions were taken at the trial to the opinion of the court.

The first was to the admission of the note as evidence. This was objected to, because the declaration averred the note to be assigned for value received, and the assignment contained no expression of a valuable consideration, but was declared to be made "without recourse." As the assignment is not set forth *in hæc verba*, this exception is so clearly unmaintainable that it will require only to be mentioned.

The 2d exception requires more consideration. It is, that although the averment that the assignment was made for value received was immaterial, yet the plaintiff, having stated the fact in his declaration, is bound to prove it. In support of this position, *Bristow v. Wright*, Doug. 665, has been quoted and relied on.

The strictness with which, in England, a plaintiff is bound to prove the averments of his declaration, although *they may be im- [*209 material, seems to have relaxed from its original rigor.

The reasons stated by Lord Mansfield, in the case reported by Douglas, for adhering to the rule, do not apply in the United States, where costs are not affected by the length of the declaration.

Examining the subject with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument, which, by being untruly described, may, by possibility, mislead the opposite party.

Where, then, the averment in the declaration is of a fact *dehors* the written contract, which fact is in itself immaterial, it is the opinion of the court that the party making the averment, is not bound to prove it.

In this case, the averment, that the assignment was made for value received, is the averment of a fact which is perfectly immaterial, and which forms no part of the written assignment; nor is it averred to be a part of it. It is an extrinsic fact, showing how the right of action was acquired, but which contributes nothing towards giving that right of action. The party making this useless averment ought not to be bound to prove it.

No case which has been cited at bar, comes up to this. The averments of the declaration, which the plaintiff has been required to prove, are all descriptive of records, or of written contracts; not of a fact, at the same time extrinsic and immaterial. The Court is, therefore, unan-

imous in the opinion, that this exception cannot be maintained.

In the progress of the trial, the counsel for the defendant, in the court below, also required that court to instruct the jury, that unless the plaintiff could show that the Ramsays, who 210*] were his agents, had the power *to collect some other debt from the defendant, the payments made by him, to them, should be credited on the notes given to them in trust for Codman, which instruction the court very properly refused to give.

Independent of the proof made by the plaintiff, that the sums of money received by the Ramsays from Wilson, were really on their own account, the instruction would not have been proper as this case actually stood. There was a running account between the Ramsays and Wilson, who had large transactions with each other, and who reciprocally advanced large sums. This running account is not stated by the defendant, in the proposition for the opinion of the court. The effect it produces is to make it proper for Wilson to prove, that advances made by him to the Ramsays were not designed to satisfy their particular engagements with each other, but were intended to discharge the debt due to Codman. Terms are improperly used in the bill, which imply a fact contradicted by the testimony. The word payment is used instead of the word advance, and this, at first view, may produce an obscurity, which is dissipated on investigating the record.

The judgment is to be affirmed with costs.

HALLET AND BOWNE
v.
JENKS AND OTHERS.

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo in order to make repairs, and prevented by the officers of the French government from relading her original cargo, and from taking away any thing in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the non-intercourse act of 13th June, 1798. And such voyage was not illegal, so as to avoid the insurance.

THIS was a writ of error to "the court for the trial of impeachments and the correction of errors in the state of New York," under the act of Congress, of the 24th September, 1789, s. 25, vol. 1, p. 63, which gives the Supreme Court of the United States appellate jurisdiction upon a judgment in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the construc- 211*] tion of any clause of a *statute of the United States, and the decision is against the right, privilege or exemption, specially set up or claimed by either party, under such statute.

The action was upon a policy of insurance, and the only question to be decided by this court was, whether the risk insured was illegal, under the act of Congress (commonly called the non-intercourse law) of the 13th June, 1798, vol. 4, p. 129. For although another question appears to rise upon the record, viz., whether a condemnation in a foreign court, as enemy's property, be conclusive evidence of that fact, yet this court is prohibited by the same 25th section of the act of 1789, to consider any other question than that which respects the construction of the statute in dispute.

On the trial of the general issue, a special verdict was found, containing the following facts:

That on the 27th day of April, 1799, the defendants, for a premium of 25 per cent., insured for the plaintiffs, against all risks, 1,000 dollars, upon twenty-five thousand pounds' weight of coffee, valued at 20 cents per pound, on board the sloop Nancy, from Hispaniola to St. Thomas. That in the margin of the policy was inserted a clause in the following words: "warranted the property of the plaintiffs, all Americans," but that the words *all Americans*, were added after the policy was subscribed; that the sloop Nancy was built at Rhode Island, and belonged to citizens of the United States, resident in Rhode Island, as well when she left that state as at the time of her capture, and, being chartered by the plaintiffs, sailed from Newport, in Rhode Island, on the 12th day of December, in the year 1798, on her first voyage to the Havanna; that in the course of the said voyage, she was compelled, being in distress, to put into Cape Francois, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th day of January, 1799; that the captain and supercargo of the sloop were part owners of the cargo, and are two of the plaintiffs in this suit; that having so put into Cape Francois, the cargo was landed to repair the vessel; that the public officers, acting under the French government there, *took from them nearly all the [*212 provisions on board the sloop, and the captain and supercargo were permitted to sell, and did sell, the remainder to different persons there; that the captain and supercargo made a contract with the public officers, by which they were to be paid for the provisions in thirty days, but the payment was not made; that, with the proceeds of the remaining parts of the cargo, they purchased the whole of the cargo which was on board at the time of the capture, and also seventeen hogsheads of sugar, which they sent home to New York, on freight; that the said officers forbade the said master and supercargo of the sloop, from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof they were compelled to sell the same, and to take the produce of that country in payment; that the sloop, with thirty thousand weight of coffee on board, twenty-five thousand pounds weight of which was intended to be insured by the present policy, sailed from Cape Francois, on the 23d day of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great Britain, as for being the property of American citizens, trading contrary to the laws of the United States; that, at the time of the capture of the sloop, besides the documents aforesaid, the following paper was found on board: "Liberty, Safe Conduct, Equality. At the Cape, 11th Thermidor, sixth

year of the French Republic, one and indivisible. The general of division and private agent of the executive directory at St Domingo, requests the officers of the French navy and privateers of the republic, to let pass freely the American vessel called the
master, property of Mr. E. Born Jenks, merchants at Providence, state of Rhode Island, in the United States, arrived from the said place to the Cape Francois, for trade and business. The citizen French consul, in the place where the said vessel shall be fitted out, is invited to 213*] fill with her name, and the captain's, *the blank left on these presents; in attestation of which he will please to set his hand hereupon.

(Signed) "J. HEDOUVILLE.
(Signed) "GAUTHIER, *the General Secretary "of the Agency."*

Which paper was received on board the sloop at Cape Francois, and was on board when she left that place; that the property insured by the policy aforesaid was claimed by the said Zebedee Hunt, and was condemned by a sentence of the said court of vice-admiralty, in the following words: "that the said sloop Nancy, and cargo on board, claimed by the said Zebedee Hunt, as by the proceedings, will show to be enemy's property, and as such, or otherwise, liable to confiscation, and condemned the same as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

That part of the act of Congress, which the underwriters contended had been violated by the defendants in error, is as follows:

Sec. 1. Be it enacted, &c. "that no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom after the first day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, *or shall be employed in any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French Republic.* And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited and shall accrue," &c.

214*] *Sec. 2. enacts, that after the first of July, 1798, no clearance for a foreign voyage shall be granted to any ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, in a sum equal to the value of the vessel and cargo, "with condition, that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West Indies or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not, be employed, during her intended voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof." June 13th, 1798. Vol. 4, p. 129.

Mason, for the plaintiffs in error. If the insurance was upon an illegal transaction, the defendants in error have no right to recover. The only question for the consideration of this court is, whether it be a transaction prohibited by the act of Congress. If the purchase of this cargo in Cape Francois was lawful, the policy is good.

The first section of the act has two branches, and contemplates two separate offenses; 1st. That no vessel shall be allowed to go to a French port. But this prohibition must be subject to the general principle, that the act of God, or of the public enemy, shall be an excuse.

2d. That if driven into such port by distress, or involuntarily carried in, yet, there shall be no trade or traffic.

The words are, "if any vessel shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid." The *going in* must be *voluntary*, but the legislature carefully omit the word *voluntarily*, when speaking of the offense of trading; for all trading must be voluntary; it cannot *be by compulsion. The [*215 object was to prevent intercourse, and the statute only makes the same saving of the forfeiture which a court would have made without such a saving clause.

The condition of the bond mentioned in the 2d section confirms this construction of the 1st. It is divided into two clauses, agreeably to the two offenses to be provided against. The proviso "unless by distress of weather," &c. is annexed only to the offense of going into the port, but there is no saving or exception as to the offense of trading.

If she had not been driven in by distress of weather, she would have been liable to forfeiture under the first offense. But having been employed in traffic with persons resident, &c. she is equally liable to forfeiture under the second, and the condition of the bond has been substantially broken.

The special verdict states, "that the captain and supercargo were permitted to sell, and did sell, the residue of the cargo to different persons there." Here was no compulsion. This selling was a violation of the law; but it is not that which avoids this policy. The fault was, that with the proceeds of those sales, the plaintiffs below purchased the cargo insured. There was no compulsion to do this, except what I shall presently notice, as stated in the verdict. It will probably be contended that the following words of the verdict show a compulsion, viz., "that the said officers forbade the said master and supercargo from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof they were compelled to sell the same, and to take the produce of that country in payment." But this is only the reasoning of the jury, and the words, by reason whereof, show

what kind of compulsion it was, and that it was not that inevitable necessity which can excuse the express violation of the law. The owners ought to have said to them, if you forbid us to take away our property, we must leave it, and look to our government for an indemnification; for they have forbidden us to sell it to you, or to purchase a new cargo. The forbidding them 216*] to relade their goods, and to take *away specie, was no compulsion to purchase produce. The verdict does not state that the master or supercargo attempted to resist the force; it may be wholly a colorable transaction.

The act of the 27th February, 1800, vol. 5, p. 15, shows what the construction of that of 1798 ought to be. The 3d section of the former provides, that in case the vessel shall be compelled by distress or superior force, to go into a French port, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, the master may receive payment in bills of exchange, money or bullion, and not otherwise, "and shall not thereby be understood to contravene this law."

This is a clear implication, that if there had not been such an express permission to receive payment in bills of exchange, money or bullion, it would have been a contravention of the law; and that law, excepting this provision, is substantially the same as the law of 1798.

Harper, contra. I might safely agree to the first position taken by the opposite counsel, that the 1st section of the act of 1798 creates two distinct offenses. But this is not so. The whole constitutes but one offense.

How is a ship to be employed in traffic? She must bring and carry. If she did not go voluntarily, she was not employed in trafficking. If the master sell the cargo under such circumstances, the vessel is not employed in traffic.

But if the act creates two separate offenses, how is the vessel employed in the traffic? She did not carry the cargo there voluntarily. But it being there, and landed, necessarily landed, how is the vessel concerned in the sales and purchases made by the master? The necessity of repairing the vessel is as much an excuse for landing the cargo, as stress of weather was for going in. The master was forbidden to relade it. But a difference is taken between prohibition and prevention. It is said that the forbidding is not preventing. But by whom was the prohibition? By the officers of the government, having authority and power to carry the prohibition into effect. It was, therefore, actual prevention.

217*] *What was the mischief intended to be remedied by the act of Congress? Not such a sale as this. It was to prevent a voluntary intercourse, not to prevent citizens of the United States from rescuing their property from impending loss. What is traffic? A contract by consent of both parties. If one is under compulsion, it is no contract, no traffic. The transaction disclosed by the verdict is only the means of saving property from a total loss. The owners were not obliged to abandon, as the gentleman contends, property thus put in jeopardy. The master and supercargo were not free agents. They were not obliged to take bills which they knew would not be paid. If I could have had a doubt upon this case, it would have been removed by the decisions of the circuit courts of the United States. In a case before one of your honors,[1] in Baltimore, a vessel had brought home from the French West Indies a cargo of the produce of those islands, after having been compelled to go in and sell her outward cargo; and it was decided that the case was not within this act of Congress. A similar case is understood to have been decided by another of your honors,[2] in New York. If those cases were not within the law, I am warranted in saying this is not.

Those decisions produced the 3d section of the act of 1800, which the gentleman has cited, and which was introduced to shut the door that had been left open. It was perceived that the law, as it stood before, would give an opportunity of fraud. The 3d section was enacted to take away the temptation; because, although there might be cases clear of fraud, it was thought best to sacrifice these particular cases, that fraud might be prevented in others. This section, therefore, has given a sanction to the decisions of the circuit courts.

Key, in reply. It is clear that there are two distinct prohibitions in the act. The two parts of the section are connected by the disjunctive "or," and not by the copulative "and." This is rendered still more evident by the form of the condition of the bond described in the second section.

*Whenever you rely on the necessity [*218 of the case to justify your acts, you must not go beyond the necessity. All beyond is voluntary. In this case it might go to the landing, and to the seizure of part, but not to the sale of the residue. The probability of loss is not necessity. If they took produce, it was only to avoid a greater loss. It was not an inevitable necessity.

Another fact shows that it was trading; not merely taking on board to bring home, property which they were compelled to receive. She was not coming home with the property when she was captured, but going on a trading voyage. And the French pass states that she came to Cape Francois for trade and business.

The intention of the act was to prevent all trading and intercourse with France or her dependencies.

In the case at Baltimore, before his honor Judge Washington, the vessel returned directly home to Baltimore with produce, which she had been compelled to take or abandon.

Mason, on the same side. It is said there must be a pre-existing intention to go to a French port. If the sloop had arrived safe at the Havanna, and been there sold to an agent of the French government, it is clear she would have been liable to forfeiture. So, if the French agent, who signed the passport, had freighted the vessel.

These cases show that a pre-existing intention is not necessary. The construction contended for would, indeed, open a wide door to fraud, as the gentleman has contended. It would only be necessary to start a plank in sight of the port, and then go in to stop the leak, and the whole law is evaded.

1.—Judge Washington.

2.—Judge Paterson, in September, 1799, in the case of Richardson and others, cited in *Caines' New York Cases*, p. 62.

March 6. MARSHALL, *Ch. J.*, delivered the opinion of the Court, to the following effect:

The Court is of opinion, according to the best consideration they have been able to give the 219*] subject, that this *case is not within the act of Congress of 1798, usually called the non-intercourse law.

It is contended by the counsel for the defendant, that the circumstances, stated in the special verdict, do not show an absolute necessity for the trading therein described. And it is said, the plaintiff might have abandoned the property, and sought redress of his government; and that it was his duty to do so, rather than violate the laws of his country. But the Court is of opinion, that the act of Congress did not impose such terms upon a person who was forced by stress of weather to enter a French port, and land his cargo, and was prevented by the public officers of that port to relade and carry it away.

Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of opinion that it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo.

The terms of the act of Congress seem to imply an intentional offense on the part of the owners.

The case put of a French agent going to the Havanna, and there purchasing the cargo for the use of the French government, under a preconcert with the owners, would certainly be an offense against the law; but when there is no such intention; when the vessel has been absolutely forced, by stress of weather, to go into a French port, and land her cargo; when part has been seized for the use of the government of France, and the master has been forbidden by the public officers of the port to relade the residue, and to sell it for any thing valuable, except the produce of the country, the mere taking away such produce cannot be deemed such a traffic as is contemplated by the act of Congress.

Judgment affirmed, with costs.[1]

220*] *MILLIGAN, Administrator of MILLIGAN,

v.

MILLEDGE and WIFE.[2]

A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.

The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.

The want of proper parties is not sufficient ground for dismissing the bill.

ERROR to the circuit court for the district of Georgia, in chancery sitting.

The object of the bill was to recover from the defendants, as legatees and devisees of George Galphin, deceased, a debt due by him to the complainant's intestate, as surviving partner of Clark & Milligan. The bill charges, that Clark & Milligan were merchants in London; that Milligan survived Clark, and that the complainant is the administrator of Milligan, the survivor; that in the year 1770, they supplied George Galphin with goods; that in 1773 George Galphin requested them by letter to supply goods to his three sons, Thomas, George and John, his nephew David Holmes, and John Parkinson, under the firm of Galphin & Holmes; that on the credit of G. Galphin, the elder, they shipped goods, &c., to the said company.

That in 1776, G. Galphin, the elder, wrote to Clark & Milligan to furnish goods to the said company, at their store in Pensacola, and that he would see them paid; that relying on the said engagement, they shipped further goods to the said company at Pensacola, and on the 31st of December, 1780, G. Galphin, the elder, owed,

	sterling.
For himself	1,120*l.* 1 2
For Galphin, Holmes & Co.	1,206 5 3
And, Jan. 1, 1784, for the Pensacola firm	3,959 15 9

all of which is now due and unpaid.

*That G. Galphin, the elder, died [*221 testate in 1781, or 1782, and duly appointed James Parsons, John Graham, Laughlin M'Gillvray, John Parkinson, William Dunbar, and his sons, John, George and Thomas Galphin, his executors; and left real and personal estate sufficient to pay all his just debts.

That all the executors declined the trust, excepting the three sons; that the copartnership of Galphin, Holmes & Co. was dissolved on the day of , without any funds for the payment of their debts; that John and George Galphin, two of the executors, never meddled with the deceased's estate, having been long insolvent, are not within reach of the process of this court are unknown to the complainant, and gone to places out of his knowledge.

That William Dunbar is dead, leaving no assets of the deceased's estate.

That David Holmes is dead, and left no property, to the knowledge of the complainant.

That Thomas Galphin and John Parkinson are out of the jurisdiction of the court, and not possessed of any property, to the knowledge of the complainant.

That John Milledge, and Martha his wife, who is daughter of G. Galphin, the elder, and a principal legatee and devisee under his will, have received and are possessed of, lands, negroes, and assets of the estate of her father, which came to them by descent, devise, or distribution, and liable to the claim of the complainant.

That Thomas, who resides in South Carolina, holds no property of the deceased in South Carolina; that the assets in that state have all been exhausted in satisfying prior judgments, or otherwise.

That all the assets are in Georgia, in the hands of Milledge and wife, who must be considered as the agents and trustees of the executor, Thomas Galphin, or of the creditors, and liable to account for the same.

1.—See the opinion of the Supreme Court of New York, in this case, in 1 Caine's Rep. 64, and that of the High Court for the Trial of Impeachments and Correction of Errors, in the State of New York, delivered by Lansing, Chancellor, in 1 Caines' Cases in Error, p. 42.

2.—Present, Marshall, *Ch. J.*; Cushing, Paterson, and Washington, *Justices.*

This cause was called for argument on the 2d of March, but the counsel not having prepared statement of the points for the court, agreeably to the rule, the court refused them to hear it.

222*] *Milledge and wife, the only persons made defendants in the bill pleaded in bar, as follows:

"The plea of Martha Milledge, one of the defendants to the bill of complaint of William Milligan.

"The end of the complainant's bill is to render liable to the payment and satisfaction of an unliquidated demand on an open account, said to be due by the estate of George Galphin, in his own right, and as security and guaranty for Galphin, Holmes & Co., certain property, real and personal, which is charged by the complainant to have come into the hands and possession of this defendant, as one of the devisees and legatees of the said George Galphin, deceased.

"This defendant, by protestation not confessing all or any of the matters contained in the said bill to be true, in such manner and form as the same is therein set forth and alleged, doth plead in bar of the same, and for plea saith, that the complainant states that David Holmes, late copartner in the house of Galphin, Holmes & Co., and David Holmes & Co., is dead, and left no property or legal representatives, at his decease, within the state of Georgia; that neither John Parkinson, nor William Dunbar, have ever qualified on the will of George Galphin, and have never come into the possession of any of the estate of the said George Galphin, or if they have, that it is disposed of and exhausted; that Thomas Galphin holds no property or estate of the said George Galphin, and that the assets of the said estate in the state of South Carolina, have all been exhausted in satisfying prior judgments, or otherwise.

"But this defendant avers, that the said David Holmes died possessed of considerable estate, real and personal, part of which, if not all, must be in possession of his legal representatives; that William Dunbar qualified on the will of the said George Galphin, and died, leaving in the possession of his executors, administrators or legal representatives, considerable estate, real and personal, which he got, either by 223*] being *one of the qualified and acting executors on the said will, or by his intermarriage with Judith Galphin, one of the devisees and legatees under the will of the said George.

"And this defendant further avers, that Thomas Galphin and John Parkinson, charged and stated to be two of the surviving copartners of Galphin, Holmes & Co., and David Holmes & Co., of which this defendant knoweth not, and said Thomas Galphin being now the only acting and qualified executor of the last will and testament of the said George Galphin, are, and this defendant is ready to show, that they must be, in possession of considerable real and personal estate, derived from the estate of the said George Galphin, deceased; that they are the proper persons liable and interested to contest, and who can with safety contest, the complainant's demands, if any he has, and the relief prayed in the said bill.

"And this defendant doth further aver, that the debt or demand of the complainant, if any doth exist, originated in the state of South Carolina; that all material, necessary, and indispensable and requisite parties, to wit, the said Thomas Galphin and John Parkinson, and the executors, administrators or legal representatives of William Dunbar, live, and notoriously and openly reside, in the state of South Carolina, and in possession of estates, real and personal, sufficient to pay the complainant's demand, if any he has, and which estates and property are more particularly liable to the said demand, if any he has; and that the said parties are also amenable and compellable to appear to any suit or bill brought against them by the said complainant, for his said demand, if any he has, in the state aforesaid. All of which facts were in the knowledge of the complainant, and to him well known, before the filing of his said bill; for that the complainant also lives and resides in the state of South Carolina; that this defendant is an entire stranger to, and ignorant of the merits and justice of the claim set up by the complainant, not being named as executrix in the will of the said George Galphin, or ever having intermeddled with the concerns of the said estate, or any ways *interest- [*224 ed in the copartnership aforesaid. All which matters this defendant doth aver and plead, in bar of the complainant's said bill, and of his pretended demands, for which he seeks to be relieved by his said bill. And this defendant prays to be hence dismissed, with her reasonable costs, in this behalf most wrongfully sustained."

This plea was sworn to before a justice of peace.

The plea of John Milledge was the same, in substance, as that of his wife.

There was also a joint and several answer of Milledge and wife, which states no other facts than the following, viz.: "That there never did exist any secret or special trust, promise, covenant, or understanding, between these defendants and the executors of George Galphin, the elder, deceased, as charged in the bill of complaint, nor did these defendants, or either of them, ever give any bond of indemnity, or other security whatever, to be accountable to Thomas Galphin, or John Parkinson, or any or either of the executors of the said George, for any property, real or personal, which might have come into the possession, or held by either of these defendants. That there does not now exist any secret or special trust, promise, covenant or understanding between these defendants and the executors aforesaid. And these defendants do, jointly and severally, deny all manner of unlawful combination," &c., "without that, that any other matter or thing in the said bill of complaint contained material or necessary for these defendants to answer unto, not herein answered unto. All which matters and things these defendants are ready to aver and maintain," &c.

At May term, 1803, of the circuit court, holden by his Honor, Judge Moore, the only entries on the transcript of the record which came up, are as follows: "Bill and amended bill." "Plea and answers." "On argument the plea sustained." There is no entry of a demurrer, or motion, or of any other proceeding, except the continuances, after filing the pleas and answers until the May term, 1803.

*At May term, 1804, of the circuit [*225 court holden by his Honor, Judge Johnson, the following decree was made:

"This cause came on to be heard this 14th day of May, in the year of our Lord 1804, upon

the bill and exhibits, and the pleas and answers of the defendants; whereupon it appearing that in the term of May, 1803, before the Honorable Alfred Moore, one of the judges of the said court, the cause was heard upon the bill and the pleas, and that after argument, it was adjudged by the court, at the term of May, 1803, that the said plea be sustained; and it appears that the complainant hath not replied to the said plea. It is therefore ordered and decreed, that the bill of complaint be dismissed, in pursuance and conformity of the decision of the court at the said term, upon the said plea, the same appearing to the court to be conclusive on the merits of the complainant's bill.

"Dated at Savannah, the day and year before written. "WILLIAM JOHNSON, Jun."

The complainant sued out his writ of error, and assigned for error,

1st. That by the said decree it is adjudged and decreed, that the plea in bar aforesaid, and the matters therein contained, are sufficient to debar the complainant from the discovery and relief sought after by his said bill of complaint, and are conclusive on the merits thereof, and that, therefore, the said plea should be sustained as a valid and sufficient answer to the bill of the complainant. Whereas the said plea is altogether irrelevant and insufficient, and contains no matter which, in law or equity, ought to bar the discovery and relief sought after by the bill aforesaid.

2d. That by the said decree, it is adjudged that the bill be dismissed, whereas by the law of the land, and the rules of equity, a decree ought to have been made in favor of the com-226*] plainant, for want of a sufficient *answer upon the merits of the said bill, as to the relief prayed thereby.

Key, for plaintiff in error, contended, that the pleas in bar were insufficient and informal, and contained matter not proper for a plea.

The defense proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit; and is to save the parties expense in examination. It is not every good defense in equity, that is likewise good as a plea; for where the defense consists of a variety of circumstances, there is no use of a plea; the examination must still be at large; and the effect of allowing such a plea will be, that the court will give their judgment on the circumstances of the case before they are made out by proof. 1 Atk. 34, *Chapman v. Turner*.

A plea cannot be a mere denial of facts charged in the bill; for such matter is only proper for an answer. But such a plea may be permitted to stand for an answer, with leave to except to its insufficiency. 1 Brown's Ch. Ca. 408, 409, 410.

The plea in this case sets forth five several distinct and independent matters, each of which is a denial of some allegation in the bill, and is, therefore, not proper for a plea, but for an answer. Nor do they go to make up one defense.

The most that can be said of the plea is, that it shows that there are other persons who ought to be made parties in the cause. Considered in this view, it may be supposed, perhaps, as requiring that Thomas Galphin, J. Parkinson, the representatives of David Holmes, and those of W. Dunbar, should have been made parties.

There can be no ground of requiring the representatives of Holmes to be made parties, because we seek relief only against the estate of G. Galphin, the elder, and not against that of Holmes. As to the representatives of Dunbar, even if it be true that he qualified *as [*227 executor, yet we are not bound to proceed against them, as there is an executor surviving. We ask no relief against Parkinson, and, therefore, we need not make him a party. And as to Thomas Galphin, he is expressly alleged in the bill, and admitted in the plea, to be out of the jurisdiction of the court, and, therefore, we were not bound to make him a party. This is expressly laid down by Mitford, in his Treatise of Pleading, p. 93, who says, "if a want of proper parties is not apparent on the bill, a defendant may plead it; and a plea of this nature goes both to the discovery and the relief. But where a sufficient reason is suggested by the bill, for not making the necessary party; as where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court; or where a necessary party is resident abroad, out of the jurisdiction of the court, and the bill charges that fact; or where the bill seeks a discovery of the necessary parties, a plea for want of parties will not be allowed. A plea for want of parties to a bill, for a discovery merely, will not hold; for the plaintiff in that case seeks no decree." Prec. in Ch. 83, *Cowslad v. Cely;* 2 Atk. s. 510, *Darwent v. Walton*.

As far as our bill seeks for relief, we could recover at law against the defendants, as executors in their own wrong. It is true, that in equity, an executor *de son tort* is not known, but whenever a person would, at law, be executor *de son tort*, he will, in equity, be considered as a trustee for the creditors.

Real estate is in Georgia considered as assets. (See the case of *Telfair v. Stead's Executor's*, in this court, at this term, *ante*, vol. 2, 407.)

The bill charges that the defendants have assets.

All the facts charged in the bill, and not denied in the plea or answer, are to be considered as admitted.

The bill also charges, that there are no assets in South Carolina.

We were, therefore, obliged to go against the assets in Georgia.

*It is no bar to say, that there is an [*228 executor in South Carolina who has no assets; and it was not necessary that we should make such an executor a party.

MARSHALL, *Ch. J.* The only question is, whether it is not necessary that you should bring a suit against the executor in South Carolina to establish the debt; because, as to that, he is the proper person to defend. After having obtained such a judgment, the complainant would be at liberty to follow the estate in the hands of the defendants, in Georgia. It is not necessary to consider them as executors in their own wrong; for you may proceed against devisees or legatees, if the executor has no assets.

Key. If the bill is against the heir, it is not necessary to make the executor a party.

MARSHALL, *Ch. J.* But that is, where the heir is the proper person to defend.

Key. It is not necessary to make the executor a party, when we can have no relief against

him. 2 Eq. Cas. Abr. 167. But if he ought to be a party, yet it is no cause for dismissing the bill.

MARSHALL, *Ch. J.* No doubt of that. The bill might have stood over to make new parties.

March 6. MARSHALL, *Ch. J.* The Court is of opinion, that the court below erred in admitting the pleas, and dismissing the bill.

Judgment reversed.[1]

229*] COOKE *v.* GRAHAM'S ADMINISTRATOR.[2]

A variance in date between the bond declared upon, and that produced on oyer, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.

The court may depart from the letter of the condition of a bond to carry into effect the intention of the parties.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria.

The declaration was in debt on a bond dated the 3d of October, 1799, in the penalty of 5,000 dollars. On oyer, the bond appeared to be dated the 3d of January, 1799, and the condition was as follows: "Whereas the said Stephen Cooke did lend to Josiah Watson, of the town of Alexandria, twenty-five hundred dollars of the said William Graham's money; and the said Josiah Watson having failed, but before he failed paid five hundred dollars; and whereas the said Stephen Cooke hath instituted a suit against the said Josiah Watson, for the recovery of the said money. Now the condition of the above obligation is such, that if the said Stephen Cooke shall well and truly pay the whole sum so lent, if it can be recovered from the said Josiah Watson, or his indorser; or in case it cannot be wholly recovered, will lose the one-half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue."

After oyer granted, the defendant had leave to imparl, but not pleading at the rule day, judgment was rendered at the rules for want of a plea.

At the next term, the defendant set aside the office judgment, by demurring generally to the declaration, which demurrer was joined by the plaintiff.

Afterwards, on motion, the defendant had leave to withdraw his demurrer, and pleaded general performance of the condition of the bond. To which the plaintiff replied, and assigned a breach in this, that the defendant has not paid the sum of money mentioned in the condition, *or any part thereof. [*230 The defendant rejoined, that the sum of money in the condition mentioned, lent by him to Watson, could not be recovered from the latter, or his indorser.

To this rejoinder the plaintiff demurred specially; 1st. Because the defendant doth not state, in his rejoinder, that he used all legal means for the recovery of the said 2,500 dollars of Watson, and his indorser.

2d. Because the defendant does not state that he has not recovered any part of the said 2,500 dollars of the said Watson, or his indorser, or how much of the 2,500 dollars, remains unrecovered of the said Watson, or his indorser.

3d. Because the defendant is bound to pay one-half of the sum that is not recovered of the said Watson, or his indorser; and if the defendant has not received any part of the 2,500 dollars of the said Watson, or his indorser, then he is bound, by the condition of the said bond, to pay one-half of the sum of 2,500 dollars to the plaintiff.

4th. Because the defendant does not give any answer as to the sum of 500 dollars, stated in the condition of the said bond to have been received by him of the said Watson, before the execution of the said bond.

5th. Because the rejoinder is a departure from the plea of conditions performed.

Upon this demurrer, the judgment of the court being in favor of the plaintiff, the defendant, upon motion, had leave to file an additional plea, whereupon he pleaded, that the whole sum lent to Watson could not be recovered of him or his indorser, nor could any part thereof be recovered, except the sum of 500 dollars mentioned in the condition of the bond; by means whereof the defendant became liable and bound to pay to the plaintiff only one-half of the said sum which could not be so recovered, and that the defendant paid to the plaintiff's intestate the said one-half of the said sum of money which he was liable and bound to pay as aforesaid. To which plea there was a general replication and issue, and verdict for the plaintiff for 2,032 dollars and 75 cents.

*On the trial of this issue a bill of [*231 exceptions was taken by the defendant below to the opinion of the court, that the plaintiff was entitled, by the said bond, to recover of the defendant the sum of 500 dollars at all events; and that he was also thereby entitled to recover of the defendant the residue of the said 2,500 dollars, if the jury should be of opinion that the defendant could have recovered the same of the said Watson, or his indorser. And if they should be of opinion that no part of the said residue could have been so recovered, then the plaintiff is thereby entitled to recover of the defendant one-half of the said residue, in addition to the said sum of 500 dollars.

Other exceptions were taken at the trial, but were abandoned by the plaintiff in error in this court.

Simms, for the plaintiff in error, contended, 1st. That the judgment of the court below, upon the demurrer, ought to have been for the defendant, inasmuch as there was a material variance between the bond produced on oyer, and that stated in the declaration; the former bearing date on the 3d day of January, 1799,

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1.—The decree of reversal was as follows: This cause coming on to be heard and considered, and counsel on the part of the appellant being heard, and the bill, pleas, and answers, being read and considered.

"It is adjudged, ordered and decreed, that the decree of the circuit court be reversed, with costs of this appeal; that the pleas of the defendants be overruled, and that they be ordered and decreed to answer the bill exhibited against them."

2.—Present, Marshall, *Ch. J.*; Cushing, Paterson and Washington, *Justices.*

and the latter being alleged to bear date on the 3d day of October, in the same year.

2d. That the court erred in their construction of the condition of the bond, in supposing that the sum of 500 dollars, mentioned to have been received from Watson, was covered by the penalty, and in instructing the jury that the plaintiff was entitled to recover that sum at all events; and, in addition thereto, a moiety of the balance, if the whole balance could not be recovered by the defendant of Watson, or his indorser.

1st. On a demurrer, the court must go to the first error in the pleadings. In this case, although the rejoinder is bad, yet the declaration is bad also. If the plaintiff declares on a bond of different date from that produced on oyer, advantage may be taken of the variance on demurrer. The plaintiff need not wait till it is produced in evidence. The variance may also be pleaded in abatement. 2 Salk. 658, *Holman v. Borough*. In the case of *Hole v. Finch*, 2 Wils. 394, the court said, "that formerly, 232*] *when the whole original writ was spread in the same roll with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage thereof, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer." But afterwards it was determined, that if the defendant will take advantage of a variance between the writ and count, he must demand oyer of the writ, and show it to the court. By the act of jeofails of Virginia, Rev. Code, p. 118, s. 26, no judgment after verdict shall be stayed for the omission of the day, month or year, in the declaration or pleading, (the name, sum, quantity or time, being right in any part of the record or proceeding.) This shows, that before that act, such omission might have been taken advantage of by motion in arrest of judgment.

WASHINGTON, *J*. Will the principle of going up to the first error, apply to a special demurrer by the adverse party?

Simms. Certainly.

MARSHALL, *Ch. J*. Can the variance be taken advantage of on a general demurrer?

Simms. Yes. It is a matter of substance.

2d. As to the construction of the bond.

By the opinion of the court, the plaintiff was entitled by the bond, to recover the 500 dollars at all events.

The 500 dollars are only mentioned in the preamble of the condition, which, like that of a statute, has no obligatory effect. It is no part of the condition of the bond that the defendant should pay that sum. It might have been paid over before, or the intestate may have been satisfied with relying on the defendant's simple acknowledgment that he had received it. The condition is in the alternative, and only one of two things is to be done. 1st. Either to pay over the whole 2,500 dollars, if he could recover it from Watson, or his indorser; or, 2d. If he could not recover the whole sum, to pay over one-half of such sum as he could not recover. There is no obligation, 233*] *under the bond, to pay over what he had already received. Perhaps the plaintiff may bring an action for money had and received for the 500 dollars. But it is not material how he is to recover it. It is sufficient, in the present case, that its payment is no part of the condition of this bond.

The sum which could not be recovered is capable of being ascertained; and it is now ascertained to be 2,000 dollars. One-half of that is the sum which the defendant agreed to lose. It is, therefore, the same as if the condition of the bond had been to pay the sum of 1,000 dollars.

But if no part of the money lent could be recovered of Watson, or his indorser, then the defendant could not be bound to pay more than the one-half of the whole sum, which is only 1,250 dollars. In no case is he bound by the bond to pay more than that sum; and yet the jury have given the plaintiff 1,500 dollars, with interest thereon from the date of the bond.

E. J. Lee, contra, admitted the general rule, that upon a demurrer, the court is to look for the first error, and give judgment accordingly; but that, in this case, the state of the pleadings makes a difference. The declaration was filed in due time, and a profert made. A judgment was obtained against the defendant, in the office, for want of a plea. This judgment was set aside by the defendant's appearance and entering a general demurrer, which was afterwards withdrawn, and a general performance of the condition of the bond pleaded. By this plea, after oyer, he had admitted, that the bond declared on is the same as that produced on oyer. And having thus admitted it to be the same bond, the omission of its true date in one part of the declaration, can only be matter of form. He has not pleaded it in abatement, nor demurred specially. On the plaintiff's special demurrer the defendant cannot take advantage of a formal variance; he can only avail himself of it by demurring especially himself. Every thing is form, without which a right of action appears to the court. Every thing which the court may amend, without altering matter of substance, is aided by a general demurrer. Sav. 88. So, every thing which may be amended *under the statute, or which would be [*234 cured by a verdict, is cured by a general demurrer.

2d. As to the second point there can be no doubt. The condition of the bond is, that the defendant shall pay the whole sum so lent, viz., 2,500 dollars, if it could be recovered by the defendant from Watson. But at the time the bond was executed, the defendant could recover only 2,000 dollars of Watson, in any event, because Watson had already paid 500 dollars. In this case, the 500 dollars is covered by the penalty.

But it is said, that these 500 dollars were not to be paid over unless the defendant recovered the whole sum from Watson; or in other words, that the 500 dollars were a premium to the defendant for losing 2,000 dollars of the plaintiff's money. But the whole was to be paid over when recovered; the whole includes all its parts; hence every part was to be paid over when recovered.

Simms, in reply.

1st. When a man demurs, he puts every thing to hazard in his own pleadings; and his adversary may take the same advantage as if he himself had demurred.

MARSHALL, *Ch. J*. As if he had demurred generally?

Simms. There is a difference between what a court would amend, and what can be amended under the statute.

2d. As to the condition of the bond.

No man can be compelled, by his bond, to pay more than he expressly agreed to pay. The defendant has only bound himself to pay the whole, in case the whole could be recovered. It does not appear that the 500 dollars were not paid or settled in some other way.

235*] *March 6. MARSHALL, *Ch. J.*, delivered the opinion of the Court, to the following effect:

The plaintiff declares upon a bond, dated the 3d of October; and upon oyer, the bond appears to bear date the 3d of January preceding.

By the oyer, the bond is made a part of the declaration. There were several pleadings, and among the rest, a bad declaration, a bad rejoinder, and a special demurrer by the plaintiff to this bad rejoinder. When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon a general demurrer. The variance between the date of the bond declared upon, and that produced on oyer, is fatal.

Upon the second point the court is of opinion, that there is no error in the construction given by the court below to the condition of the bond. There are many cases on the construction of bonds, where the letter of the condition has been departed from to carry into effect the intention of the parties.

But for the first error, the judgment must be reversed, and judgment entered for the plaintiff in error on the demurrer.

Judgment reversed, with costs.

CASES

ARGUED AND DECIDED AT FEBRUARY TERM, 1806.

The Judges present at this term were,

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.
The honorable WILLIAM CUSHING,
The honorable WILLIAM PATERSON,
The honorable BUSHROD WASHINGTON, AND
The honorable WILLIAM JOHNSON,
} ASSOCIATE JUSTICES.

Judge Chase was absent the whole term, on account of ill health; and Judge Cushing was prevented, by indisposition, from attending until the 19th of February.

On the 12th of February, 1806, the Honorable John Breckenridge was sworn as Attorney General of the United States, in the place of the Honorable Levi Lincoln, resigned.

GENERAL RULE.

FEBRUARY TERM, 1806.

The following rule was directed to be entered on the minutes of the court:

All causes, the records in which shall be delivered to the clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases, where a writ of error shall be a *supersedeas* to a judgment, rendered in any circuit court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the District of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or *so soon [*240 thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

Supreme Court of the United States.

241*] *February Term, 1806.

DOBYNES & MORTON
v.
UNITED STATES.

To support a judgment on a collector's bond, at the return term, it must appear, by the record, that the writ was executed 14 days before the return day.

THIS writ of error came up at last term from the district court of the United States for the Kentucky district, which, by law, has the jurisdiction of a circuit court of the United States.

The suit was originally brought by the United States against Lewis Moore, as principal, and Dobynes and Morton, as sureties, in a bond given by Moore, as a collector of the revenue.

The writ of *capias ad respondendum* was issued on the 12th of February, 1803, returnable to the 2d Monday of March following; and judgment was recovered by default, at the return term, on motion.

The error insisted upon was, that it did not appear by the record that the writ had been "executed fourteen days before the return day thereof," according to the 14th section of the act of Congress of July 11, 1798, vol. 4, p. 197.

The record contained a copy of the bail bond given by Morton, dated the 11th of March, 1803; and a receipt from the gaoler, for the body of Dobynes, dated the 12th of March, 1803.

The 2d Monday of March could not have been later than the 14th of the month.

242*] *Mason, for the United States, suggested diminution in this, that the writ was served on Dobynes and Morton, on the 20th of February, as appeared by the record of the district court; and obtained a *certiorari*.

But now, at this term, the return of the *certiorari* not showing anything more than what appeared on the first transcript.

Breckenridge, Attorney General, admitted that the judgment could not be supported, as there was nothing in the record by which the return of the marshal could be amended, so as to show that the writ had been executed fourteen days before the return day.

C. Lee, for the plaintiffs in error.

Judgment reversed.

HANNAY v. EVE.

The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war.

The duty of a master of a vessel, to his owners, will not oblige him to violate the good faith even of an enemy, in order to preserve his ship, nor to employ fraud, in order to effect that object.

THIS was a writ of error to the circuit court of the United States, for the district of Georgia, sitting in chancery, to reverse a decree which dismissed the complainant's bill on a demurrer.

The complainant, as assignee of Cruden & Company, alleged, in his bill, that on the 24th of December, 1782, during the war between the United States and Great Britain, the British armed ship Dawes, owned by Cruden & Company, who were British subjects, and commanded by Oswell Eve, the defendant, sailed with a cargo, the property of Cruden & Company, from Kingston, in Jamaica, for New York, then in possession of the British troops. That on her passage the ship met with much tempestuous weather, by which she was rendered incapable of reaching her port of destination; in consequence of which, the defendant, after consulta-*tion with the crew and passengers, [*243 came to the determination to sail for the nearest port in the United States, thereby to save the lives of the crew and passengers, which were in imminent danger, and also to save as much as possible to the owners. That the vessel and cargo were liable to be captured by the cruisers of the United States, or if she went into any port of the United States, without being captured, she would become a *droit* of admiralty to the United States, or some of them. That the defendant stated to the crew and passengers, that as Congress, by their resolve of the 9th of December, 1781, had enacted and declared, "That all ships and vessels, with their cargoes, which should be seized by the respective crews thereof, should be deemed and adjudged as lawful prize to the captors," as the vessel was incapable of reaching New York, and as she would be totally lost to the owners, to himself, and the crew, if captured by the cruisers of the United States, the best mode would be, to seize and capture the vessel and cargo, make the passengers, who were military men of high rank and distinction, prisoners of war, and sail for the nearest port, and there obtain a condemnation of the vessel and cargo for the benefit and compensation of the crew, who would lose their wages if she was regularly captured, and that the residue should remain in the defendant's hands, as agent and trustee, and for the sole use and benefit, of the owners. That this plan was agreed to, and executed; and an agreement, signed by the defendant and the crew, ascertaining what share each man was to be allowed, and which was to be the basis of the judge's decree, as to the distribution of the prize money. That the crew consented to the defendant's having a

larger share than they would if he had not declared his intention to act in the whole as the agent and trustee, and for the benefit, of the owners. That the vessel was accordingly carried into a port in North Carolina, libelled, condemned, and distribution made, according to the proportion fixed by the agreement. That the defendant afterwards purchased a number of the shares of the seamen, for the benefit of his owners; that he also purchased part of the cargo, at the marshal's sales, and shipped it to Charleston, where he sold it to great profit, for 244*] the benefit of the owners. *The bill then prays a discovery, and that the defendant may account, and be decreed to pay, &c.

To this bill the defendant demurred, and assigned two causes of demurrer.

1. That it appears by the complainant's own showing, that the ship and cargo were regularly condemned under the resolve of Congress, of the 9th of December, 1781, as lawful prize, and the proceeds decreed to the defendant, and others, as lawful captors, the legality of which decree ought not now to be called in question.

2. That the bill contains no matter of equity, but what is cognizable at law.

Upon argument, the judge (Stevens) sustained the demurrer, and dismissed the bill, but without costs.

P. B. Key, for the plaintiff in error. The principal question is, whether the complainant has equity.

If Eve had given up the ship for his own benefit, it would have been an act of barratry, a breach of trust, and the owners would have had a right of action at law against him for his misfeasance. But they may, if they please, affirm his surrender of the vessel and oblige the defendant to account.

If there is any impediment to the relief sought, it must be grounded on the resolve of Congress; for if the owners had a right of action at law, it was saved by the treaty of peace.

The master was always under a moral obligation to account, whatever protection he might derive from the resolve of Congress, which gave the whole ship and cargo as prize. There being, then, a moral obligation, sufficient to support a promise, so as to prevent it from being *nudum pactum*, and an express promise charged in the bill, and confessed by the demurrer, there is nothing wanting to entitle the complainant to the relief he asks. It is true, that the promise was made to the crew, yet it enures 245*] to the benefit of the owners. Should *it be said that the promise was *in fraudem legis*, the answer is that it was a stratagem of war, and, therefore, justifiable. In *foro conscientiæ*, it was as justifiable to evade as to enforce such a law; and if it was a fraud against the law of Congress to receive the proceeds of the ship and cargo, for the use of the owners, it was equally a fraud against the owners to persuade the crew to carry the vessel into a port of the United States, under a pretence of saving the property to the owners, and afterwards to take the whole proceeds to his own use.

Harper, contra. The ordinance of Congress of 4th December, 1781, (Journals of Congress, vol. 7, p. 243,) it is true, authorized mutiny and treachery, but it was only a law of retaliation. The British had adopted a similar provision; and Congress found it necessary to retaliate.

The facts stated by the complainant, in his bill, are such as to show the necessity of delivering up the vessel, and that she was absolutely lost to the owners.

The bill states expressly that she was incapable of reaching her port of destination; that she must either founder or be captured, or voluntarily run into an enemy's port. It justifies the conduct of the master, in giving up the vessel, but grounds its claim to relief, either upon a supposed moral obligation of the defendant, (resulting from his duty as master of the vessel,) to do every thing in his power for the benefit of the owners; or upon an express promise made to the crew, which, it is contended, enures to the benefit of the owners; or upon an allegation of an imposition upon the crew, to induce them to consent to deliver up the vessel.

As to the first ground, the master's duty did not oblige him to violate the laws of another country, especially of that country to whose laws he applied for protection and relief. His duty to his owners ceased when he could no longer preserve the property by fair and honorable means. His duty could never oblige him to commit a fraud upon the good faith even of an enemy.

*The second ground is that of an ex- [*246 press promise to the crew. This is liable to three objections. 1st. That it is a promise without consideration, and, therefore, *nudum pactum;* 2d. That it is not made to the owners; and, 3d. That it was *in fraudem legis*.

The third ground of claim is that of imposition upon the crew, to induce them to give up the vessel. This, if it can be the ground of claim by any person, must be that of a claim by the crew, or some of them, to set aside the agreement for the division of the prize money, and cannot be a ground of claim by the complainant. It is also liable to the objection, that the courts of the United States can never sanction a claim grounded upon a fraud upon the laws of the United States.

The owners, by affirming the transaction, and calling upon the defendant to account, have made themselves a party to the fraud; and the maxim of law applies, *in pari delictu melior est conditio possidentis*.

To show the extent of the principle that contracts *in fraudem legis* were void, he referred the court to the following authorities. Plowden's Commentaries, 75; 1 Domat, 145; 2 Bac. Abr. 582; Cowper 39, 342; 1 T. R. 734; 1 Atk. 352; 2 Atk. 136; Buller, 146; 2 P. Wms. 134, 347, 350; 3 T. R. 454.

Key, in reply. The foundation of this bill is the original trust, before the agreement with the crew. It was a violation of that trust to give up the ship. The defendant was bound to do all in his power to protect the property. If he has been guilty of a fraud upon the United States, the owners were not a party. The fraud of which the plaintiff complains is, that the defendant induced the crew to give up the ship, under the idea of doing it for the benefit of the owners, and then turning round, and pleading the resolve of Congress against the claim of the owners.

But if that resolve was a bar, a subsequent

acknowledgment of the original trust, and a promise to account, will again set it up.

247*] *February 13. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The essential difficulty in this cause arises from the consideration, that under the resolution of Congress, by which the vessel and cargo mentioned in the proceedings were condemned, a sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice.

It has been correctly argued by the plaintiff in error, that the captain was under obligations to the owners, from which, in a moral point of view, he could not be completely absolved. He was bound to save for them the ship and cargo by all fair means within his power; but he was not bound to employ fraud in order to effect the object. The situation of the vessel unquestionably justified her being carried into the port of an enemy, and, perhaps, in the courts of England, the libelling of the vessel by the captain and crew, might be construed to be an act which would enure solely to the benefit of the owners; but war certainly gives the right to annoy an enemy by means such as those which were employed by Congress, and courts are bound to consider them as legitimate, and to leave to them their full operation.

The agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a stratagem which the laws of war would authorize, but it was certainly a fraud upon the resolution of Congress, and no principle can be more clear than that the courts of the United States can furnish no aid in giving efficacy to it. Congress having a perfect right, in a state of open war, to tempt the navigators of enemy vessels to bring them into the American ports, by making the vessel and cargo prize to the captors, the condemnation of a vessel so brought in amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the owners, and of their claim upon

248*] *the captain. Had no communication taken place between the captain and his crew, whereby a portion of the prize money was allotted to him in trust for the owners, which would not have been allotted to him as a captor, in virtue of his station in the vessel, it would have been a plain case of prize under the resolution of Congress, and any intention under which the capture was made, whether declared or not, would have been like other acts of the will, controllable and alterable by the persons who had entertained it. But if, by a contract with the crew, stipulating certain advantages for the owners of the ship and cargo, the vessel has been carried in, when she would not otherwise have been carried in, or a larger proportion of the prize has been allowed to the captain than would have been allowed to him for his own use, a plain fraud has been committed by him, and the question, whether the trust which he assumed upon himself, and under which he obtained possession of the property, can be enforced in this court, is one of more difficulty, upon which a difference of opinion has prevailed. It has been thought by some of the judges, that the contract being in itself compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation, which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion, that the contract being clearly in fraud of the law, as existing at the time, a law to which, under the circumstances attending it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. The person in possession must be left in possession of that which the decree of a competent tribunal has given him.

This opinion seems completely to decide the point made under the treaty of peace. According to it, a debt never existed to which the treaty could apply. No debt was due from the captain to his owners, but in virtue of the confiscation of the ship and cargo; and it has never been alleged that the treaty extended to captures, made during the war, of property in the actual possession of the enemy, whatever might be the means employed in making them.

*If the allegations of the bill had stat- [*249 ed any contract subsequent to the condemnation, by which Captain Eve had made himself a trustee, the previous moral obligation might have furnished a sufficient consideration for that contract. But the allegations of the bill are not sufficiently explicit on this point. They do not make out such a case. His declarations appear to have been contemporaneous with the transaction, and only to have manifested the intention under which he acted, an intention which he was at liberty to change.

Judgment affirmed.

MONTALET *v.* MURRAY.

If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record, and go for an affirmance.

MARSHALL, *Ch. J.*, stated the practice of the court to be, that where there is no appearance for plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance.

P. B. Key, for the defendant, had the plaintiff called.

Dismissed.

The Chief Justice also stated, in answer to a question from the clerk, that, in such cases, costs go of course.

SARAH AND ABIGAIL SILSBY *v.* THOMAS YOUNG AND ENOCH SILSBY.

D. devised all his estate to his executor in trust, to convert the same into money, and after payment of debts, to invest the surplus in the funds, or put it out on interest. He then bequeaths 1,500*l.* to E. to be paid at the age of 21, subject to the subse-

quent provisos; and directs 1,000*l.* to be set apart and the interest to be paid to S. during her life, and, after bequeathing other pecuniary legacies, says, provided "that in case the personal estate, and the produce arising from the real estate, which I shall die seized and possessed of shall not be sufficient to answer the said annuities and legacies hereinbefore by me bequeathed, then, and in such case, I direct that the said annuities and legacies so by me bequeathed shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the 1,500*l.* bequeathed to E.," whom he also makes his residuary legatee. The estate was more than sufficient, at the time of the testator's death, to pay all debts, annuities and legacies, but afterwards, by the bankruptcy of the executor, became insufficient. Held, that E.'s legacy of 1,500*l.* should be liable to S.'s annuity.

THIS was a writ of error to the circuit court of the United States for the district of Georgia, to reverse the decree of that court, which dismissed the bill of the complainants, Sarah and Abigail Silsby.

Daniel Silsby, the brother of the complainants, and uncle of the defendant, Enoch Silsby, 250*] being seized and possessed *of real and personal estate in England and in the state of Georgia, by his will, made in England, on the 11th of January, 1791, devised all his estate to his executor W. Gouthit, of London, in trust, to turn the same into money, or securities for money, and after payment of his debts, to place out the surplus upon any public or private securities upon interest, or to invest it in the public funds.

He then bequeaths to his nephew, Enoch Silsby, 1,500*l.* sterling, to be paid to him at 21 years of age, "subject to the provisos hereinafter mentioned," and directed the interest to be paid to his guardian during his minority, to be applied to his maintenance and education.

He then directs his trustee to set apart 1,000*l.* sterling, and pay the interest thereof to his sister Sarah, during her life, for her sole and separate use and disposal, and in case of her death without issue, the principal was to be paid over to Enoch. A similar provision was made for his sister Abigail, the other complainant. And after bequeathing several other pecuniary legacies, he uses the following words: "Provided always, and I do hereby expressly declare it to be my will and meaning, that in case the personal estate, and the produce arising from the real estate, which I shall die seized and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the said annuities and legacies so by me given and bequeathed, shall not abate in proportion; but that the whole of such deficiency (if any there shall be) shall be deducted out of the said sum of one thousand five hundred pounds herein before by me bequeathed to my said nephew, Enoch Silsby. And in case the personal estate, and the produce arising from the sale of the real estate, which I shall die seized and possessed of, shall be more than sufficient to answer and satisfy the several annuities or legacies herein before by me bequeathed, then, and in such case, I give and bequeath the surplus and residue which shall so exceed the purposes of this my will unto my nephew, Enoch Silsby, subject to such conditions as are herein before in this my will mentioned and contained, touching and concerning the said sum of one thousand and five hundred pounds sterling, so by me bequeathed as is herein before particularly mentioned."

*The testator died at Ostend, on his [*251 way to the United States, in February, 1791, leaving real and personal estate more than sufficient to pay all the debts and legacies, and which came to the hands of Gouthit, the executor, who paid all the debts and all the legacies, excepting those bequeathed to the complainants, and to the defendant, Enoch Silsby, and another legacy of 500*l.* to Daniel Silsby Curtain; but upon these he regularly paid the interest until the year 1796, when he became bankrupt.

The testator in his will mentions that he has in the hands of Harrison, Ansty & Co., of London, 5,000*l.* sterling, for which they allow him an interest of 5 per cent. per annum.

Gouthit, in his letter to the complainants of September 7, 1791, says, "I have an excellent offer; a mortgage for 2,000*l.* which, if you think well, I will take it; for if I should at any time see well to place it anywhere else, by giving six months' notice it would be paid. It is on an estate in Manchester, one of the greatest trading towns in this kingdom, and I can make you 5 per cent. sterling on it, which will, you know, be 50*l.* a year for each of you, and you may have it paid as you please, but every six months, I think, would be best. The gentleman I mean to lend the money to is an old acquaintance of your brother's, and the estate is worth 5,000*l.* He does but want 2,000*l.*, so you know nothing can be safer on earth, and I will have the deed so recited as to set forth the money is for your use, &c. This, I doubt not, but will meet your approbation. I have taken no money out of Harrison's hands, nor even interest, as I have no doubts of its safety, and the interest is going on."

In answer to which, the complainants write him on the 1st of February, 1792. "Yours of September the 7th, you mention an old friend of our dear brother's wanting to hire the 2,000*l.* on mortgage. We would willingly oblige him, but cannot. We choose to let it remain just as our brother left it, and shall draw on you every six months for our interest."

*Gouthit, before his bankruptcy, [*252 drew all the money out of the hands of Harrison, Ansty & Co. who were, and always have been, solvent, and in good credit. He never placed out in any specific funds the 2,000*l.* from which the complainants' annuities were to arise.

On the 20th December, 1791, Gouthit sent a power of attorney to the defendant, Thomas Young, of Savannah, in Georgia, to collect the effects of the testator in that state, under which power Young obtained letters of administration with the will annexed, and took into his possession all the property there, some part of which he paid over to Gouthit. He, also, in the year 1800, paid the legacy due to Daniel Silsby Curtain, and part of the 1,500*l.* legacy to Enoch Silsby. Considerable debts due to the estate are still outstanding in Georgia.

At the time of Gouthit's bankruptcy he was indebted to the estate of his testator in the sum of 5,380*l.* 12*s.* 2*d.* sterling, but the commissioners refused to admit him as executor of the testator to prove the same as a creditor of his own estate, whereupon the legatees, who had not been paid, petitioned the Lord Chancellor of England, that Gouthit might be so admitted to

prove the debt for their benefit, which his Lordship decreed accordingly; and a dividend of 403*l.* 10*s.* 10*d.* sterling was received by the accountant general of the court of chancery, but no part of that sum has been received by the complainants.

Enoch Silsby filed a bill in equity in the circuit court of the United States, for the district of Georgia, against Young, to compel him to account, and pay over to him, as residuary legatee, all the estate remaining in the hands of Young.

The complainants, Sarah and Abigail, filed the present bill in equity in the same court against both Thomas Young and Enoch Silsby, praying that Enoch's legacy of 1,500*l.* may abate in favor of their legacies, and that they may charge the residue of the estate for the balance, and have their 2,000*l.* placed out on good security according to the will, and that they may be paid the arrearages of their annui-
253*] ties out of the 1,500*l.* legacy, *and out of the residue of the estate which came to the hands of Young.

The judge below (Judge Stephens) dismissed the present bill, and decreed that Young should account to Enoch Silsby, upon the other bill in which Enoch Silsby was complainant, and Thomas Young defendant.

Morsell, for the plaintiffs in error.

1st. If the plaintiffs have not discharged the general funds, they are entitled to the relief they pray for.

2d. They have not discharged those funds, nor relinquished their claim upon the whole estate of the testator.

It is true, that if one legatee, by diligence, has got his legacy, he shall not be obliged to refund in case of a subsequent waste of effects by the executor; but that is only where all the legacies are payable at one time, and the legatees are in a capacity to compel the payment of their legacies.

In the present case, the principal of their legacies to the complainants was not to be paid to them. The testator had directed his executor to set apart 2,000*l.* sterling, and to pay the interest only to the complainants during their lives. It was, therefore, a bequest of an annuity merely. There was nothing for the complainants to do. They had no right to designate the funds which should be set apart by the executor, in whom alone was vested the right and the power to make the appropriation. By the words of the will, if the estate should not be sufficient to pay all the legacies, yet the complainants were not to suffer. But the defendant, Young, having paid some of the legacies in full, has thereby admitted assets for all. The complainants having regularly received their annuities to the year 1796, when Gouthit, the executor, became bankrupt, had no right to complain, and had no reason to press for a specific appropriation of the money, from which their annuities were to be paid. They knew that the whole estate stood chargeable to them until
254*] *their 2,000*l.* were set apart, according to the directions of the will. The residuary legatee cannot avail himself of a breach of trust by the executor, to the injury of the complainants, who claim under the same trust. The executor was not bound by the will to give any security, nor could the complainants call upon him therefor.

The time at which the estate should be insufficient to pay all the legacies, so as to enable the complainants to call upon the residuary legatee, is not designated by the will in express terms; but it is clear that the time of the death of the testator was not the time he contemplated; because, after directing his executor to sell his real estate, he says, "in case the personal estate, and the produce arising from the real estate, which I shall die seized and possessed of, shall not be sufficient," &c., thereby contemplating a period after his death, and sufficiently distant to enable his executor to sell the real estate. The words of the will are, "sufficient to answer the said annuities." How long? The answer is obvious; as long as the annuities are to be paid, which was during the lives of the complainants. The residuary legatee was, therefore, to answer for the insufficiency if it happened at any time during their lives.

The case of *Marsh v. Evans*, 1 P. Wms. 668, is very similar to the present. The testator gave to each of his two sons, and to his daughter, 2,000*l.* a piece, "with a proviso, that if his assets shall fall short for the payment of these legacies, still the daughter shall be paid her full legacy, and that the abatement shall be borne proportionately out of the sons' legacies only." "The testator left sufficient to pay all the legacies, but the executrix wasted the assets, and by that means only a deficiency happened."

The Master of the Rolls decreed, that the daughter should abate equally with the sons. But the Lord Chancellor reversed the decree, and directed that the daughter should have her full legacy, and that the abatement should be out of those of the sons only.

*It is unimportant to the complain- [*255
ants by what means the assets became insufficient, inasmuch as the testator intended to secure their annuities at all events. It was the testator, and not the complainants, who trusted the executor.

The legacy of 1,500*l.* to Enoch is (as far as the complainants are concerned) to be considered as a residuary legacy, because, by the express words of the will, it is placed upon the same ground; and nothing can be taken by the residuary legatee, until all the debts and particular legacies are paid. 2 Ld. Raym. 1320, *Spendlove v. Aldrich.*

The case of *Orr v. Kaines*, 2 Ves. 193, shows, that it is an established rule, that if an executor pays one legatee in full, he thereby admits assets to pay all the others.

2d. The complainants have not, by any act, waived their right to come upon the whole estate, nor forfeited that right by any laches.

The letter of February, 1792, is a mere refusal to sanction any thing not required or directed by the will. The complainants say, that they choose to let it (*i. e.*, the 2,000*l.* provided by their testator as a fund for the payment of their annuities) remain just as the testator left it. It is not even a hint that they meant to rely on the money in the hands of Harrison, Ansty & Co., and if it was, yet they had no power to prevent the executor from drawing those funds out of the hands of that house; nor did it have that effect, for Gouthit did actually withdraw them, and apply them to other purposes.

The complainants were not bound to call upon the executor to designate the funds set apart for the payment of their annuities; and as long as they were regularly paid, they had no cause to suspect the solvency and the honesty of Gouthit, on whom their testator had chosen to bestow his confidence. They cannot, therefore, be charged with laches.

256*] *Harper, for the defendant, Enoch Silsby, contended, 1st. That as the estate was sufficient at the time of the testator's death, and became insufficient long afterwards, by the default of the executor, the contingency has not happened upon which the will renders Enoch Silsby's legacy of 1,500*l.* liable solely to abatement; and that he is, therefore, entitled to receive the whole; or, at most, is liable only to an abatement, pro rata, with the other legatees.

2d. That the complainants, by their acts, made their election to depend on the estate in England, and on the security of Gouthit, and, therefore, cannot resort to the residue in this country.

3d. That if their acts do not amount to such an election as will preclude them from resorting to the residue, yet their laches, in omitting to take steps for compelling the executor to place out their legacies on public or private securities, according to the will, ought to have that effect.

The complainants were of full age at the time of making the will. The defendant, Enoch Silsby, was an infant for a long time after the testator's death. There is a limitation over to Enoch of the principal sum of the complainants' legacies. By their conduct he has lost the reversion of the 2,000*l.*, and of 1,200*l.*, the surplus. It is not just that the loss should fall upon him who was then an infant. The claim of the complainants would sweep every thing from Enoch, who was the peculiar object of the testator's bounty. The defendant, Young, must take the consequences of his own act, if he has paid any of the legatees in full. He is solvent, and having, by his act, admitted assets, the complainants cannot resort to the residuary legatee.

But the testator died possessed of estate enough to pay all the debts and legacies; and, therefore, Enoch's legacy of 1,500*l.*, by the terms of the will, is not bound to abate.

257*] *If the testator meant to give the complainants their legacies at all events, he would have said so. He knew that he had enough to pay all at the time of making his will, but accidents might happen before his death, and it was to guard against those only that he provided for the case of insufficiency.

There is a great difference between this case and that of *Marsh v. Evans*, cited from 1 P. Wms. 668. In that case the proviso was, that "if his assets should fall short." The word *assets* is technical, and refers to the estate *after* his death. The legacies were not payable until his children should be of full age, and the whole expression evidently alludes to a state of things which might happen at any time between his death and the time when the legacies would become not payable.

But in the present case, the testator meant to refer to the time of his death; if there should then be an insufficiency to pay all, Enoch's 1,500*l.* should abate, but not otherwise.

The anonymous case in 1 P. Wms. 495, establishes the rule, that if one legatee, by diligence, obtains his legacy, and the executor having had sufficient assets, wastes them and occasions a deficiency, the legatee shall not be obliged to refund.

In the case of *Walcot v. Hall*, 23d February, 1788. Supplement to Viner, vol. 3, p. 432, the distinction is taken between a deficiency at the time of the death, and that which arises afterwards.

The case of *Orr. v. Kaines*, 2 Ves. 194, shows that where there was an original sufficiency of assets, and the executor remains solvent, the legatees shall not refund.

As Young is solvent, the complainants cannot oblige the other legatees to refund, unless there was an original deficiency of assets.

*2d. As to the acts of the complain- [*258
ants.

Their letter to Gouthit prevented the 2,000*l.* from being put out on security. It is, therefore, the same thing, in effect, as if the executor had, at their request, put it out on a security which had failed.

But they have actually made choice of the security. They knew the money was in the hands of Harrison, Ansty & Co., and in their letter they say, "we choose to let it remain just as our brother left it;" that is, in the hands of Harrison, Ansty & Co. After having done that, Gouthit remained their agent for the purpose of drawing and remitting the interest. They were the only legatees who were of age, and capable of assenting to such a disposition of their legacies. The other legatees were infants. If the complainants had directed the 2,000*l.* to remain in the hands of the executor, and he had failed, they must have sustained the loss. By refusing his offer to place it out on mortgage, they have, in effect, assented to his retaining it, and he having failed, they must submit to the consequence. If they had assented to his offer, the money would have been safe, and the defendant, Enoch, would not have lost his chance of the reversion. If the executor himself had placed it out on security, and set it apart, according to the directions of the will, and it had been lost, they could never have called upon the residuary legatee.

3d. But the complainants have been guilty of laches, in not compelling the executor to place out the money on security. They had early notice of the will, and took no measures to have their legacies secured, until the failure of Gouthit, which was six years after the testator's death. By this neglect, Enoch has lost his reversion. He was a minor, and, therefore, no laches can be imputed to him.

P. B. Key, for the defendants.

1st. As to Young.

*He considers himself as a stakehold- [*259
er only. If the complainants are entitled to be first paid, he holds for them; if not, then he holds for the defendant, Enoch.

If there is an original deficiency of assets, and one legatee receives the whole of his legacy, the others may compel him to refund, and the executor will not be obliged to pay the other legatees in full. So, if an executor pay one in full, by mistake, it shall not preclude him from alleging a defect of assets.

There is no case in which an executor has been thus precluded, by a payment in full to one of the legatees. The case from 2 Ves. 194,

was where the executor had not only paid one in full, but had neglected to make an inventory.

2d. As to the defendant, Enoch Silsby.

The general principle is admitted, that specific pecuniary legatees are to be first paid; and that, if there is not sufficient to pay the whole, they must abate in proportion.

This will appears to have been drawn by able counsel. If the testator meant that the particular legacies should have been paid out of the whole estate, he would have said so; but he has directed a particular fund to be set apart, out of which the annuities of the complainants were to be paid. If this fund had been set apart, as directed by the will, the defendant, Enoch, would have been entitled to the residue, and exonerated from all liability to refund. The complainants were the only legatees of competent age to compel the executor thus to set apart the fund; or, at least, they were the only legatees to whom laches can be imputed. They not only neglected to do this, but by their letter prevented the executor from doing it.

The residuum was to abate upon the same contingency only upon which the legacy of 1,500*l.* was to abate; and that contingency never happened. "The personal estate, and the produce arising from the real estate, of which the **260***] testator died seized and possessed," *was "sufficient to answer all the debts, annuities, and legacies."

If the time of the testator's death was not the time when the sufficiency of the estate was to be ascertained, yet, if at any time afterwards, the personal estate, and the produce of the real estate, which came to the hands of the executor, was sufficient, the right of the complainants to come upon Enoch's legacy of 1,500*l.* and upon the residuum ceased. It was then incumbent upon the complainants to look to their own legacies, and get them properly secured; if they did not, they gave personal credit to the executor, and if he wasted the estate, and became insolvent, they must suffer the loss. They had a right to require security in chancery. It is a part of the regular chancery jurisdiction to compel such security, and no suggestion of a *devastavit* was necessary. The funds in England were more than sufficient to pay all the debts and legacies. It was not necessary to wait for the settlement of the estate in Georgia. Young, the administrator in Georgia, never had a sufficiency of assets; and, therefore, his payment of one legacy in full, if that is the fact, cannot bind him to pay all the rest.

Martin, in reply. The question is, whether if upon an account against the defendants, any funds shall be found in their hands, we are entitled to recover.

They contend that we are not entitled to an account.

The will speaks of the produce of the estate, and not of the estate itself; contemplating the intermediate acts of the executor; looking forward to subsequent events, and negativing the idea that the testator was contemplating only the situation of his estate at the time of his death. He directs all his estate to be turned into cash, and his debts to be collected, and the whole vested in funds.

The principle of abatement was not to take place until the legacies were to be paid.

261*] *The complainants were not bound to elect any particular fund. They had a right to look to the whole estate.

The word "it," in their letter to the executor, evidently refers to their legacy of 2,000*l.*, and not to any particular sum in the hands of Harrison, Ansty & Co. That letter did not influence the conduct of the executor, for he did not leave the money in the hands of those merchants. If he had done so, and they had failed, there might have been some plausibility in the argument.

The complainants were not bound to apply to chancery to compel the executor to give security. Until the year 1796 they had no reason to complain, and no cause for suspicion. The testator had placed confidence in the executor, and had left it entirely to his discretion when, and in what manner, he should place the money out on security; consequently, there was no laches on the part of the complainants.

February 13. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

This being a suit in chancery, brought by legatees claiming an account, in order to the payment of their legacies, and their bill having been dismissed without an account, the decree can only be supported by showing that there are, in the hands of the administrator, no assets which ought to be applied to the purposes prayed in the bill.

The testator having bequeathed to each of his two sisters, Sarah and Abigail, who are the complainants, the interest on one thousand pounds sterling, and that being in arrears, and assets having come to the hands of his representative, the complainants are certainly entitled to an account, unless they have forfeited all pretensions to their legacies.

*The defendants say that they have [***262** fortified their rights.

1st. By a letter, selecting a particular debt in satisfaction of their legacy, which debt is lost.

2d. By their laches.

The better to understand the correspondence, which is relied upon, it must be recollected, that, by the will, the whole estate, real and personal, of the testator, was devised to executors and trustees, who were directed to place it out on public or private security, in such manner as should, in their judgment, best promote the interest of the legatees. The testator then directs, among other bequests, that his trustees shall set apart one thousand pounds sterling for each of his sisters, the interest of which shall be paid to them during their natural lives, after which the principal is to be divided between the children of each, if they should marry and have children, but is given to his nephew, Enoch Silsby, in the event of the first legatees dying unmarried, or without children.

This duty of the executor and trustee being thus plainly marked, he addressed a letter to the legatees, in September, 1791, in which he mentions an offer which had been made him, of a mortgage of 2,000*l.*, the amount of the sums to be set apart for them, which he will take, if it meets their approbation. If the plaintiffs had taken this mortgage, and the title had proved defective, or the mortgaged property had been destroyed, they would, most probably, have forfeited all claims upon the estate of their testator, and would have been, at least, censured by the legatee in remainder, for having de-

stroyed, by an improvident intervention in the management of the estate, his right to the principal sum, on their dying unmarried. Such an interference, on their part, was unnecessary, because the executor was authorized, by the will, to place the estate either on private or public security, as he should think most advantageous, and would have been particularly indiscreet, because they could neither judge of the validity of the title, nor of the value of the premises proposed to be mortgaged. To have intermeddled 263*] *with the subject would, therefore, have been in them a departure from propriety and common prudence, not to be accounted for, nor justified.

Under these circumstances, they say, "You mention an old friend of our dear brother's wishing to hire the 2,000*l.* on mortgage. We would willingly oblige him, but cannot. We choose to let it remain just as our brother left it."

To the court it seems that this letter will admit of but one construction. It is a plain declaration that they do not mean to intermeddle with the duties of the executor, but to leave him to perform them according to the directions of his testator. "We choose to let it" (the legacy of 2,000*l.*) "remain just as our brother left it," is plainly saying that the legacy must remain on the foundation on which the will placed it. The construction which would convert these words into a declaration that they chose the debts of their testator not to be collected, and that they chose to take upon themselves the hazard of the solvency of any particular debtor, whose debt should remain outstanding, or of the executor, if he should happen to collect it, is really too violent a distortion of them to be tolerated for an instant.

As little foundation is there for the allegation, that the rights of the complainants have been forfeited by their laches. The court can perceive no laches on their part. It was not particularly incumbent on them to incur the expense of inquiring into the manner in which the executor performed his trust, with respect to the estate at large. They received their interest regularly, and there was no circumstance to awaken a suspicion that they were in danger. On the residuary legatee, and on his father and natural guardian, it was more particularly incumbent to examine into the conduct of the executor, and though he may be perfectly excusable for not having done so, he cannot throw the loss on others, whose conduct has been perfectly faultless.

264*] *The court is, therefore, clearly and unanimously of opinion, that the complainants have not forfeited their rights; and, consequently, that the decree must be reversed, and an account directed.

In considering the principles on which the account is to be taken, the court think it perfectly clear that the specific pecuniary legacies must be set apart, before the defendant, Enoch Silsby, can be entitled to the residuum. The words annexed to the bequest of the residuary estate, which subject it to the same conditions with the bequest of the 1,500*l.*, are understood by the court to relate to the condition of payment, at the age of 21, and to the limitations over, in case of the death of the residuary legatee, not to the question of abatement; and a residuum, *ex vi termini*, is that which remains after particular legacies are satisfied.

The court is also of opinion, that if there be not sufficient assets to satisfy all the specific legacies, the loss must fall exclusively on the 1,500*l.* given to Enoch Silsby, until that fund be exhausted.

It has been argued that the words of the will limit this charge on that legacy to the contingency of an insufficiency of assets at the death of the testator. The words are, "It is my will and desire, that if the personal estate, and the produce arising from the real estate, of which I shall die seized and possessed, shall not be sufficient to answer the several annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the annuities and legacies shall not abate in proportion, but that the whole of such deficiency, if any there be, shall be deducted out of the said sum of 1,500*l.* herein before by me bequeathed to my said nephew, Enoch Silsby."

These words have undergone a very critical examination, and it has been contended that the time at which the sufficiency mentioned in the will is to be determined is fixed by the testator at his death, in like manner as if the expression had been, "if my estate shall not, at the time of my death, be insufficient," &c. But the words do not appear to the court to demand such an interpretation. The words, "the personal and real estate of *which I shall die seized [*265 and possessed," are no more in substance than the words "all my real and personal estate" would have been. They describe the subject, on the insufficiency of which an abatement of a particular legacy is to take place, but not the time when that insufficiency is to be tested. In the opinion of the court, that time is when the will is carried into execution, by the application of the funds to their object. If, when that application is made, a deficiency appears, "then, and in that case" it is, that the abatement is to take place in the specific legacy to Enoch Silsby.

This specific pecuniary legacy being given to the same person to whom the residuum is given, and on the same terms, assumes completely the character of a residuary bequest, and the testator does not appear to have intended to give it any preference over the residuum. He seems to have intended certain provisions to his relations, the extent of which were apportioned to his opinion of their necessities, and which he did not leave in a situation to be enlarged or diminished by any incident which might affect the state of his affairs. Should his property be merely sufficient to pay those annuities and legacies, they were to sustain no deduction; should it be ever so much enlarged they were to receive no increase; but all he might possess, exceeding those specific donations, was to be given to his nephew. His bounty to his other legatees was measured; that to his nephew was not defined. As in every case where specific legacies are first given, so in this, it is the intent of the testator to prefer the specific legatees. There would have been no motive for giving a specific legacy, subject exclusively to abatement in case of deficiency, to the residuary legatee, but for the purpose of providing a fund for his

education and maintenance during his infancy. For every other purpose, this particular legacy to Enoch Silsby is to be considered as a part of the residuum.

It is not easy to assign a motive in the testator for intending a preference to his specific, over his residuary legatee, in the event of an insufficiency of assets, at his death, which would not equally apply to an insufficiency which should take place afterwards. The only motive for this preference which could possibly 266*] have existed, *was his wish that if the fund should not be adequate to pay all his legacies, yet, no deduction should be made from those which were particularly bequeathed. This wish originated in his particular feelings towards his relations, and could not depend on the insufficiency which he provided against taking place at the time of his death, or a few months or years afterwards. If, at the time of his death, his estate had been sufficient, but before it could be collected and applied according to his will, bankruptcies, or any other casualties, had occasioned a deficiency, no reason can be perceived by the court for supposing that the contemplation of such a deficiency would have induced him to make a different arrangement of his affairs, from what he would have made had he contemplated a deficiency at his death. And between such a deficiency, and one occasioned by the fault or misfortune of an executor, chosen, not by his legatees, but by himself, the court can perceive no distinction.

It is, therefore, the opinion of this court, that the decree of the circuit court be reversed, and that the cause be remanded to the circuit court, that an account may be taken, in order to a final decree.

Reversed.

DECREE.

This cause came on to be heard on the bill, answers, exhibits and other testimony in the cause, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the decree of the circuit court, in directing the bill of the complainants to be dismissed, and that the same ought to be reversed and annulled. And this court doth farther direct and order, that the said cause be remanded to the circuit court, that accounts may be taken of the assets which are in the hands of the defendant, Thomas Young, of the payments which have been made to Enoch Silsby, and of the sums which are due to the complainants, and of such other matters as may be necessary to a final decree.

267*] *STRAWBRIDGE *et al.*
v.
CURTISS *et al.*

If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.

THIS was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction.

Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the State of Vermont, and upon whom the subpœna was served in that state.

The question of jurisdiction was submitted to the court without argument, by P. B. Key, for the appellants, and Harper, for the appellees.

On a subsequent day.

MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

The words of the act of Congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, *and some of [*268 those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.

NOTE.—A controversy is not "between citizens of different states," *unless all* the persons on one side of it are citizens of different states from *all* the persons on the other side. If any of the plaintiffs and defendants are citizens of the same state, the controversy does not come within the operation of the judicial power of the United States.

Teal v. Walker, 5 Reporter, 202.
Lockhart v. Horne, 1 Woods, 628.
Wickliff v. Eve, 17 How. 468.

But where infant is complainant against citizen of another state, defendant, the next friend of the infant, in the action, may be citizen of same state as defendant.

Williams v. Ritchie, 3 Dill. 406.

To give the court jurisdiction, one of the parties must be a citizen of the state where the suit is brought; and that fact must be positively averred on the record.

Kelly v. Harding, 5 Blatchf. 502.
Burnham v. Rangely, 1 Wood. & M. 7.
Kitchen v. Strawberry, 4 Wash. C. C. 84.

A citizen of the District of Columbia, or of a territory not yet admitted as a state, is not a citizen of a "state" within the meaning of the statute defining the jurisdiction of the circuit court.

Hepburn v. Elzey, 2 Cranch, 445.
Wescott v. Fairfield, Pet. C. C. 45.
New Orleans v. Winter, 1 Wheat. 91.

Diverse citizenship as ground of federal jurisdiction—see notes, 10 C. C. A. 249, 27 C. C. A. 298.

GORDON v. CALDCLEUGH *et al.*

This court has not jurisdiction upon a writ of error to a state court, under the 25th section of the judiciary act of 1789, if the decision of the state court be in favor of the privilege claimed under an act of Congress.

THIS was a writ of error to the judges of the court of equity of the state of South Carolina, holden in and for the eastern district of the said state.

James Gordon, "of the city of Charleston, in the state aforesaid," filed a bill in equity against Caldcleugh and Boyd, "of London, in the kingdom of Great Britain," William Muir, "of Hamburgh," and John Gillespie, George M'Kay, and Joseph Reid, whose residence is not mentioned in the bill. At the return of the subpœna, Caldcleugh, Boyd and Reid, appeared and filed a petition, stating themselves to be aliens, and subjects of the King of Great Britain, and that the complainant was a citizen of the state of South Carolina, and praying that the cause might be removed to the circuit court of the United States, according to the 12th section of the judiciary act of 1789. To which petition Gordon, the complainant, answered, that the prayer thereof ought not to be granted, because Gillespie and M'Kay, two of the defendants, were citizens of the state of South Carolina. But the court, "after observing that the parties, defendants to the suit, residing in this state, were stakeholders, and not materially concerned in the determination of the cause, ordered that it be transferred to the federal court, agreeable to the prayer of the petition.

The complainant immediately, in the same court, assigned errors, in the following form: "Whereupon the said James Gordon comes and 269*] says, that in the *giving of the final judgment, in the cause aforesaid, upon the construction of the 12th clause or section of the statute of the United States, entitled an act to establish the judicial courts of the United States, passed the 24th day of September, 1789, and 2d section of the 3d article of the constitution of the United States, and the 12th article of the amendment of the constitution, there is manifest error in this, to wit, that the judgment aforesaid was given in form aforesaid, for the said Caldcleugh, Boyd and Reid, upon their petition, for the removal of the said cause for trial, into the circuit court of the United States, to be held for the district of South Carolina, whereas judgment should have been given for the said James Gordon, against the removal aforesaid; and this he is ready to verify.

Caldcleugh, Boyd and Reid joined in error; and thus the case came up.

The writ of error did not state that the court of equity of the state of South Carolina, to the judges of which it was directed, was "the highest court of equity of the state in which a decision in the suit could be had," so as to bring the case within the provisions of the 25th section of the judiciary act of 1789, nor did that fact in any other manner appear.

E. J. Lee for the plaintiffs in error.

February 13. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the Court.

This court has no jurisdiction under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, &c., or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission *held under, the United [*270 States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.

In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not against the privileges claimed under the statute; and, therefore, this court has no jurisdiction in the case.

The writ of error must be dismissed.

M'FERRAN v. TAYLOR and MASSIE.

He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.

Quære, if the mistake be of a matter deemed perfectly immaterial by both parties at the time of the contract, and of a matter which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?

A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded.

ERROR to a decree of the district court of the district of Kentucky, in chancery.

M'Ferran in his bill alleged that on the 19th of March, 1784, the defendant, Taylor, for a valuable consideration, executed his bond to the complainant, for the conveyance of 200 acres of land out of 1,000 acres located by him on Hingston, or out of 5,000 acres which Taylor then had for location. The condition of the bond was as follows: "That if the said Richard Taylor, his heirs, &c., shall well and truly make, or cause to be made, to the said Martin M'Ferran, his heirs or assigns, a good sufficient title in fee-simple to two hundred acres of land in the county of Kentucky, out of 1,000 acre tract, lo-

NOTE.—An admission by the pleadings cannot be contradicted by the evidence, and is conclusive.

Van Dyke v. Maguire, 57 N. Y. 431.

"That what the parties have agreed to in their pleadings shall be admitted though the jury find otherwise."

7 Bacon's Abridgement, 459.

A finding by a referee, even if sustained by the evidence, cannot be sustained, if it contradicts the admissions of the pleadings.

Ballou v. Parsons, 11 Hun, 602.

Equity will as a general rule relieve from an act done, or avoid a contract made under mistake as to or ignorance of a material fact, (1 Storys' Eq. Jur. § 140) and that not only where there has

cated by the said Richard Taylor on Hingston's fork of Licking; or 200 acres out of 5,000 which the said Taylor has now for location, provided he obtain the same, at such part or place thereof as the said M'Ferran shall choose, not to exceed more than twice the breadth in length thereof, so soon as the lands can, in any degree 271*] of safety, be surveyed; *then this obligation to be void, otherwise to remain in full force and virtue."

The bill futher alleged, that on the 25th of September, in the same year, the defendant, Taylor, executed another bond to the complainant for 300 acres of land adjoining the former tract of 200 acres.

That the said 5,000 acres of land alluded to by the bonds, was granted to Taylor, for his military services, by a warrant numbered 1,734, which issued for 6,000 acres; but that Taylor did not inform the complainant that it contained more than 5,000 acres. That 1,000 acres of the 6,000 had been located on Paint creek, and 2,000 on Brush creek, in the northwestern territory, and 3,000 on the Green river, in the district of Kentucky. That Taylor had not any lands on Hingston, so that the complainant cannot make his choice there, where he avers the general quality of the land is equal to any in Kentucky, and is worth from 8 to 10 dollars an acre. That Taylor has sold the 1,000 acres on Paint creek to the defendant, Massie, who, before he paid for the land, and obtained a title from Taylor, had notice of the complainant's claim to 500 acres from Taylor, as before stated.

That before the sale to Massie, Taylor had sold the 2,000 acres on Brush creek to Abraham Buford, or to some one else, and in consequence thereof, assigned the certificate of survey to John Brown. That in 1796, the complainant applied to Taylor to show him his lands, that he might make his choice, but Taylor neglected and refused to show them. That the complainant chooses to have the 500 acres laid off, and conveyed to him from the land on Paint creek, and has given notice of his choice to Taylor, who refuses to convey the same from out of that tract, and refuses to accompany the complainant to have the same paid off; and that Massie also refuses to convey.

The bill concludes with a prayer, that the complainant may be permitted to make choice of 500 acres of land out of the 1,000 acres on Paint creek; that the defendants may be compelled to convey the same; and that the court would grant general relief, &c.

*The answer of the defendant, Tay- [*272 lor, admitted the bonds, and that the 500 acres were to be laid off in one tract. It alleged that the consideration of the first bond was two horses, sold to him by the complainant, at the price of 40*l.* Virginia currency for both; and that the consideration of the other bond was another horse, valued at 48*l.* It refers to the entry for the 1,000 acres upon the waters of Licking, dated June 15th, 1780, which is in these words: "Colonel Richard Taylor enters one thousand acres on treasury warrants, adjoining an entry of Major Thompson's, on a buffalo road leading from Hingston's fork to the Sweet Licks, beginning at his southeast corner, thence north along said Thompson's line 600 poles, thence east for quantity." The answer then avers that the mentioning of Hingston's fork of Licking in the bond, was not a description of locality, but of tract; and that the mentioning Hingston was no greater recommendation of the land than if another fork of Licking had been named; because both parties were unacquainted with it, and Taylor had understood that his said entry was on Hingston. That a provision in the bond for a choice out of 5,000 acres was an alternative; and it was not intended that the complainant should have his choice out of the 6,000 acre warrant; and it was intended and understood by both parties, that Taylor should hold 1,000 acres thereof, unencumbered, and not liable to the complainant's choice. It avers further, that these 1,000 acres were located on the shares on Paint creek; that Taylor held part, and Kenton and Helm another part, as locators; that he sold his part to Massie, but he does not recollect the quantity. Of the remaining 5,000 acres he exchanged 2,000 with Colonel Abraham Buford, for two entres of 1,000 acres each, because there was a greater proba-

been suppression or concealment which would amount to fraud, but also in many cases of innocent ignorance and mistake on both sides. *Id.*

Mistake as to quantity of land will not be corrected if mistake did not influence price. Davis v. Parker, 14 Allen (Mass.) 94.

Grounds upon which equity will interfere in cases of written contract fully discussed. Marvin v. Bennet, 26 Wend. 169, 182.

Aff'g—S. C. 8. Paige Ch. 312.

Citing—Earl of Chesterfield v. Jansen, 1 Atk. 301; Fox v. Maccreath, 2 Brown C. C. 400; Green v. Winter, 1 Johns Ch. 27; Gibson v. Jeyes, 6 Ves. Jr. 270; Huguenin v. Baseley, 14 Ves. 273; Joynes v. Statham, 3 Atk. 388, Case 129; Bingham v. Bingham, 1 Ves. 126; Roosevelt v. Fulton's Ex'rs, 2 Cow. 129; Hinghen v. Lond. Ass. 1 Ves. 807.

The mistake which entitles to action is thus stated from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Mowatt v. Wright, 1 Wend. 360; 1 Dom. 248, B. 1, tit. 18, § 1, pl. 1.

In judgment of its legal effect we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11.

Where the effect would have been different had the truth been known, relief will be granted. Wheadon v. Olds, 20 Wend. 174.

Mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error, or where it is inconsistent with good faith and proceeds from a violation of the obligations, which are imposed by law upon the conscience of either party.

But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria.* 1 Story Eq. Jur. § 151; Willards Eq. Jur. p. 69, ch. 1, § 2.

On the general subject of mistake see—Thomas v. Barton, 48 N. Y. 193; Pitcher v. Hennessey, 48 id. 415; Hardigree v. Mitchum, 51 Ala. 151; Robertson v. Walker, 51 Ala. 484; Boyce v. Watson, 20 Ga. 517; Thurman v. Clark, 47 Ga. 500; Miner v. Hess, 47 Ill. 170; Burgin v. Gibberson, 26 N. J. Eq. 72; Heavenridge v. Mondy, 49 Ind. 434; Monroe v. Skelton, 36 Ind. 302; Mo. v. Frank, 51 Mo. 98; Stock I. Co. v. Hudson I. Co., 107 Mass. 290; Oliver v. Mut. Com. Ins. Co., 2 Curtis, 277; Grymes v. Sanders, 3 Otto, 55; Hunt v. Rousmaniere's Adms. 1 Pet. 13; Hoppough v. Strubble, 60 N. Y. 430; Matter of Price, 67 N. Y. 231, and cases cited on p. 233; Garnar v. Bird, 57 Barb. 277; Boyd v. De La Montaigne, 47 How. Pr. N. Y. 433.

bility of getting good land upon small entries than upon large. That these 2,000 acres were located on the south side of Green river. That the other lot of 2,000 acres, part of the 5,000, was located on the north fork of Paint creek; but understanding the land was not good, he had 1,500 acres withdrawn, and finally located on some of the waters of Paint creek, as he is informed; but he is so much unacquainted with that country, that he cannot point it out particularly. The remaining 1,000 acres are located and patented south of Green river. That he has offered the complainant a choice of any of those lands, except the 1,000 acres held 273*] *by Massie, Kenton and Helm, which he has refused. That the 500 acres on the north fork of Paint creek are inferior to the other lands, as he has been informed and believes; and the complainant having positively refused them, Taylor has sold them. But the 1,500 acres on the waters of Paint creek, which were originally part of the 2,000 acre lot, and the three tracts of 1,000 acres each, south of Green river, are yet held by him ready for the choice of the complainant. That Taylor informed the complainant, before the commencement of this suit, fully of the exchange with Buford, and has been always ready and willing to let him have his 500 acres as aforesaid. That Taylor informed the complainant of his said military warrant; and that it was for 6,000 acres; and that he reserved 1,000 acres thereof, which it was then possible he might want to live on, and that the complainant's right of choice was only to extend to the remaining 5,000 acres. That since Taylor discovered that the first-mentioned 1,000 acres laid on Slate creek, a branch of Licking, and not on Hingston, a branch of Licking, he informed the complainant thereof, and also that he had no lands on Hingston.

The answer of Massie denied, that previous to his paying the consideration of the land to Taylor, and the issuing of the patent, he had any notice that the complainant had any claim to that land, and averred that he was a bona fide purchaser, for a valuable consideration, without notice.

The jury (who, by the practice of Kentucky, are called to ascertain facts in chancery suits) found the following facts:

1. That the defendant executed the bonds.

2. That at that time he had no lands on Hingston's fork of Licking.

3. That on the 29th of August, 1795, he assigned to John Brown, the plot and certificate of survey, &c. (the 2,000 acres before mentioned,) which survey was made by virtue of a military warrant, No. 1,734.

274*] *4. That on the 31st of July, 1797, he assigned to Massie, &c., the 1,000 acres before mentioned, being a survey of part of the same warrant.

5. That the complainant demanded of Taylor 500 acres, in virtue of the said bonds, before the commencement of this suit; but it does not appear that any lands have been conveyed in compliance with that demand; neither does it appear that any particular piece of land was pointed out by the complainant, when the said demand was made, except that he had made his election to have 500 acres out of the survey assigned to Massie, and gave notice thereof to Taylor, who refused to convey it.

6. That 500 acres might be laid off in that survey worth five dollars an acre, in the form called for in the bonds.

7. That the 5,000 acres mentioned in the bonds were part of the warrant No. 1,734, for 6,000 acres, granted to Taylor for his own services.

8. That Taylor had the entry of 1,000 acres of June 15th, 1780.

9. That when the bonds were executed, Taylor had a military warrant for 6,000 acres, 1,000 whereof were entered on Paint creek, in partnership with the locators, and since assigned to Massie; 2,000 were exchanged with Abraham Buford, for other 2,000 acres of military warrants, in separate entries of 1,000 each, because Taylor deemed it more probable that he should get good land on small entries than on large ones.

10. That 1,000 acres of the said 5,000 were entered on the south side of Green river.

11. That the remainder of the 5,000 acres is located on Paint creek, or its waters.

12. That Taylor is willing that the complainant should make his choice out of any of the three tracts of 1,000 acres each, south of Green river, or out of the 1,000 acres on the waters of Licking, or out of the 500 acres, or the 1,500 acres, on the waters of Paint creek.

*13. That the average price of lands [*275 on Hingston is three and a half dollars per acre, and on Slate two dollars per acre.

14. The 1,000 acres adjoining Thompson are worth two dollars per acre.

15. The land transferred from Taylor to Buford is worth one dollar and fifty cents per acre.

16. The land transferred by Buford to Taylor is worth two dollars per acre.

The decree of the district court, upon the bill, answers, and facts found, was, in substance,

That the complainant should, on or before the 1st of September then next, make choice of his 500 acres out of the following tracts of land, to wit, 1,000 acres adjoining Major Thompson's entry, on a buffalo road leading from Hingston's fork to the Sweet Licks; the 2,000 acres transferred by Buford to Taylor; the 1,000 acres entered in the name of Taylor on Lost creek, a branch of the Ohio; the 500, or the 1,500 on Paint creek; and give notice to Taylor of such choice within one month after it should be made.

Commissioners were appointed to lay off and survey the said 500 acres for the complainant; and it was further decreed, that Taylor should, before the 1st of November then next, convey the said 500 acres to the complainant; but if the complainant should not make his choice, and give notice as aforesaid, then Taylor should, on or before the 25th of the then next November, convey to the complainant 500 acres out of one of the said tracts, in a reasonable form, according to the condition of the bonds; and that Taylor should pay the costs of the suit.

Upon this decree the complainant sued out his writ of error.

Breckenridge, Attorney General, for plaintiff in error. The records show that Taylor had no land on Hingston, *and that, at the [*276 time of the decree, the plaintiff had not the liberty to choose out of the 5,000 acres.

When a specific execution of a contract is decreed, it must be decreed to be executed entirely, or not at all.

Contracts receive the same construction in a court of equity as in a court of law. Neither can make an agreement for the parties.

A court of law, in a construction of the present bond, on an action of debt, upon a breach of the condition in not conveying land on Hingston, could not consider the bond as discharged by the conveyance of land on Slate creek.

The defendant knew, or ought to have known, his property, so as not to deceive the plaintiff.

The difference in value between the lands on those two watercourses, is found by the jury to be a dollar and a half per acre. Suppose the land on Slate creek had been worth ten times as much as that on Hingston, the defendant could not, by this bond, have been compelled to convey land on Slate creek, when he had contracted to convey land on Hingston.

As the defendant, therefore, had no lands on Hingston, a specific performance of the contract was impracticable, and, therefore, the plaintiff was, at least, entitled to damages to the value of those lands.

The decree is erroneous in another point. It directs the plaintiff to make choice out of 5,000 acres of the defendant's land, when it is confessed by the answer that the defendant had but 4,500 acres; the 500 on the waters of Paint creek having been sold by him. It is true, that the 12th fact found is, that the defendant is willing to let the plaintiff have his choice out of all his military lands, including these 500 acres, but a jury can find nothing contrary to that which is confessed or not denied in the pleadings.

277*] *The court below has decreed that the defendant may specifically execute his contract, although it appears,

1. That he has no land on Hingston.

2. That he has sold 500 acres of the 5,000, and, consequently,

3. That the 6,000 acres out of which the plaintiff had a right to choose, is reduced to 4,500.

By the contract, the plaintiff had a right to choose out of 6,000 acres, and as the defendant had no land on Hingston, is it not fair and equitable that the plaintiff should have liberty to choose out of the defendant's 6,000 acres? And as the defendant has reduced the plaintiff's choice to 4,500 acres of land, inferior to the other 1,500 acres, the plaintiff seems to be entitled to damages for the difference in quality.

The plaintiff is certainly entitled either to a choice out of the whole of the defendant's military lands, or damages equal to the whole value of the lands on Hingston.

Hughes, for the defendant in error. Two questions arise in this case:

1. Had the plaintiff a right to choose lands not mentioned in the bond?

2. Has any conduct of the defendant enlarged the plaintiff's right of choice, under the contract?

The bill charges no fraud.

Massie's 1,000 acres were not within the plaintiff's choice. Taylor meant to reserve these 1,000 acres unencumbered. The plaintiff was to choose only out of 5,000 acres; and, although Taylor had a right to locate 6,000 acres, yet that was no reason for the plaintiff's claim to choose out of the whole 6,000. The answer of Taylor positively denies that the plaintiff's choice was intended, or understood by either party, to extend to the whole 6,000 acres of military land; and this answer being responsive *to an allegation in the bill, [*278 and not contradicted by evidence, is conclusive upon that point.

2. Has any conduct of the defendant enlarged the plaintiff's right of choice?

He relies on the mistake in the description of the land, but does not allege fraud.

If it was a mistake, both parties were equally ignorant, as both lived in Botetourt county, in Virginia.

It was not known to either that the lands on one of the creeks was more valuable than those on the other, or that they would become so in the course of the twenty years which have now elapsed since the date of the contract.

The words of the bond are, "out of one thousand acre tract located by the said Richard Taylor, on Hingston's fork of Licking." The real location was "on a buffalo road leading from Hingston's fork to the Sweet Licks." The description was intended to be of the tract located by the defendant several years before, and was not intended to fix its locality. Both the parties meant the same thing: they meant the 1,000 acre tract located by the defendant in 1780, wherever it might lie. The fact turned out to be, that the tract did not lie exactly as it was supposed to lie, but still it was the same tract which was contemplated by both parties. The description "on Hingston's fork of Licking," could not, at that time, influence the plaintiff; he has not even averred in his bill that it did.

The defendant has always been ready and willing to give the plaintiff his choice in the land actually intended by both parties, at the time of the contract.

The jury have found the present comparative value of the lands not what it was twenty-two years ago. Its present value may depend on a variety of circumstances, which could not have been foreseen and contemplated at the time of the contract.

*The defendant is ready specifically [*279 to execute the contract as it was understood by the parties at the time; but, as the plaintiff now construes it, it cannot be executed specifically, and, therefore, there is no ground for an equitable jurisdiction. The party must be left to his remdy at law.

There is no contradiction between the admission in the defendant's answer, that he had sold the 500 acres which the plaintiff had refused, and the 12th fact found by the jury, that the defendant was willing that the complainant should make his choice out of those 500; for, although the defendant may have sold them, yet, it does not appear that he has conveyed them away, and he may be willing to forfeit his contract for the sale of them, if the plaintiff should choose them; or if conveyed, he may be willing to take the chance of repurchasing them.

The Attorney General, in reply. Under no rational or legal construction of the bonds can they be supposed to refer to lands located on Slate creek, when they mention lands located

on Hingston. This would be to make, and not to construe, the contract. The acquirement of land on Hingston was the plaintiff's object. It was unimportant to him by whom, or when, the lands were located.

If the defendant had contracted to transfer, on a certain day, 6 per cent. stock, he could not discharge that contract by the transfer of 3 per cent. stock, although he should make up in quantity the difference of value arising from the different quality of the stock. But here the defendant offers only the same quantity of inferior land.

It is no excuse for the defendant, to say that no fraud was intended by him in describing the land as lying on Hingston, when it laid on Slate; and that it was a mere mistake of a name. Whether it happened by mistake, or fraud, is totally immaterial to the plaintiff. The defendant sold, and the plaintiff bought, the land on the defendant's own description. He was bound to describe it truly. But the jury have found his description to be false in a very important particular. The injury to the plaintiff is the 280*] *same, whatever may have been the motives of the defendant, and he is equally bound to repair the injury.

The plaintiff, therefore, if not entitled to the land on Paint creek, which he has elected or to the value thereof, is entitled to the value of the lands on Hingston.

MARSHALL, *Ch. J.*, delivered the opinion of the court.

The bill states the original contracts, and claims a specific performance, by permitting the plaintiff to elect the 500 acres to which he is entitled, out of the tract of 1,000 acres, which had been located on Paint creek; and also contains a prayer for general relief.

On the specific object of the bill, the right to make an election out of the lands on Paint creek, there can be no difficulty. One thousand acres, part of the original warrant, having been clearly withdrawn at the time of the contract, from the quantity out of which the 500 acres, sold by the defendant, were to be chosen, there can be no pretext for the claim set up in the bill.

As little foundation is there for the claim to damages, instead of the land itself, on account of the 500 acres stated in the answer to have been sold; which sale, the counsel for the complainant considers as a wrong which has put out of his client's reach a tract he had a right to elect, and has, consequently, disabled the defendant from complying with his contract.

To this claim two answers may be given, either of which would completely defeat it.

1st. The fact found by the jury shows, that the defendant is still ready to convey this land. The Attorney General would exclude this finding from the case, because it contradicts the admission of the answer; and it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded.

The principle of law is unquestionably laid down correctly; but the court can perceive no incompatibility between the admission of the answer, and the fact, as found by the jury. They may both be true; and, of consequence, 281*] *the court must consider both as true. After the answer was filed, the land may have been repurchased by Mr. Taylor, and such a repurchase would have been proper evidence to justify the fact found by the jury, and would put him in a situation to perform his contract, so far as respected this particular tract. But were it even otherwise,

The 2d answer is, that the concession made by the defendant must be taken altogether. He states the complainant to have refused this particular tract of 500 acres before it was sold. The complainant had, consequently, elected not to take it, and, of course, the defendant was at liberty to dispose of it.

The other point in the case is attended with more difficulty. It is, that the representation made by Taylor, at the time of the sale, was untrue in a material point. He represented the tract of 1,000 acres which had been located, and out of which the plaintiff would have a right to take the lands he purchased, to lie on Hingston's fork of Licking, when, in truth, it lay on Slate, another branch of the same river, where the lands prove to be less valuable than on Hingston. That this misrepresentation is material, cannot be denied; but it is contended by the defendant, that it originated in mistake, not in fraud; and as the country was at that time unknown to both the contracting parties, and the material object was to give the purchaser a right to take the land he had purchased out of the tract already located for the seller, an accidental error in the description of the place where the tract in contemplation of the parties lay; an error which could have had, at the time, no influence on the contract, ought not now to affect the person who has innocently committed it.

From the situation of the parties and of the country, and from the form of the entry, it is reasonable to presume that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain *li- [*282 able for that variance. In this case, the defendant has sold land on Hingston, and offers land on Slate. He has sold that which he cannot convey, and as he cannot execute his contract, he must answer in damages.

It is therefore, the opinion of the court, that the plaintiff is entitled to an issue to ascertain the damages he has sustained by the inability of the defendant to perform his contract, and to the damages which shall be found.

Although, in the general principles laid down, the court was unanimous, I did not, in consequence of the particular circumstances of this case, concur in the opinion which has been delivered. I will briefly state those circumstances.

In his bill, the plaintiff does not allege that he was, in any degree, induced to make the contract, by supposing the land already located to lie on Hingston's fork. This representation, then, was an accidental circumstance which has not, in the slightest degree, influenced his conduct. Nor does he now, in his bill, urge this variance in the description of the property as a reason for claiming damages, instead of the specific thing contracted to be sold. Nor does it appear that this claim was set up in the district

court. On the contrary he alleges, that the land on Paint creek is also in his power, and insists on making his election out of that tract. Under such a bill, in a case where the contract is a very advantageous one to the purchaser, I am not convinced that a court of equity ought to award him damages, on account of an error in the description of the property which was innocent in itself, which at the time appeared to be unimportant, and which most obviously did not conduce to, or in any manner affect, the contract. The person claiming damages in such a case should, I think, be left to his remedy at law. I should, therefore, have been disposed to affirm the decree of the district court. I am, however, perfectly content with that which I have been directed to deliver.[1]

283*] *WILSON v. SPEED.

An assignee of a pre-emption warrant is held to be a competent witness, if the facts intended to be proved by his testimony do not tend to support the title of the party producing him.

A general dismissal of the plaintiff's caveat in Kentucky, does not purport to be a judgment upon the merits.

ERROR to the district court of Kentucky, on a judgment which dismissed the caveat of Wilson against Speed.

The caveat was in these words: "Let no grant issue to James Speed, a citizen of the state of Kentucky, for 139 acres of land, said to be surveyed upon an entry of 200 acres, by virtue of a treasury warrant, number 13,800, the 24th of November, 1782, and the survey dated the 10th day of November, 1797, because John Wilson, a citizen of the state of Virginia, claims the same; part by virtue of a survey made on his settlement right, the 20th day of January, 1786, and part by virtue of a survey made on the entry of his pre-emption warrant, on the 20th day of January, 1786, for Andrew Cowan, and assigned by him to William Dryden, for his use; which claims are of a superior nature to the said Speed's. April 22d, 1799.

(Signed) "JOHN WILSON."

The facts appearing upon the record, so far as they are pertinent to the questions before this court, were as follows:

In the year 1776, Wilson made an improvement, by raising a crop on the land, and built part of a cabin.

In consequence of this improvement, he obtained, on the 16th of February, 1780, a certificate for a settlement right to 400 acres, and a right of pre-emption to 1,000 acres.

On the same day Andrew Cowan obtained a certificate for the pre-emption of 1,000 acres, on account of marking and improving the same, in the year 1776, adjoining the lands of John Wilson on the north side, to include his improvement.

284*] *On the 23d October, 1780, Andrew Cowan entered a pre-emption warrant for 1,000 acres, on the head waters of Boon's Mill creek, to include his cabin, and the head waters of several small branches running into Kentucky and Dick's rivers. "Also, as assignee of John Wilson's one thousand acres, adjoining the above, including said Wilson's cabin."

On the 29th of April, 1783, John Wilson entered "400 acres of land, by virtue of a certificate for settlement, lying on a dividing ridge between the waters of Kentucky and Dick's rivers, to include part of both waters, and his improvement."

These 400 acres were surveyed for Wilson on the 20th of January, 1786; and were never assigned by him.

On the same day, the 1,000 acres, upon the pre-emption warrant, were surveyed for Andrew Cowan as assignee of Wilson.

On the back of this original certificate of survey was written an assignment, purporting to be from Andrew Cowan to William Dryden, and attested by "Young Ewing." And also an assignment, (made by order of Garrard county court, during the pendency of the present caveat,) by certain commissioners, in behalf of the heirs of Dryden, to William Buford.

On the 24th of November, 1782, James Speed, the defendant, entered 200 acres upon a treasury warrant, the survey upon which was the cause of the present caveat.

This survey was for 139 acres, part of the 200, dated the 10th of November, 1797, and interfered with Wilson's survey of 400 acres, upon his settlement right, and with that for 1,000 acres, pre-emption, which were surveyed in the name of Andrew Cowan, as assignee of Wilson. Upon the inquiry into the facts before the jury, the plaintiff, Wilson, took two bills of exceptions. The first stated, that he offered to produce the said Andrew Cowan (who had released to the plaintiff, and *all claiming under [*285 him, all his, the said Cowan's right to the land, &c.) to prove, that although the pre-emption warrant for the 1,000 acres was taken out in his name, it was not taken out by him, or with his privity; and that, although the entry was in his name, it was not made by him, or with his privity. And also, to prove that he never did, and does not now, set up any claim or title to the said pre-emption, or any part thereof. Also to prove, that the assignment on the original survey of the said pre-emption, now brought into court by the register of the land office, purporting to be an assignment made by the said Cowan to William Dryden, was not executed by him; the execution of the same not being proved by "Young Ewing," the attesting witness to the same.

But the court was of opinion that the said Cowan was not a competent witness, and excluded him from giving testimony.

The 2d bill of exceptions stated that, after the testimony of Cowan was excluded, the plaintiff offered to produce Charles Campbell, to prove that the said assignment, and the signature thereunto, as well as the name of the attesting witness, were in the handwriting of William Dryden; to the admission of which testimony the defendant objected, alleging, that "Young Ewing," the subscribing witness, ought to have been produced, and the court being of that opinion, the testimony of Charles Campbell was also excluded; and the caveat was dismissed, with costs.

Hughes, for the plaintiff in error, contended that the judgment of the court below was erroneous, for two reasons:

1.—The judges present were, Marshall, *Ch. J.*; Paterson, Washington, and Johnson, *Justices*.

1st. Because the witnesses who were rejected, were competent; and,

2d. Because the caveat ought not to have been dismissed, as to that part of the defendant's survey which interfered with Wilson's survey of 400 acres, upon his settlement right.

286*] *1. As to the rejection of the witnesses.

If Cowan had any interest, it was removed by the release. And if it be alleged that he ought not to be permitted, upon the ground of impolicy, to discredit his own paper, the answer is, that that principle has been applied only to negotiable paper; but here the witness is called merely to disprove what is alleged to be his hand-writing. It is to show that he never put his hand to the paper, and not to invalidate a paper to which he had given a credit, by subscribing his name. The counsel for the defendant below relied upon the case of *Walton v. Shelly*, 1 T. R. 296, but besides the inapplicability of the case, it has been overruled by that of *Jordaine v. Lashbrooke*, 7 T. R. 601.

But Campbell's testimony ought not to have been rejected. The court rejected it on the ground that "Young Ewing," the subscribing witness, ought to have been produced. It is true, that if we had wanted to establish the assignment from Cowan as genuine, it would have been incumbent upon us to have produced Young Ewing, or accounted for his absence. But if the assignment was fictitious, how was Young Ewing to prove that Cowan did not execute it? He could only say that his own name was not written by himself, and that he did not subscribe his name as a witness to that instrument; but it does not necessarily follow, that Cowan did not execute the assignment. The testimony of Young Ewing was not the best evidence of the fact that the plaintiff wished to prove. Whereas Campbell could have proved expressly that the whole assignment and signatures were written by Dryden, and not by Cowan and Ewing.

2. But the judgment is erroneous, because it dismissed the caveat, and did not decide which of the parties "hath the better right." It does not appear to have been decided upon its merits; particularly, as far as the plaintiff claimed a settlement right.

Breckenridge, Attorney General, for the defendant. The testimony of Cowan was properly rejected on three grounds.

287*] *1. Because it went to prove a title different from that set up by the plaintiff.

The act of assembly requires that the caveat should express "the nature of the right on which the plaintiff therein claims the land."

The caveat states, that he claims, "by virtue of a survey, made on the entry of his pre-emption warrant," "for Andrew Cowan, and assigned by him to William Dryden, for his" (the plaintiff's) "use."

The proof offered was, that the survey and warrant never was assigned by Cowan. The plaintiff, therefore, wished to bring proof to contradict his own allegations.

The jury are, by the land law, to find "such facts as are material to the cause, and not agreed by the parties." But the facts offered to be proved, were foreign to the cause.

2. Because the testimony went to contradict and falsify a record.

According to the uniform decisions of the courts in Kentucky, warrants, entries and surveys are matters of record, as much as the patent. The records produced by the plaintiff show, that the warrant, entry and survey, are in the name of Cowan, and that Cowan assigned to Dryden, and that Dryden's heirs, by a decree of Garrard county court, assigned to Buford.

The facts would have been contradicted by the testimony offered.

But if the plaintiff could be permitted to invalidate or falsify the record, it could not be done on the trial of a caveat, which is intended as the means of trying legal rights to incipient titles; titles which are on their passage to maturity. *Ante*, vol. 1, p. 66. It is a proceeding in derogation of the common law, and ought to be strictly pursued. If Cowan has no title, or is only a trustee, this inquiry cannot be made in the trial *of a caveat, but must be made [*288 in equity. Dryden's heirs cannot be bound by such an ex parte inquiry; and they are interested as assignees of Cowan. In order to overturn the claim of Speed, Wilson must have had a prior existing legal right.

3. Because the witness might be ultimately benefited by the event of the suit.

The release is of no avail; it came from the wrong quarter. Cowan ought to have been released by Dryden's heirs and Buford.

Cowan is interested in one of two ways, or in both; 1st. In the ultimate goodness of the title by his assignment; or, 2d. For having assigned that to which he had no claim. If Wilson prevails, Cowan is benefited, because the title which he transferred is sanctioned and settled by the decision. If the determination of a cause may, perhaps, prevent a suit against the witness, he is inadmissible. Esp. N. P. 705.

As to the correctness of excluding Campbell's testimony, there can be no doubt. To have received it, would have violated that known rule, that the subscribing witness to an instrument must be produced. This rule, it is true, has some exceptions, but none that will include this case. Esp. N. P. 780.

But if all the testimony offered had been admitted, it would have been irrrelevant; and would have been bad upon demurrer. At the time of entering the caveat, the plaintiff had no right in law, because it was registered in the name of Dryden. At the time of the decree, it was in Buford, under the decision of the court of Garrard county.

With respect to the 2d point made by the plaintiff's counsel, viz., that the caveat was not dismissed upon the merits, so far as relates to the plaintiff's settlement right, he is probably mistaken in point of fact.

*The judgment of the court, although [*289 not altogether full and formal on this point, justifies the inference that the court did examine into the merits of that claim. Of this, however, the court here will judge for themselves, upon an inspection of the judgment itself, as stated on the record. It says "the court being now sufficiently advised of and concerning the premises, is of opinion, that the caveat herein be dismissed;" and this is the only judgment which could have been given against the plaintiff. If the judgment had been for the defendant, it would have said that he had the better right.

Hughes, in reply. It has always been the practice of the courts in Kentucky, to decide the right to be in the plaintiff or defendant, when the decision is on the merits.

The testimony offered, did not go to prove a different title from that set up by the plaintiff; it went to prove his allegation to be substantially true.

The process by caveat is a summary remedy, and the law, by directing the court to decide according to the very right of the case, gives a chancery jurisdiction. In case of a caveat, there can be no legal title. It is a process given expressly to prevent a legal title.

The entry, &c., are not matter of record. It is true, there appears to be an assignment on a paper in the register's office, but that does not make the assignment a record.

Cowan was not interested. He was not liable to Dryden if the assignment was a forgery.

Campbell's testimony was the best evidence to prove the fact for which it was offered. That of the subscribing witness might be the best evidence that the assignment was genuine, but not that it was a forgery.

290*] *The judgment was not upon the merits, and there is nothing in the record from which a contrary inference can be drawn.

February 14. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

In this case, the errors assigned are,

1. That testimony has been improperly rejected by the judge of the district court.

2. That the caveat, as to that part of the land which was claimed in virtue of the survey on Wilson's settlement right, was improperly dismissed.

The caveat, so far as respects the claim of Wilson, in virtue of the survey on his pre-emption warrant, thus stated his title: "John Wilson claims, by virtue of the survey, made on the entry of his pre-emption warrant, for Andrew Cowan, and assigned by him to William Dryden, for his use."

The pre-emption warrant issued on Wilson's certicate to Andrew Cowan, as assignee thereof; the survey was made in Cowan's name, and is assigned to William Dryden, but the assignment does not purport to be for the use of John Wilson.

At the trial the plaintiff offered to prove that the assignment to Cowan was made in trust for himself, and that the assignment to Dryden was never made by Cowan. The witness, by whom these facts were to be substantiated, was Cowan himself. He was objected to by the counsel for the defendant, as incompetent, and the objection was sustained by the court. To this opinion of the district judge, an exception was taken, and the question proposed, is the competency of Cowan to prove the fact, that he never was entitled to the land in controversy, and did not make the assignment of the survey.

291*] *We put the release out of the case, because it cannot affect the interest of Cowan, if he had any, that interest being a liability to the person appearing to be his assignee.

Upon a consideration of this fact, and its connection with a caveat brought by Wilson, the witness appears to the court to stand free from any possible objection on the part of the defendant. It would not appear that he could derive a benefit from proving, in this cause, that he never was entitled to the land in dispute, and never assigned the survey.

But, from the facts proposed by the plaintiff, which were before the court, it appears that Dryden had sold to Buford, for whose benefit this caveat was really brought; and it is alleged by the counsel for the defendant, that if the testimony of the witness would establish the right of those who might ultimately resort to him, under his supposed assignment, and such a suit would be prevented by a decision of this caveat in favor of Wilson, he is, therefore, an incompetent witness; but the court does not perceive that this consequence would flow from the testimony; and if it is imagined that Cowan might suspect it, this would constitute an objection, rather to his credit than his competency. Cowan, therefore, was competent to prove the facts to establish which his testimony was offered. But if he had been received, and had established those facts, what would have been their amount? They are,

"That Cowan never did purchase the said pre-emption, did not make the entry on the pre-emption warrant, or survey it, or procure it to be surveyed, and does not now, nor ever did, claim title to the same.

"That the plaintiff, claiming to own the land, did sell it to William Dryden, who sold the same to William Buford, for whose benefit the caveat was brought."

These are the facts which the plaintiff proposed to prove, and which are stated on the record. Had they *been proved, it ap- [*292 pears to the court that the caveat ought to have been dismissed. These facts do not support the title set up in the caveat.

It is conceived by this court, that the statements made in the caveat could only be supported by an assignment, which, on the face of it, purported to be for the use of Wilson. That an assignment made to Dryden, whereby the legal ownership of the survey was conveyed to him, although, in fact, intended for the benefit of Wilson, would not enable Wilson to maintain a caveat in his own name. It would authorize him to use the name of Cowan, but not to prosecute the suit in his own name. If, however, a contrary practice has been firmly established in Kentucky, the court would be very unwilling to shake that practice. But in this case, the assignment to Dryden was not, in fact, for the use of Wilson, but of Dryden himself. The testimony, therefore, if received, could only have defeated the plaintiff's action. It cannot be said, therefore, that the judge has erred in dismissing the caveat, as to the part claimed under the pre-emption warrant.

But, with respect to so much of the caveat as was supported by the survey on the settlement right, no exception of form, or to the testimony, has been taken, and it ought not, therefore, to have been dismissed, but on the merits. On this point, therefore, there is error in the judgment of the district court, for which it must be reversed.

This cause came on to be heard, on the transcript of the record of the proceedings of the court for the district of Kentucky, and was argued by counsel; on consideration whereof, it seems to the court, that there is error in the judgment of the district court in this, that the caveat entered by the plaintiff was entirely dis-

missed, whereas it ought to have been decided on its merits, so far as respected that part of the land which was claimed by the plaintiff under his survey of four hundred acres. It is therefore, considered by the court, that the said 293*] judgment be reversed and annulled; *and that the defendant pay to the plaintiff, his costs. And the cause is remanded for further proceedings.

BUDDICUM v. KIRK.

Notice of the time and place of taking a deposition, given to the attorney at law of the opposite party, is not such notice as is required by the act of Assembly of Virginia. But the attorney at law may agree to receive, or to waive notice, and shall not afterwards be permitted to allege the want of it.

If notice be given, that a deposition will be taken on the 8th of August, and that if not taken in one day, the commissioners will adjourn from day to day until it shall be finished; and the commissioners meet on the 8th, and adjourn from day to day till the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeably to notice.

Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence.

An assignment of debts, and balances of accounts cannot be pleaded as an accord and satisfaction to an action of debt on a bond.

ERROR to the circuit court of the District of Columbia, in an action of debt against the defendant, as heir at law of the obligor, on a bond dated the 20th of September, 1774, conditioned to pay 994*l.* 3*s.* 5*d.* Virginia currency, in equal installments, at six and twelve months from the date of the bond.

The defendant, being an infant, pleaded by Archibald M'Lain, his guardian.

1. Payment; to which there was a general replication and issue.

2. That after the execution of the bond, viz., on the day of , 1784, at, &c. it was accorded and agreed, between the plaintiff and the said James Kirk, (the obligor,) in his lifetime, that the said James Kirk should assign, and make over to the plaintiff, all the balances of money due to the said James Kirk, and one Josiah Moffett, arising from a store kept by them in partnership, in the town of Leesburgh, in discharge and satisfaction of the said bond; and that the said James Kirk did afterwards, on the day and year last mentioned, at the town aforesaid, pursuant to the said accord and agreement, assign and make over to the plaintiff, all the aforesaid balances, and the plaintiff did then and there receive the said assignment and transfer of the said balances, in satisfaction for the said bond; and this he is ready to verify, &c.

This plea was adjudged bad on general demurrer.

294*] *3. "That after the execution of the said writing obligatory, the plaintiff, by his certain deed of release, with his seal sealed, which said deed is lost and destroyed by time and accident, did release and discharge the said James, in his lifetime, and his heirs, of and from the payment of the said writing obligatory, that is to say, on the day of , in the year 1784, at the county aforesaid; and this he is ready to verify."

To which plea there was a general replication and issue.

Upon the trial, the jury found both the issues of fact for the defendant, and the plaintiff took two bills of exceptions.

1. The first stated, that the defendant offered in evidence the deposition of Patrick Cavan, tending to prove that wheat, to the amount of 166*l.* 8*s.* 10*d.*, had been delivered by the obligor to the plaintiff, on account of the bond, and sundry debts due to Kirk and Moffett had been assigned to the plaintiff in full discharge of the bond; and that the plaintiff had indulged some of the debtors until the debts were barred by the statute of limitations. That notice was given to the plaintiff's attorney, that the deposition would be taken on the 8th of August, 1801, and if not taken in one day, that the commissioners would adjourn from day to day until it should be finished, and that he agreed that it might be taken on that day, whether he attended or not; but did not assent or object to its being taken on any other day. That the commissioners, to whom the *dedimus* was directed, met on the 8th of August, 1801, and adjourned to Monday the 10th, and from the 10th to the 11th, from the 11th to the 12th, and from the 12th to the 19th, when the deposition was taken. That the plaintiff's attorney did not attend on the 8th, or any of the other days, and had no notice of the several adjournments.

That the defendant also offered to prove by Archibald M'Lain, that the plaintiff's attorney, after the deposition was taken, read it, but did not then object *to its being read in [*295 evidence; and that the said Patrick Cavan died before the trial. To the reading of this deposition the plaintiff objected, but the court suffered it to be read.

2. The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that the defendant was not entitled, on the plea of payment, to discount the bonds and notes assigned to the plaintiff, as mentioned in the deposition of Cavan, unless it should appear to the jury that the same had been collected by the plaintiff; which instruction the court refused to give, but directed the jury, that the deposition was competent evidence to be offered in proof of a discount on the plea of payment.

E. J. Lee, for the plaintiff in error, contended,

1. That the deposition was irregularly taken, inasmuch as a notice to take a deposition on the 8th, is not notice to take it on the 19th; and although notice was given, that if the deposition was not taken on the 8th, the commissioners would adjourn from day to day, yet in this case, they adjourned over from the 12th to the 19th, without giving new notice. Besides, the notice in this case is to the attorney *at law*, and not to an attorney *in fact*. If it be said, that an attorney at law may bind his client, by an agreement relative to any matter in the proceedings, or trial of a cause, yet, the assent of the attorney only went to the taking the deposition on the 8th of August, and not on any subsequent day.

2. It was not competent for the defendant to prove that assent, by the testimony of Archibald M'Lain, who was his guardian of record, and answerable for costs.

3. The matter contained in the deposition was not competent evidence upon either of the issues. It certainly was not evidence of a release under seal; and the assignment would not be a payment, unless it produced the money to the plaintiff. If any thing but money is relied upon as satisfaction of a bond, it must be pleaded by way of accord and satisfaction, and 296*] not *as payment. One bond cannot be pleaded in discharge of another, *a fortiori* cannot an assignment of a bond. 1 Burr. 9, *Rhodes v. Barnes.*

Simms, for the defendant.

1. If the plaintiff had not notice of the time of taking the deposition, it was his own fault, or that of his attorney. The attorney, having received and acknowledged notice for the 8th of August, was bound to attend; and if he had attended, he would of course, have had notice of the adjournment. This want of notice, therefore, is to be attributed to his own negligence. But if the notice was insufficient, the court, under the circumstances of the case, did not err in admitting the deposition. When the plaintiff's attorney read the deposition, he did not object. By his silence he lulled the defendant into security, at a time when, if the objection had been made, he might have corrected the mistake, by giving new notice, and taking the deposition *de novo*. But instead of that, he concealed his objection until the deponent was dead, and when he knew that the defendant would totally lose the benefit of his testimony. In such a case the court will say, that the silence of the attorney when he read the deposition, was a waiver of the notice.

2. As to the second objection, that Archibald McLain was not a competent witness, because he was the guardian of the defendant. It does not appear upon the record, that the witness was the same Archibald M'Lain, who was the guardian. And besides, it appears, that before the trial the defendant himself was of age, and had leave to appear by attorney.

3. As to the objection, that the matter of the deposition was not competent evidence on the issues. The court did not say it was complete proof of payment, but that it was matter proper to be left to the jury upon the plea of payment, and from which a payment might be inferred.

297*] *March 1. MARSHALL, *Ch. J.*, delivered the opinion of the Court to the following effect:

This case comes up on two bills of exceptions.

1st. As to the notice of taking the deposition; and,

2d. As to its applicability.

1. As to the notice. There are two modes of taking depositions under the act of Congress. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. This deposition is not taken under that part of the act. By a subsequent part of the section, depositions may be taken by *dedimus potestatem*, according to common usage. The laws of Virginia, therefore, are to be referred to on the subject of notice. Those laws do not authorize notice to an attorney at law. The word attorney, in the act of assembly, means attorney *in fact*. An attorney at law is not compellable to receive notice; but he may consent to receive, or he may waive it, and shall not afterwards be permitted to object the want of it. But this deposition was not taken agreeably to the notice received. The commissioners did not adjourn from day to day; but passed over the intermediate time between the 12th and the 19th of August.

This circumstance, however, is not, by the court, deemed fatal, under the particular circumstances of this case, though without those circumstances it might, perhaps, be so considered. The agreement that the deposition might be taken, whether the attorney were present or absent; his subsequent examination of the deposition, without objecting to the want of notice, and the death of the witness, were sufficient grounds for the defendant to believe that the objection would be waived.

2. The objection to the competency of M'Lain is totally unfounded, as it does not appear upon the record *that he was the guardian; [*298 and especially, as the defendant became of full age before the trial.

3. The objection to the applicability of the deposition is also void of foundation. For although it was not conclusive evidence, it was still admissible.

The court is, therefore, of opinion, that there is no error in the judgment below.

Judgment affirmed.

DOUGLASS & MANDEVILLE
v.
M'ALLISTER.

The court, upon a jury trial, is bound to give an opinion, if required, upon any point relevant to the issue.

In estimating damages for the breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose. *Semb.*

ERROR to the circuit court of the District of Columbia, in an action of assumpsit, for not delivering flour according to contract.

The transcript of the record contained a bill of exceptions, which stated that the plaintiff offered in evidence the following writing, addressed by the plaintiff below, to the defendants, the present plaintiffs in error, viz.:

"Will you receive my flour on the following terms, viz.: Whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the wagoner, and deduct it from the carriage. You will credit me with the highest market price at the time of delivery, and note it on the receipt; and any balance of flour that may remain in your hands unpaid as it is delivered, you will pay me when I send for it, or deliver as much flour as is coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed or charged at sixpence per barrel.

"Agreed. Given under our hands, Alexandria, April 27th, 1803.

(Signed) "DOUGLASS & MANDEVILLE.
"JOHN M'ALLISTER."

299*] *The defendants had received from the plaintiff 408 barrels of flour under that contract, and the plaintiff made his election, and demanded the flour of the defendants on the 14th of October, 1803. No final answer was made by the defendants to the demand till the 19th of November; but the intermediate time was given to them to consider of the demand, and make propositions of compromise. No compromise being made, and the flour not being delivered, this action was commenced on the 21st of the same month. It did not appear that any answer was given to the plaintiff's demand. At the trial, the plaintiff offered evidence to the jury of the price of flour on the 19th and 21st days of November, the price being the same on both days, and contended to the jury only for that price. Whereupon, the counsel for the defendants prayed the court to instruct the jury, that in estimating the compensation for the non-delivery of the said flour, they should be governed by the price of that article on the day the plaintiff signified his option, and made his demand under the contract, to have the flour specifically delivered to him; and further prayed the court, in case the aforesaid instruction was not given, to direct the jury by what rule, in point of time, they are to take the price of flour in the estimation of the damages, sustained by the plaintiff, by reason of the breach of the contract. But the court being divided in opinion upon those points, (two judges only being present,) did not give the instructions as prayed, wherefore the defendants excepted, &c.

The jury found a verdict for the plaintiff for 2,159 dollars and 48 cents, upon which judgment was rendered accordingly, and the defendants brought their writ of error.

The question before this court was, whether the court below ought to have given the instructions prayed for by the plaintiffs in error.

This question was submitted, without argument, by Swann, for the plaintiffs in error, and E. J. Lee, for the defendant.

300*] *February 17. MARSHALL, *Ch. J.* The error complained of is, that the circuit court did not give an opinion on a point proposed. The court was certainly bound to give an opinion, if required, upon any point relevant to the issue.

It appears, from the facts stated, that the cause of action did not accrue until the 19th of November, when the negotiation for a compromise was broken off. A tender of the flour at any time, after the 14th, and before the 19th, would have been a compliance with the contract.

As the plaintiff claimed no more than the price of the flour on the 19th, and as the refusal of the court to instruct the jury did not alter the verdict, which was for the price on that day, and was for the same amount as if the opinion had been given, there is no error of which the defendants could complain.

Judgment affirmed, with costs.

SIMMS AND WISE *v.* SLACUM.

A discharge from the prison rules under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law; and upon such discharge no action can be sustained upon the prison bounds bond.

ERROR to the circuit court of the District of Columbia, in an action of debt brought by Slacum, as assignee of Charles Turner, sergeant of the court of Hustings of Alexandria, upon a prison bounds bond, in which Simms was the principal and Wise the surety.

The condition of the bond was as follows: "Whereas Jesse Simms, in gaol and custody, by virtue of a writ of *capias ad satisfaciendum*, sued out of the clerk's office of the court of Hustings, holden in Alexandria, dated the 12th day of August, 1800, at the suit of George Slacum, assignee of Charles Turner, sergeant of the court of Hustings aforesaid, for the sum of 1,285 dollars and 45 *cents, including [*301 all legal costs at the time of the caption aforesaid, having prayed the benefit of the prison rules, as laid out and bounded by order of the court of Hustings aforesaid, and having tendered the above bound Peter Wise, Junior, as surety for the same, agreeable to an act of the general assembly in that case made and provided.

"Now, if the said Jesse Simms, do well and truly keep himself within the prison rules, as laid out and bounded by the court of Hustings aforesaid, and from thence not depart, until he shall be discharged by due course of law, or pay the aforesaid sum of 1,285 dollars and 45 cents to the aforesaid George Slacum, assignee of Charles Turner, sergeant aforesaid, then the above obligation to be void, or else to remain in full force," &c.

The pleadings were finally brought to this issue, whether Simms did depart from the prison rules without being discharged by due course of law?

At the trial, three bills of exceptions were taken by the defendants; but the only question decided by this court arose upon the third; which stated, that after the execution of the bond, Simms was discharged by a warrant from two justices of the peace, under the authority of the insolvent act of Virginia; and that, being so discharged, and not before, he departed out of the rules. The plaintiff offered evidence to prove sundry acts of fraud committed by Simms, in order to procure the discharge; whereupon the counsel for the defendants prayed the opinion of the court, and their instruction to the jury, that if they should be of opinion, from the evidence, that frauds were committed individually by Simms, in obtaining his discharge, but without the participation of the magistrates who granted it, and without the participation of Wise, the other defendant, such frauds, so committed by Simms, could not so far vitiate or avoid the said proceedings under the insolvent act, and the discharge so obtained by Simms, as to charge Wise, in this action, for a breach of the condition of the bond, by reason of Simms's having left the prison rules by virtue of such discharge. Which instruction the court refused to give; but were of opinion, and directed the jury, that if they should be of opinion, from the evidence, that any fraud was com-

mitted by Simms alone, in obtaining, or for the 302*] purpose of *obtaining, the said warrant of discharge, though without the concurrence of either of the magistrates, or of Wise, in such fraud, it did so avoid the discharge so obtained by Simms as to charge Wise in this action for a breach of the said condition by reason of Simms's having left the prison rules by virtue of such a void discharge. To which refusal and instruction the defendants excepted.

The act of assembly of Virginia, 1792, c. 67, concerning the county courts, s. 15, P. P. 86,[1] authorizes the county and corporation courts to lay out, and mark the "bounds and rules" of their respective prisons; and declares, that "every prisoner not committed for treason or felony, giving good security to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his or her health, and keeping continually within the said bounds, shall be adjudged in law a true prisoner."

The act of 1792, c. 79, concerning the escape of prisoners, s. 2, P. P. 119, provides, that if a prisoner, having given security for, and obtained the liberty of, the prison rules, shall escape and go out of the same, the sheriff shall immediately apply to a justice of the peace for an escape warrant to retake the prisoner, and give notice thereof to the creditor, and assign over to the creditor the bond taken for the liberty of the rules, who shall be obliged to receive the same; and the creditor may proceed to take his debtor upon the escape warrant; and if he be retaken and committed to gaol, the sureties in the prison rules bond shall be discharged; but if the debtor be not retaken on the warrant, and committed, the sureties are liable to the creditor. And the sheriff is not liable, unless the sureties were insufficient when taken.

By the 1st section of the act, the escape warrant must be upon the oath of the sheriff, or some other credible person.

The act of 1793, c. 151, for the relief of insolvent debtors, P. P. 303, authorizes two justices of the peace to discharge insolvent debtors, 303*] and provides, that notice *shall be given to the party at whose suit the prisoner is in execution. It declares, also, that the warrant of discharge shall be sufficient to indemnify the sheriff against any action of escape. And that the prisoner shall not be again imprisoned upon any judgment obtained previous to his taking the oath, unless by virtue of a *ca. sa.* issued by order of the court in which the judgment shall have been rendered.

The estate of the insolvent is vested in the sheriff. But the creditor may, on *scire facias*, have a new *fi. fa.* to seize any property which the debtor may afterwards acquire.

C. Lee, for the plaintiffs in error. A prisoner in the bounds is as much in gaol as if within the walls of the prison. The oath of the insolvent debtor was provided as the guard against fraud; but the bond is only a substitute for walls to the prison bounds. As to the surety, a discharge by a competent authority is conclusive.

The warrant of discharge is an indemnity to the sheriff, whether obtained by fraud or not. The act of assembly does not expressly provide that it shall indemnify the surety as well as the sheriff, but he is within the same reason.

The body of the debtor cannot be retaken, unless by order of the court, on proof of fraud. In the case of the fraud in the debtor alone, the remedy of the creditor is not by an escape warrant, but by a new *ca. sa.* against his person, or a *fi. fa.* against his goods.

The sheriff is bound to discharge the prisoner upon receipt of the warrant; if he disobeys it, he is liable to an action of false imprisonment; and after obeying it, he cannot go before a justice of the peace, and swear it was an escape, so as to obtain an escape warrant. If he cannot get an escape warrant, he cannot assign the prison rules bond; for he is, by the act, only authorized to assign it when an escape has actually happened. The creditor is not bound to take an assignment; nor can he demand it. When, therefore, the debtor is discharged by a competent authority, the obligation of the bond ceases. It is *functus officio;* the surety is no longer liable for an escape, and is *as [*304 much discharged as if, after an escape, the debtor is retaken on an escape warrant, and committed to gaol.

The act of assembly did not intend that the bond should give the creditor a new security for his debt, or to place him in a better situation than he would be if his debtor were to remain within the stone walls of the gaol. The bond was intended for the ease and benefit of the debtor.

If the bond is a security against the fraud of the debtor, there are no bounds to the responsibility of the surety.

The words "in due course of law," mean by authority of law; that is, by a competent legal authority.

The notice required by the act to be given to the creditor, is to enable him to attend and show fraud if he can. But if the surety is answerable for fraud, it would be more for the interest of the creditor not to show the fraud at that time, but to wait until it has had the effect of obtaining a discharge.

If a judgment at law is obtained by fraud, it is still a valid judgment until reversed.

Swann, for the defendant in error. In England it is settled, that a discharge under an insolvent act must be free from fraud or collusion, and in every respect regular. It is true that the warrant of discharge is prima facie evidence of a due discharge, and throws the burden of proof of fraud upon the other party. Esp. N. P. 167, 245. But fraud, when proved, will "avoid every kind of act." 1 Burr. 395, *Bright v. Eynou.*

In order to guard a creditor against the risk of his debtor's escape, when allowed the liberty of the prison rules, the law requires that the debtor should bind himself in a penalty, and if he escapes, he is as much liable at law for the penalty as his surety is, and the surety is as much bound as the debtor. The one is bound exactly as the other is bound. If the penalty is forfeited as to one, it is forfeited as to the other. Whatever would make Simms liable upon the bond, would make Wise equally *liable. [*305 If, then, Simms had voluntarily escaped, he

1.—P. P. is used in this book as a reference to Pleasant & Pace's edition of the laws of Virginia, published in 1803. 8 vo.

would have been liable to the penalty of his bond. But a discharge obtained by fraud and imposition is, as to him at least, void; otherwise you permit a man to take advantage of his own fraud; for if the discharge is valid, it puts an end to his obligation upon his bond. A discharge obtained by fraud is, in substance, as much an escape, as if the prisoner had merely gone off in disguise, or imposed upon his gaoler by a borrowed dress. But it is a maxim of law, that no man shall gain an advantage by his own fraud. If this fraudulent discharge dissolves the obligation of the bond, Simms gains an advantage by his own fraud; therefore, the fraudulent discharge cannot dissolve the obligation of the bond. If the obligation of the bond be not dissolved as to Simms, it is not as to Wise, for both are equally bound.

But the words of the condition of the bond are, that Simms shall not depart therefrom "until he shall be discharged by due course of law." A discharge obtained by fraud and imposition is not a discharge in due course of law; on the contrary, it is a perversion of the course of law; the law is turned aside from its due course. Shall Simms be permitted to say that his discharge, grounded on falsehood, fraud and imposition, is a discharge in due course of law. If Simms cannot say it, Wise cannot say it. Wise can avail himself of no defense at law which would not equally avail Simms.

There is a vast difference between the case of the sheriff and that of the surety. The sheriff is bound to obey the warrant. All he has to inquire is, whether the justices had jurisdiction. He is only the officer of the law, and bound to execute all lawful precepts. Not so the surety. He is a volunteer. He undertakes for the good faith of the debtor. He substitutes himself in his place, to the extent of the penalty.

It is not necessary that the sheriff should swear an escape before he can assign the bond. It is true he cannot oblige the creditor to take the bond, unless an escape has been sworn to; but there is nothing in the law which forbids the sheriff to assign the bond, or the creditor to receive it without such an oath.

306*] *February 19. MARSHALL, *Ch. J.*, delivered the opinion of the majority of the court.

This case depends on the construction of an act of the legislature of Virginia, which allows the prison rules to a debtor whose body is in execution, on his giving bond, with sufficient security, not to go out of the rules or bounds of the prison; that is while a prisoner. The condition usually inserted is, not to depart therefrom till he shall be discharged by due course of law, or shall pay the debt. The act further provides, that the prisoner, on delivering a schedule of his property on oath, to a tribunal constituted for the purpose, and pursuing certain steps prescribed in the law, shall be discharged, and all his property shall be vested in the sheriff, for the benefit of the creditors at whose suit he is in execution.

In the case at bar, the forms of the law were observed, and a certificate of discharge obtained, after which the debtor departed from the rules. Conceiving this discharge to have been obtained by fraud, the creditor brought a suit upon the bond, and the court instructed the jury, that if a fraud had been practiced by the debtor, although neither the justices who granted the certificate, nor the security, partook thereof, yet it avoided the discharge, and left the security liable in this action. To this opinion the defendant's counsel excepted, and upon that exception the cause is before this court.

The certificate of discharge may be granted either by the court sitting in its ordinary character for the transaction of judicial business, or by two magistrates who are constituted by law an extraordinary court for this particular purpose. Whether granted in the one mode or the other, it is of equal validity. In either case, the judgment of discharge is the judgment of a court, and, as such, is of complete obligation.

The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and, therefore, all acts performed under them are valid, so far as respects third persons. A *sher- [*307 iff who levies an execution under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud, as if it had been obtained fairly.

When the person who has committed the fraud attempts to avail himself of the act, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose; but it may well be doubted whether a penalty would be incurred, even by the person committing the fraud, for an act which the judgment would sanction. Thus, if a debtor taken on mesne process escapes, he may be retaken by the authority of the sheriff, and if not retaken, the sheriff may be liable for an escape; but if he fraudulently obtains a judgment in his favor, in consequence of which he goes at large, it has never been imagined that the sheriff could retake him on suspicion that the judgment was fraudulent, or be liable for an escape on the proof of such fraud.

Thus too, where, as in Virginia, an injunction has been adjudged to discharge the body from confinement, if a debtor in execution, by false allegations, obtains an injunction whereby his body is discharged from prison, or from the rules, it has never been conjectured that the injunction thus awarded was void, and the acts performed under it were to be considered as if the injunction had not existed. In that case, it would not be alleged that there was an escape, and that the security to the bond for keeping the rules was liable for the debt, because the discharge was fraudulently obtained; but the discharge would have all its legal effects, in like manner as if no imposition had been practiced on the judge by whom it was granted.

The judgment rendered in his favor may not shield the fraudulent debtor from an original claim, but it is believed that no case can be adduced, where an act, which is the legal consequence of a judgment, has in itself created a new responsibility, even with respect to the party *himself, much less with respect [*308 to third persons, who do not participate in the fraud.

It would seem, then, upon general principles, that a debtor who has departed from the prison rules under the authority of a judgment of discharge granted in due form by a competent tribunal, has not committed an escape, even to charge himself, much less a third person. Such a discharge might not be permitted to protect him from the original debt, even if the case had not been particularly provided for by statute; but the act of departing from the rules after being thus discharged, could not charge him with a new responsibility to which he was not before liable, much less will it impose on his security a liability for the debt. Departing from the rules, after being discharged in due course of law, is not a breach of the condition of his bond.

This opinion receives great additional strength from those arguments, drawn from the objects and provisions of the act, which have been forcibly urged from the bar.

The objects of the act unquestionably are, not to increase the security of the creditor, but to relieve the debtor from close imprisonment in the confined gaols of the country, and to consult his health, by giving him the benefit of fresh air. But as this indulgence would furnish the means of escaping from the custody of the officer, and thereby deprive the creditor of his person, it was thought necessary to guard against the danger which the indulgence itself created, not to guard against dangers totally unconnected with this indulgence. Security, therefore, ought, in reason, to be required against a departure from the rules without a lawful authority so to do, because the means of such departure were furnished by being allowed the use of the rules; but security against a fraud in obtaining such authority need not be required, because the means of practicing that fraud are not facilitated by granting the rules. They may be used by a debtor in close gaol, as successfullly as by a debtor admitted to the rules.

It is also a material circumstance in the construction of the act, that ample provision is 309*] made for the very case. *A new capias may be awarded to take the person of the debtor. This remedy is not allowed in the case of an escape; and it is strong evidence that the legislature did not contemplate a departure from the rules, under a certificate issued by proper authority, as an escape; that the remedy given the creditor is competent to a redress of the injury, replaces him in the situation in which he was before it was committed, and is not founded on the idea that there has been an escape.

The arguments founded on the provisions respecting the property of the debtor, also bear strongly on the case. They confirm the opinion, that a departure from the rules, under a certificate of discharge granted by a proper tribunal, ought not to be considered as an escape. So, too, does that provision of the act which requires notice to the creditor, and not to the security.

Without reviewing the various additional arguments which have been suggested at the bar, the court is of opinion, that upon general principles, strengthened by a particular consideration of the act itself, a departure from the rules under such an authority as is stated in the proceedings, is not an escape which can charge the security in the bond for keeping the prison rules, although that authority was obtained by a fraudulent representation on the part of the debtor, neither the magistrates nor the security having participated in that fraud.

There is error, therefore, in the instruction given to the jury, as stated in the third bill of exceptions, for which the judgment is to be reversed, and the cause remanded for further trial.

Judgment reversed.

PATERSON, *J.* As to the third exception, which embraces the main point in the cause, my opinion differs from the opinion of the majority of the court, and accords with the direction given by the court below. The condition of the bond is, "that Simms do well and truly keep himself within the prison rules, and thence not to depart until he shall be discharged by due course of law, or pay the sum of 1,285 dollars and 45 cents to George Slacum, *assignee," &c. The act that will not [*310 exonerate the principal will not exonerate the surety from the obligation which they have entered into; for the surety stands on the same floor as the principal, and assumes the like character of responsibility, in regard to the terms specified in the condition of the bond. The benefit of the act of insolvency, if obtained by fraud or perjury on the part of Simms, will be unavailing, and his going beyond the limits of the prison, in consequence or under color of a discharge, thus procured, will be an invalid and unwarrantable departure. Fraud infects the decision; and the legal principle is, that the fraudulent person shall not be suffered to protect himself by his own fraudulent act. If he should, then a judgment, which is laid in fraud, will, as in the present case, operate to the extinction of a legal, pre-existing obligation or contract. But a discharge, fraudulently obtained, is of no virtue; of no operation; and is, in truth and in law, no discharge; it has neither legal effect, nor even legal existence as to the party himself, and the surety who stands in his shoes. If the judgment be of no avail as to the principal, it will be of no avail as to the surety; it cannot be ineffectual as to the one, and operative as to the other. The discharge must be legal to be valid, and to exonerate the surety from the special condition of the bond. The judgment itself is a fraud on the law; and I can discern no difference between the debtor's going beyond the prison bounds voluntarily, or under color of a judgment so obtained; except that the latter is a case of deeper dye, and less excusable in a legal and moral view than the former.

Although Simms is liable to be imprisoned by virtue of a new process, yet he may have gone out of the jurisdiction of the court; or if not, Slacum will be deprived of the benefit of the bond which Simms and Wise executed

The sheriff stands on different ground; for he is exonerated from all liability, by an express provision in the statute. Besides, if the justices have jurisdiction of the subject, and should not exceed their jurisdiction, it is not incumbent on the sheriff to examine into the regularity, fairness, and validity of their proceedings and judgment; he looks at the instrument of

311*] discharge, which, emanating *from a competent authority, it is his duty to obey. But though the discharge may excuse the sheriff, as an officer of the court, it will not excuse the party, nor his surety. As to them, it is inoperative and of no legal efficacy.

HARRIS
v.
JOHNSTON.

An action cannot be maintained on an original contract for goods sold and delivered, by a person who has received a note as conditional payment, and has passed away that note. A bill of parcels delivered by I, stating the goods as bought of D and I, is not conclusive evidence against I, that the goods were the joint property of D and I; but the real circumstances may be explained by parol.

If part of the goods were the sole property of D, and the residue the sole property of I, and if I had authority from D to sell D's part, I may maintain an action for the whole in his own name.

An indorsee of a promissory note, payable to order, cannot, in Virginia, maintain an action at law, upon the note, against a remote indorser, but he may in equity.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria, in an action of assumpsit, for goods sold and delivered, and money had and received.

The defendant pleaded the general issue, and upon the trial took two bills of exceptions.

The first stated that this action was commenced on the 10th of July, 1801, and that on the trial the plaintiff offered evidence of the sale and delivery of goods, to the amount of 2,149 dollars and 33 cents.

That the defendant offered in evidence a bill of parcels of the same goods, rendered by and in the handwriting of the plaintiff, Johnston, amounting to 644*l.* 16*s.* Virginia currency, containing a particular account of rum and sugar, beginning with these words: "Mr. Theophilus Harris, bought of Dunlap & Johnston," at the foot of which bill was the following receipt, signed by the plaintiff: "Received Messrs. Clingman and Magaw's note for the above sum, payable to the order of John Towers, or order, indorsed by John Towers and Theophilus Harris, payable the 2d April, 1798, when paid, received in full;" which bill was rendered to the defendant by the plaintiff, at the time of the sale and delivery.

The defendant further offered evidence to prove, that the note in that receipt mentioned, was delivered to the defendant with the blank indorsement of Towers, and by the defendant indorsed in blank to the plaintiff, at the time of the sale and delivery of the goods,*and [*312 by the plaintiff afterwards indorsed to one John Dunlap, who, on the 19th of April, 1798, brought suit thereon against the present defendant, Harris, in the court of Hustings, in the town of Alexandria, upon his indorsement, striking out the name of the plaintiff, Johnston, and filling up the defendant Harris's indorsement with a direct assignment from Harris to Dunlap. That upon that suit judgment was rendered, by the court of Hustings, for Dunlap against Harris, from which judgment he appealed to the Dumfries district court, where the judgment of the court of Hustings was reversed,[1] and Dunlap appealed from the judgment of the district court to the court of appeals, where the judgment of the district court was affirmed.

The defendant, on the trial of the present suit, also offered evidence to prove that the said John Dunlap, on the 19th of April, 1798, also commenced suit against Towers, upon his indorsement of the same note, which suit is still pending in the court below. That the said John Dunlap is the same Dunlap whose name is mentioned at the head of the bill of parcels aforesaid, and who is still living.

Whereupon, the defendant prayed the court to instruct the jury, that upon proof of these

1.—It was understood and admitted by the counsel on both sides, that the judgment was reversed because the court was of opinion that, in Virginia, the holder of an indorsed promissory note, payable to order, cannot strike out an intermediate blank indorsement, and fill up the blank indorsement of a remote indorser, with an order to pay the money to himself; and that the holder cannot maintain an action against any of the parties to the note, but his own immediate indorser, or the maker of the note.

NOTE.—The note of the debtor is not payment of a pre-existing debt.
- Putman v. Lewis, 8 Johns. 304.
- Cole v. Sackett, 1 Hill 516.
- Pequeno v. Taylor, 38 Barb. 375.
- E. Riv. Bk. v. Butterworth, 45 Id. 476.
- Combs v. Bateman, 10 Barb. 573.
- Murray v. Gouverneur, 2 Johns. Cas. 438.
- Van Steenburgh v. Hoffman, 15 Barb. 28.
- Tobey v. Barber, 5 Johns. 68.

Where debtor has given his negotiable note no recovery can be had on original debt, without surrender of note, or proof it is lost. Cases cited above, and
- Holmes v. DeCamp, 1 Johns. 34.
- Angel v. Felton, 8 Id. 149.
- Pintard v. Tackington, 10 Id. 104.
- Smith v. Lockwood, Id. 375.
- Burdick v. Green, 15 Id. 247.
- Hughes v. Wheeler, 8 Cow. 77.

If negotiated, or agreed to be payment, it may be payment. Under some circumstances it is.
- Herring v. Sanger, 3 John. Cas. 71.
- Van Eps v. Dillaye, 6 Barb. 244.
- Parsons v. Gaylord, 3 Johns. 463.
- Gibson v. Tobey, 46 N. Y. 637.
- Pettibone v. Blackmar, 48 N. Y. 689.
- Dayton v. Trull, 23 Wend. 345.

Note of third person for existing debt is not payment unless by agreement. Cases cited above, and
- Johnson v. Weed, 9 Johns. 310.
- Monroe v. Hoff, 5 Den. 360.
- Vail v. Foster, 4 N. Y. 312.
- Lofsky v. Maujer, 3 Sand. ch. 69.
- Noel v. Murray, 18 N. Y. (3 Kern.) 167.
- Crane v. McDonald, 45 Barb. 354.
- Young v. Stahelin, 34 N. Y. 258.
- Bates v. Rosekrans, 37 N. Y. 409.
- Davis v. Allen, 3 Comst. 168.

Note of a third person is assumed to be payment without there is proof to contrary.
- Shaw v. Repub. L. Ins. Co. 69 N. Y. 286.
- And cases above cited.

N. Y. cases where note has been held to be payment.
- Conkling v. King, 10 N. Y. 440.
- St. John v. Purdy, 1 Sand. 9.
- Francia v. Del Banco, 2 Duer, 133.
- Heidenheimer v. Lyon, 3 E. D. Smith 54.
- N. Y. S. Bk. v. Fletcher, 5 Wend. 85.
- Rice v. Dewey, 54 Barb. 455.
- Fisher v. Marvin, 47 Id. 159.
- James v. Hackley, 16 Johns. 273.
- Whitbeck v. Van Ness, 11 Johns. 409.
- Breed v. Cook, 15 Id. 241.
- Rew v. Barber, 3 Cow. 272.

circumstances, the plaintiff could not recover in this action for goods sold and delivered; and that from the bill and receipt, given as aforesaid, the transaction must be considered as a joint contract. Which instruction the court refused to give, as prayed, but directed the jury, that the bill of parcels, before mentioned, is evidence (but not conclusive) of a joint contract of sale for the rum and sugar; and that the plaintiff may explain the transaction by parol, or other evidence, to prove that he 313*]*was the sole owner of the sugar, and that the said Dunlap was the sole owner of the rum, and that the contract for the sale of the sugar was made with the plaintiff in his own right, and that the contract for the sale of the rum was made with him as agent for Dunlap. But if the plaintiff should produce no such explanatory evidence, he could not maintain the present action.

And the court further instructed the jury, that if they should be satisfied that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap; and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant, for the whole amount of the goods so sold and delivered; and that the other facts stated are not sufficient to bar the plaintiff.

The 2d bill of exceptions in the present cause stated, that the plaintiff produced a witness, who proved, that the sale of the goods was made in the store of Dunlap, where the goods were deposited; that he never knew Dunlap to claim any title to the sugar, nor the plaintiff to the rum, and that previous to the sale, Dunlap claimed the rum as his separate property, and the plaintiff claimed the sugar as his separate property; and that Dunlap requested the plaintiff to sell the rum with the plaintiff's sugar. Whereupon the defendant prayed the court to instruct the jury, that the evidence so offered was not competent to contradict or explain the purport of the bill of parcels and receipt, or to show that the plaintiff sold part of the goods as his separate property, and the residue as agent of Dunlap; and that it did not amount to proof of such several property and agency, as could enable the plaintiff to recover in this action, for the whole of the goods sold.

Which instruction the court refused to give; but instructed the jury, that the declarations of Dunlap, or of the plaintiff, or the request of either of them, cannot be given in evidence, unless the defendant was present when such declaration or request was made.

*A verdict being rendered for the [*314 plaintiff, the defendant moved the court for a new trial, which was refused, and the court ordered the clerk to deliver up to the defendant the note of Clingman & Magaw, indorsed by Towers, which was referred to in the receipt, and which was filed in the suit of Dunlap v. the present defendant.[1]

Upon this case two questions arose.

1st. Whether the bill of parcels was conclusive evidence of a joint contract of sale, and of the joint property of Dunlap and Johnston?

2d. Whether, under the other circumstances of the case, the plaintiff could recover in this action?

C. Lee and Jones, for the plaintiff in error.

1. The bill of parcels is written evidence, purporting a joint contract, and cannot be contradicted by parol.

The action ought to have been joint. The bill of exceptions does not state any evidence from which the jury could infer that part of the goods was the sole property of one, and the residue the sole property of the other. The circumstances offered to prove that fact were too slight to justify the inference, and the court ought to have instructed the jury to that effect.

2. The contract which arose on the sale of the goods has been changed to a special contract, to pay on a certain condition, viz., if the plaintiff shall use due diligence to get the money on the note, and shall not succeed. If the plaintiff negotiates the note, he receives its *value; he is paid for the goods sold; [*315 he has received satisfaction, and can never resort to the defendant, until the note is returned to the plaintiff, and he has taken it up, and

1.—The record does not state the whole order of the court upon the motion for a new trial. The court, upon further argument and consideration, being doubtful whether the plaintiff could support this action until he had got back the note from Dunlap, informed the plaintiff's counsel that they would grant a new trial, unless the plaintiff would get that note, and return it to the defendant, and also obtain a release from Dunlap to Harris of all right of action for the rum sold.

Where note of third person is falsely represented as good, it is no payment, though insolvency was not known; certainly not where it is known to debtor.
Wilson v. Foree, 6 Johns. 110.
Pierce v. Drake, 15 Id. 475.
Roberts v. Fisher, 43 N. Y. 159.
Duden v. Waltzfelder, 16 Hun. 337.

Bill or note only operates as conditional payment unless there is an agreement or implied agreement otherwise.
Wadlington v. Covert, 51 Miss. 631.
Haines v. Pearce, 41 Md. 221.
Sweet v. James, 2 R. I. 270.
Nightingale v. Chaffee, 11 Id. 609.
Blunt v. Walker, 11 Wis. 334.
Coburn v. Odell, 30 N. H. (10 Foster) 540.
Moses v. Trice, 21 Gratt. Va. 556.
Alfred v. Baker, 53 Ind. 279.
Young v. Hibbs, 5 Neb. 433.
Edmond v. Caldwell, 15 Me. 340.
Snow v. Perry, 9 Pick. 539.
Doebling v. Loos, 45 Mo. 150.
May v. Gamble, 14 Fla. 467.
Matteson v. Ellsworth, 33 Wis. 488.
Marshall v. Marshall, 42 Ala. 149.
Middlesex v. Thomas, 20 N. J. Eq. 39.

In Maine and Mass. presumption is that note is payment. This may, however, be rebutted.
Parham Sew. Mach. Co. v. Brock, 113 Mass. 195.
Milliken v. Whitehouse, 49 Me. 527.
Ward v. Bourne, 56 Id. 161.
Perkins v. Cady, 111 Mass. 318.
Carter v. Townsend, 1 Cliff. U. S. C. C. 1 (Me.)
Palmer v. Elliott, Id. 63 (N. H.)
The Anna v. Kimball, 2 Id. 4. (Mass.)
Hudson v. Bradley, Id. 130 (Id.)
Baker v. Draper, 1 Id. 420 (Id.)

See also
Hill v. Sloan, 59 Ind. 182.
Hutchinson v. Olcott, 4 Vt. 83.
Wenut v. M. S. Co. 46 Vt. 460.

The rule as held in the United States courts is that of most of the states, that note is not payment unless such was intent of parties.
Peter v. Beverly, 10 Pet. 567, 532.
Sheehy v. Mandeville, 6 Cranch 253.
Wallace v. Agry, 4 Mason 336.
The Kimball, 3 Wall. 37.
Bk. of U. S. v. Daniel, 12 Pet. 32.
Lyman v. Bk. of U. S. 12 How. 225.

offered to return it to the defendant. Whatever would prevent the plaintiff from recovering against the defendant on the note, would equally prevent him from recovering on the contract for goods sold and delivered. The present suit was commenced while suits were depending on this very note, by Dunlap against the present defendant, and by Dunlap against Towers. The defendant cannot, at the same time, be answerable upon the note and upon the original contract of sale.

The order which the court made, that the plaintiff should deliver up to the defendant the note which had been filed in the case of *Dunlap v. Harris*, did not aid the judgment. The court had no authority to make such an order; the note was the property of Dunlap, and not of the plaintiff. But the note was of no use to the defendant. It was barred by the act of limitations, and that by the conduct of the plaintiff.

In the case of *Kearslake v. Morgan*, 5 T. R. 513, it is admitted by the counsel on both sides, that if a negotiable note, given for a prior simple contract debt, be indorsed over by the plaintiff, and is outstanding, the plaintiff cannot recover upon the original contract. In the present case, it must be presumed that the plaintiff received value for the note when he passed it to Dunlap, and it does not appear that he has ever been obliged to refund.

Swann, E. J. Lee, and Simms, contra. It does not appear that the note was not returned. But this court, in the case of *Clarke & Young*, *ante*, vol. 1, p. 181, had decided that it is not necessary, in such a case, to return it. So in the case of *Puckford v. Maxwell*, 6 T. R. 53, the court said, that "in cases of this kind, if the bill, which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and, therefore, he may consider it as a nullity, and act as if no such bill had been given at all." The same point is 316*] *also decided in 1 Esp. Rep. 5, and 7 T. R. 64, *Owenson v. Morse*.

The question of negligence does not arise in this case. The reason of the admission in the case of *Kearslake v. Morgan*, that if the note was outstanding, the plaintiff could not recover, upon the original cause of action, is, that the defendant would be liable to be sued upon it. The words are, "if he may be sued upon it by a third person." But here the record itself shows that Harris could not be sued upon it by a third person, being only liable to the present plaintiff, who was his immediate indorsee, that point having been decided in the court of appeals in Virginia, upon this very note. As, therefore, Harris is liable upon the note to the present plaintiff only, and as he will not be liable to him on the note, in case he recovers in the present action, it is the same thing as if the note had been taken up by the plaintiff, and ready to be delivered to the defendant.

Jones, in reply, admitted, that modern decisions have laid down the law broadly, that if the note or bill is not honored, it is of no avail: but it is otherwise, if the note or bill be negotiated; it is then a payment until returned.

In the case of *Young & Clarke*, the plaintiff had not negotiated the bill, and the parties answerable to Clarke were insolvent.

The liability of the defendant to a suit by a third person, on the note, is not the only ground of the opinion in *Kearslake v. Morgan*. Another ground is, that the defendant may have the benefit of the note against the parties answerable to him.

But, if the present defendant is not liable to be sued on the note in the name of a third person, yet Dunlap may sue him upon it, in the name of Johnston.[1]

*February 19. MARSHALL, *Ch. J.*, [*317 delivered the opinion of the Court.

This case comes up on two exceptions taken to opinions given in the circuit court.

The plaintiff in the court below had sold to the defendant in that court, certain goods, wares and merchandise, of which he had given him a bill, headed with the words, "Mr. Theophilus Harris bought of Dunlap & Johnston," &c. At the foot of this bill of parcels was the following receipt: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers or order, indorsed by John Towers and Theophilus Harris, payable 2d April, 1798, when paid, received in full."

This note was indorsed in blank by the de-

1.—MARSHALL, *Ch. J.* Not if Johnston recovers in the present suit.

Jones. But if Dunlap has a right to the note, he may sue in equity, and payment by Harris to Johnston would not be a bar.

MARSHALL, *Ch. J.* True. We shall consider that point. I have always been of opinion, that in such cases a suit in chancery can be supported; though I do not recollect any case in which the point has been decided.

Sutton v. Albatross, 1 Phil. 423.
Allen v. King, 4 McLean 128.
Maze v. Miller, 1 Wash. C. C. 328.
Parker v. U. S., Pet. C. C. 262.
U. S. v. Clarke, Hempst. 315.
Riley v. Anderson, 2 McLean 589.
Dennston v. Imbrie, 3 Wash. C. C. 396.
Douglas v. Reynolds, 7 Pet. 113.

There are many other cases in various states, but it is impossible, within the limits of a note, to cite them all or to draw the distinctions between them.

Note is not payment; it merely postpones time of payment of old debt until a default be made in the payment of the note.

Clark v. Mundal, 1 Salk. 124 S. C. 3 Salk. 68.
Kearslake v. Morgan, 5 Term R. 513.
Puckford v. Maxwell, 6 Id. 52.
Owenson v. Morse, 7 Id. 66.
Stedman v. Gooch, 1 Esp. 3.
Ward v. Evans, 2 Raym. 928 S. C. 2 Salk. 442.
Drake v. Mitchell, 3 East 251.
Brown v. Watts, 1 Taunt. 353.

Negotiable note of third person not indorsed by debtor, is

Emly v. Lye, 15 East 7, per Bayley, J.

As to checks and bills of exchange as payment, see

Mehlberg v. Tisher, 24 Wis. 607.
Maynard v. Johnson, 4 Ala. 116.
Camp v. Guellett, 7 Ark. 524.
Rowe v. Collier, 25 Tex. (Supp.) 252.
Arnold v. Sprague, 34 Vt. 402.
Wemet v. Lime Co. 46 Id. 458.
Swett v. Titus, 67 Barb. 327.
Kermeyer v. Newby, 14 Kans. 164.
Lame v. Cloud, 22 Gratt. (Va.) 518.
Stevens v. Park, 73 Ill. 387.
Phillips v. Bullard, 58 Ga. 256.
First Nat. Bk. v. Leach, 52 N. Y. 350.
Andrews v. Ger. Nat. Bk., 9 Heisk (Tenn.) 211.
Downey v. Hicks, 14 How. U. S. 240.
Slocum v. Lurty, Hempst. 431.
Cooper v. Gibbs, 4 McLean. 396.
Gallagher v. Roberts, 2 Wash. C. C. 191.

fendant in error, and a suit was instituted upon it by Dunlap against Harris, in which suit he ultimately failed, it being the law of Virginia, that on a note an action by the indorsee can only be maintained against the drawer, or his immediate indorser.

The defendant below objected.

1st. That the bill of parcels was conclusive evidence of joint property in the goods sold and delivered, and, therefore, that the action was not maintainable in the name of Johnston alone.

2d. That no action was maintainable on the original contract, the plaintiff below having indorsed the note mentioned in the receipt, and not having reacquired any property in it, so as to be able to restore it to Harris.

No laches are imputed, or are imputable, to the holder of the note.

318*] *Both these points were decided against the defendant below, and a judgment was rendered against him, from which he has appealed to this court.

On the first point the court is of opinion that there is no error. The written memorandum was not the contract, and was only given to show to what object the receipt at its foot applied. It is not, therefore, a bar to a disclosure of the real fact; it is not conclusive evidence of joint ownership in the property sold, and of a joint sale, but will admit of explanation. The court, therefore, did not err in allowing explanatory evidence to go to the jury, nor in allowing the jury to judge of the weight of that evidence.

On the 2d exception, the material point to be decided is, whether an action can be maintained, on an original contract for goods sold and delivered, by a person who has received a note as a conditional payment, and has passed away that note.

Upon principle, it would appear that such an action could not be maintained. The indorsement of the note passes the property in it to another, and is evidence that it was sold for a valuable consideration.

If, after such indorsement, the seller of the goods could maintain an action on the original contract, he would receive double satisfaction.

The case cited from 5 Term Reports appears to be precisely in point. The distinction taken by the counsel for the appellee, that in this case Harris can never be sued on the note is not so substantial as it is ingenious. Harris has a right to the note, in order to have his recourse against his indorsee, and Johnston has not a right to obtain satisfaction for the goods from Harris, while he is in possession of the satisfaction received from Dunlap. In the case quoted from Durnford & East, the liability of the defendant to an action from the actual holder of the note, is not the sole ground on which a disability to sue on the original contract was placed. That disability was also oc-
319*] casioned *by the obvious injustice of allowing to the same person a double satisfaction, and of withholding from the debtor, who had paid for the note before he could indorse it, and who would be compelled, by the judgment, to pay for the goods, on account of which he had parted with it, the right of resorting to his indorser. But, if it was indispensable to show that Dunlap has a remedy against Harris, it is supposed that the holder of a note may incontestably sue a remote indorser in chancery, and compel payment of it.

The case of *Young & Clarke*, decided in this court, does not apply, because, in that case, the plaintiff below had not parted with his property in the note.

The court does not think that the order (made after the judgment was rendered) for the rendition of the note to the defendant below, can correct the error committed in misdirecting the jury.

The judgment is to be reversed, for error in directing the jury that the action was maintainable on the original contract, after the note received as conditional payment had been indorsed.

DIXON'S Executors
v.
RAMSAY'S Executors.

An executor cannot maintain a suit in the District of Columbia, upon letters testamentary, granted in a foreign country.

All rights to the testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.

ERROR to the circuit court of the District of Columbia, upon a judgment in favor of the defendants, upon a general demurrer to their plea, which (after oyer of the plaintiffs' letters testamentary) stated, that the defendants' testator, at the time of making the promises, &c., and from thence, always, until his death, resided in the town of Alexandria, in the county of Alexandria, in the District of Columbia, and that the defendants have always resided in the same town, and that the plaintiffs have not obtained probate of the said letters *testa- [*320
mentary, at any place within the District of Columbia, or the United States of America.

E. J. Lee, for the plaintiffs in error. The question is, whether the plaintiffs must take out letters testamentary in the District of Columbia before they can maintain an action as executors.

There is nothing in the laws of Virginia which requires that letters testamentary should be there taken out upon a foreign will, provided they have been taken out in the country where the testator lived and died. The 14th section of the act of Virginia, P. P. 162, relates only to the title to lands under a will.

If, then, there is nothing required by the laws of Virginia, the right, and the powers of the executors, depend upon the rules of the civil law, and the law of that country of which the testator was a subject.

By the law of England, an executor may commence suit before the probate. 1 Com. Dig. 2 Bac. Abr. 413.

The very naming of an executor is a disposition to him of all the testator's personal estate, for he comes *in loco testatoris*, and is entitled to the surplus, after payment of debts and legacies. 2 Bac. Abr. 423. He derives all his power, not, like an administrator, from the government of the country, but from the will of his testator.

The debts due to the estate follow the person

of the creditor, not that of the debtor, and the disposition of them is to be governed by the laws of that country of which the testator was a subject. 2 Bos. & Pull. 229, 230, *Bruce v. Bruce;* 3 Ves. Jun. 200, *Bempde v. Johnston;* Appendix to Cooper's Bankrupt Law, 29, Babille's Opinion; Vat. b. 2, c. 3, s. 8, 109, 110, 111; 3 Dall. 370, 377, (note;) 4 T. R. 184, 175, *Hunter v. Potts.*

The case of *Fenwick v. Sears*, ante, vol. 1, p. 259, was that of an administrator who derives his whole authority from the laws of the place; it therefore cannot decide the present case, which is that of an executor who derives his **321*]** whole authority from the will of his *testator. That case, too, was decided under the peculiar laws of Maryland, which differ from those of Virginia upon this subject. By the law of Maryland, 1798, c. 101, s. 4, no alien can be an executor or administrator.

But it is said that the rights of creditors require that the executor should give security for the faithful administration of the estate. But this would be of no avail, if the executor, after giving security, should choose to return to England. For, according to the decision of the court of appeals of Virginia, in the case of *Baylor's Executors*, a creditor cannot maintain an action against the sureties of an executor, until he has proved his debt by an action and judgment against the executor, and proved a *devastavit* also, by a suit. But he can never get a judgment against an executor, who is not found in the state; and, consequently, can never have judgment against the surety. But if an executor be absent, the creditor may, in chancery, attach the assets. A voluntary payment to an executor without letters testamentary, in Virginia, is good. Why, then, should not the executor be permitted to sue?

If no purpose of justice is to be answered by refusing the right to sue; and if it is not refused by the positive laws of Virginia, a strong argument may be drawn from the inconvenience of obliging an executor to procure letters testamentary in every state in the union, and, perhaps, for very trifling debts.

Swann, contra. The case of *Fenwick v. Sears* has settled the question, as to a foreign administrator. In what does that differ from the case of a foreign executor? It is said that the latter derives his authority from the will, which is a universal title. But the authority under the will is inchoate, until completed by the probate, and is limited to a very few acts. It is certain that an executor, before probate, cannot obtain a judgment. The ordinary in England, and the court in Virginia, may refuse an executor, who is under a disability; for example, an alien enemy; an infant under seventeen; an idiot, **322*]** &c. Until, therefore, he is *received, his capacity to act is not decided by the only competent tribunal.

In England, the ordinary cannot require security from an executor. 2 Bac. Abr. 376, 377. It can only be done by the court of chancery considering him as a trustee, when there is good ground to apprehend his wasting the estate. In Virginia, the interest of creditors, legatees and distributees, is attended to. Yet their interest might be destroyed, if the executor was permitted to receive money, or give an acquittance before he had given security. It is, therefore, questionable, whether an executor, in Virginia, can do any valid act until he has qualified himself according to law.

It is also doubtful whether the assets can be attached, 3 Wilson, 297, for that would invert the order of administration. If they cannot, a foreign executor might, by his attorney, withdraw all the assets, and leave the creditors without remedy. A judgment creditor here would have a preference. But if he sues in England upon a judgment of this country, his claim is reduced to a simple contract.

Probate in a peculiar jurisdiction will not support a suit out of that jurisdiction. It would be strange, therefore, if a probate, even in the prerogative court, which is the present case, should extend across the Atlantic into a foreign country. 1 Ld. Raym. 562, *Hilliard v. Cox;* 2 Ld. Raym. 855, 856, *Adams v. Savage.*

The laws of Virginia have provided for the probate of all wills, foreign as well as domestic. P. P. 162, s 14 and 15.

C. Lee, in reply. By the civil law, the executor succeeds to all the movables and personal estate, and credits of his testator. His title is derived from the will, and his powers are as great as those of his testator were. 2 Bl. Com. 510.

*The will is to be proved where the **[*323** testator died, and the property is to be distributed according to the laws of that country.

The whole estate, wherever situated, is to be distributed according to one law. If a foreign executor should give bond in Virginia, by which law is he to be governed? Can there be two executors of the same will, governed by different laws, as to their administration? Can strangers interfere and get administration? It is true, the municipal laws may bind property in the country; but if no such laws, then the property is governed by the laws of the country where the testator had his domicile. Security ought not to be required here, if not required in England; and if taken in England, it ought not to be required here. (See Target's opinion upon the *Duchess of Kingston's* will, in Collectanea Juridica.)

February 19. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country.

It is contended that this case differs from that of an administrator, which was formerly decided in this court, because an administrator derives his power over the estate of his intestate from the grant of the administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be.

This distinction does certainly exist; but the consequences deduced from it, do not seem to follow. If an executor derived from the will of his testator a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintains the *suit by virtue of his letters testamen- **[*324** tary, he can only sue in courts to which the power of those letters extends. It is not, and

cannot, be denied, that he sues by virtue of his letters testamentary; and, consequently, in this particular, he comes within the principle which was decided by the court in the case of an administrator.

All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.

The court can perceive the inconvenience which may often result from this principle, but it is an inconvenience for which no remedy is within the reach of this tribunal.

Judgment affirmed.

SCOTT
v.
NEGRO LONDON.

If the owner of a slave removing into Virginia, shall take the oath required by the act of Assembly, within sixty days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought into Virginia by a person claiming and exercising the right of ownership over him eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than 12 months; and although the true owner never brought him in.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria.

Negro London brought an action of assault and battery against Scott, to try his right to freedom. His claim was grounded upon the act of assembly of Virginia, of the 17th December, 1792, P. P. 186, the 2d section of which is in these words: "Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free."

The 3d section imposes a penalty upon every person importing slaves contrary to the act.

325*] *The 4th section is in these words: "Provided, that nothing in this act contained, shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he or she shall take the following oath, before some justice of the peace of this commonwealth: 'I, A. B., do swear, that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves, nor have I brought with me any slaves with an intention of selling them, nor have any of the slaves which I have brought with me been imported from Africa, or any of the West India islands, since the first day of November, one thousand seven hundred and seventy-eight. So help me God.'

"Nor to any person claiming slaves by descent, marriage or devise; nor to any citizen of this commonwealth being now the actual owners of slaves within any of the United States, and removing such hither; nor to travelers or others making a transient stay, and bringing slaves for necessary attendance, and carrrying them out again."

The defendant below took a bill of exceptions, which stated, in substance, the following facts:

The defendant's father, claiming to own the plaintiff as his slave, brought him from Maryland into Alexandria, in July, 1802, without the knowledge or consent of the defendant, and hired him out in Alexandria until his death, which happened about Christmas in the same year. The plaintiff has continued to reside in Alexandria until the present time, except about three weeks in April, 1803. The defendant's father never took the oath required by the 4th section of the act. The defendant, in March, 1803, got possession of the plaintiff, and in April following, being then a resident of Maryland, but intending to remove to Alexandria, hired him out in Alexandria, claiming him as his slave, under a bill of sale from Thomas Contee, dated the 3d of September, 1800. The defendant came from Maryland in June, 1803, and, on the 5th of July next following, took the oath prescribed by the 4th section of the act. Whereupon the court instructed the jury, that if they should be of opinion, from the evidence, that the defendant's father brought the *plaintiff from [***326** the state of Maryland into the county of Alexandria in the year, 1802, and exercised acts of ownership over the plaintiff, and hired him out as his slave, and that the plaintiff has been kept in the county of Alexandria one whole year, or so long at different times as amount to a whole year, from the importation to the bringing of the action, and that no other oath was made than that which the defendant has offered in evidence as aforesaid, then the plaintiff is entitled to his freedom, although the jury should be satisfied that he was the property of the defendant at the time he was so brought into the town of Alexandria.

E. J. Lee, for the plaintiff in error. At the time the plaintiff in error took the oath, the negro had not been kept a year in the county of Alexandria; the forfeiture had not accrued; the oath was taken within sixty days after the removal of his owner. The importation by the father, without the knowledge or consent of his son, the owner, did not oblige the latter to take the oath within sixty days after such importation. The act is penal, and is, therefore, to be construed strictly. No prosecution against the son, for the penalty under the third section of the act, could have been maintained upon such an importation by the father. The oath by the son would have been a good defense. The act does not say it shall be taken within sixty days after the importation of the slave, but within sixty days after the removal of the owner.

The opinion of the court below was, that the oath ought to have been taken within sixty days after the removal of the negro.[1]

1.—The opinion of the court below seems to have been misunderstood by the counsel. The grounds upon which that court decided are believed to be,

327*] *C. Lee, contra. The general rule is, that a slave imported shall be free. Is the present case within the exception?

The father, being in possession of the slave, claiming title and exercising authority as owner, brought him from Maryland into Alexandria. If he did so without authority from the son, and if the son was the true owner, and if the slave was lost by the negligence, or in consequence of the act of the father, he is liable to the son. The father, therefore, was a person to whom the effects of the 2d section would extend, and to save himself from those effects, it was his duty to have taken the oath prescribed by the 4th section.

328*] *But it is clearly to be inferred from the 4th section, taken together with the words of the oath, that the oath will protect the owner's title only to such slaves as he shall bring with him when he comes to reside in Virginia. The words are, that nothing in the act shall extend to him who may incline to remove, if, within sixty days after "such removal," he shall make oath that he has not "brought with him any slaves," with an intention of selling them. It is not meant to say that the slave must come in at the same instant with the owner, but it must be all part of one transaction. The son never brought the slave into Alexandria. He was not brought with the intent of residing here with the son.

Suppose the son had never come to reside in Alexandria, and the slave had been kept by the father, in Alexandria, more than a year, what could prevent the slave from obtaining his freedom? Could it be objected, that the father was not the true owner, and that the slave was kept there without the knowledge and consent of the son? Again, suppose the son had not come till after the slave had been kept in Alexandria a year by the father, and the son should then, within sixty days after his removal, take the oath, would that destroy the slave's right to freedom. If it would not, it must be because the son could not connect the importation of the slave with his own removal. Why could he not connect an importation made thirteen months before his removal, as well as an importation made eleven months before his removal? Is it because a right to freedom had vested in the slave before the removal of the son? That cannot be; because the proviso says, that nothing in the act contained shall extend to those who may incline to remove, if, within sixty days after such removal, they will take the oath. The word nothing refers as well to the year's residence, as to the first importation of the slave. It might be said, therefore, that the son did incline to remove; and within sixty days after such removal, did take the oath, and, therefore, he is not to be affected by the year's residence. The length to which this argument may be carried, shows its sophistry. It leads to the entire destruction of the second section of the act; for if the true owner may come, and make oath after one year, he *may after fifty. The [*329 proviso, therefore, must be limited to an importation of the slave with his owner. Upon this construction, it will read thus: "Provided that nothing in this act shall extend to those who shall remove with their slaves, and who shall, within sixty days after such removal, take the oath."

But the son did not remove with his slave, and, therefore, is not within the benefit of the proviso.

Jones, in reply. A slave does not, under this act, gain his freedom, unless he was brought in by his true owner. The acquisition of freedom by the slave is a part of the penalty upon the owner, for violating the law. The freedom can only be acquired in a case where the owner is liable to the penalty of 200 dollars under the 3d section.

When the owner and the slave do not come in at the same time, the sixty days begin to run from the time of the removal of the master. If the owner comes before the slave has resided one year in Virginia, it is sufficient.

February 19. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

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not that the son was bound to take the oath within sixty days after the removal of the slave by the father, but that the father ought to have taken the oath within sixty days after his removal with the slave. The act does not require the oath to be taken by the person who has the absolute property of the slave, but by him who brings a slave into the state. The words of the oath are, "nor have I brought with me any slaves with an intention of selling them." The son might safely take the oath, and sell the slave immediately, for he did not bring the slave with him. The son would not have been liable to the penalty of 200 dollars under the 3d section, because he did not import the slave; but the father would, because he did import him.

The right to freedom which the slave acquires is not a mere penalty on the owner, but an independent right, not to be controlled by its consequences. The object of the act was to discourage, and gradually to abolish slavery; or at least to prevent its increase. Two means were adopted by the legislature. One was the prevention of further importations; the other was the emancipation of such as should be imported contrary to the act. This emancipation was not a penalty intended solely to prevent importation, but a specific remedy for the evil after it had happened. The penalty of 200 dollars, under the 3d section, was the preventive means, and the emancipation, under the 2d section, was the remedial means of accomplishing the object of the legislature. The evil was not the importation of freemen, but of slaves. To make slaves free was, therefore, as direct an accomplishment of their object, as to prevent their importation. The act could not intend that the right to freedom, given by the 2d section, should depend upon a title litigated between two persons, each claiming to be the owner. The words are, "slaves which shall hereafter be brought into this commonwealth," not by their owners, but by any person claiming and exercising authority over them. If a stranger should take a slave from Maryland, claiming title, and bring him into Virginia, and keep him there a year, the slave must, under the 2d section of the act, be free. And the remedy of the true owner must be against the wrong-doer, in the same manner as against a man who should, without authority, take his slave from Maryland, and in attempting to cross the Potomac, the slave should be drowned. So, in this case, if the father, without authority from the son, brought the slave from Maryland into Alexandria, and the slave thereby gains his freedom, by the negligence of the father, the father is liable to the son. The right of the slave to his freedom does not depend upon the crime of the person who may in law be adjudged to be the true owner. It is sufficient for the slave to show that the person in whose possession and under whose control he was, and who claimed and exercised over him the authority of an owner, has violated the law, and done the act which, by law, confers upon him his freedom. The consequential damage to the owner cannot affect the true slave. He was not the cause of the injury. The true owner must look to the author of the injury, against whom the laws have provided him a remedy.

This case arises under a clause in an act of the Virginia assembly, giving freedom to slaves who shall be brought thereafter into that state, and kept therein one whole year together, or so long at different times as shall amount to one year; and under a proviso of the same act, that it shall not extend to any person who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he shall take an oath which is prescribed in the act.

The negro London was brought from Maryland into Alexandria, where he was hired out in the year 1802; some months after which, his master, the plaintiff in error, also removed into 330*] Alexandria, and within the *year from the time the negro was brought in, and also within the sixty days from the time the plaintiff in error removed to Alexandria, the oath prescribed by the law was taken.

No right to freedom having vested in London at the time this oath was taken, the question is, has it brought the plaintiff within the proviso of the act?

That the plaintiff is within the letter of the proviso, is unquestionable. He is a person who inclined to remove from one of the United States into Virginia, who actually did remove, and who took the requisite oath within the limited time.

But it is contended, in behalf of the defendant in error, that the acts of bringing the negro into the state, and of removing into it, must be concomitant, in order to bring the case within the proviso; or, in other words, that the owner must be a person "inclining to remove into the state," at the time the slave was brought in. This inaccuracy of construction seems to be founded on the idea, that the penalty of forfeiting the property accrues on bringing the slave into the state, whereas it attaches on his continuance in the state for twelve months. Till such continuance has taken place, the offense has not been committed. If, then, all the acts which bring a person within the proviso, are performed before the right to freedom is vested, and before the provisions of the act have been infracted, it seems to the court, that the rights of the party remain unaffected by the act.

If London had been ordered to Maryland for a day, and then brought with his master into Alexandria, the construction of his counsel would be satisfied; and it seems strange, where the letter of a law has not been violated, that such an unimportant circumstance should affect its spirit.

Unless this mode be admitted of coming within the proviso, a person inclining to remove into Virginia, whose slaves had preceded him, though not for one year, could not bring himself within, or avoid the forfeiture, although permitting 331*] them to come into that state was no *offense; a construction of the act which the court cannot think consistent with its spirit or letter.

This court is, therefore, of opinion, that the circuit court erred in directing the jury that, under the circumstances stated, the plaintiff below was entitled to his freedom, and doth reverse the judgment rendered by the circuit court, and remand the cause for further proceedings.

Judgment reversed.

WISE *v.* WITHERS.

A justice of the peace in the District of Columbia is an officer of the government of the United States, and is exempt from militia duty.

The court martial has not exclusive jurisdiction of that question, and its sentence is not conclusive.

Trespass lies against a collector of militia fines, who distrains for a fine imposed by a court martial, upon a person not liable to be enrolled in the militia, the court-martial having no jurisdiction in such cases.

ERROR to the circuit court of the District of Columbia, in an action of trespass *vi et armis*, for entering the plaintiff's house and taking away his goods. The defendant justified as collector of militia fines. The plaintiff replied, that at the time when, &c., he was one of the United States' justices of the peace for the county of Alexandria. This replication, upon a general demurrer, was, by a majority of the court below, adjudged bad; whereupon the plaintiff sued out a writ of error, and the questions made on the argument were,

1. Whether a justice of the peace, for the county of Alexandria, was liable to do militia duty? and,

2. Whether an action of trespass will lie against the officer who makes distress, for a fine assessed upon a justice of the peace by a court-martial?

C. Lee, for the plaintiff in error. This case depends upon the act of Congress of March 3d, 1803, entitled, "An act more effectually to provide for the organization of the militia of the District of Columbia," vol. 6, p. 237.

*The 6th section says, "that the com- [*332 manding officers of companies shall enroll every able-bodied white male, between the ages of eighteen and forty-five years, (except such as are exempt from military duty by the laws of the United States), resident within his district."

The act of Congress of the 8th of May, 1792, vol. 2, p. 93, s. 2, exempts from militia duty "the vice president of the United States; the officers, judicial and executive, of the government of the United States; the members of both houses of Congress, and their respective officers; all custom-house officers, with their clerks; all post officers, and stage drivers, who are employed in the care and conveyance of the mail of the post office of the United States; all ferrymen, employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective states."

This act applies not only to such officers as then existed, but to all such as might thereafter be created.

If the plaintiff is an officer, judicial, or executive, of the government of the United States, he is exempted.

In *Marbury's Case, ante*, vol. 1, p. 168, this court decided that a justice of the peace, for the District of Columbia, was an officer, and that he became such as soon as the commission was signed, sealed and ready to be delivered. If the commission, therefore, is a criterion to decide who is an officer, we are at a loss to conceive what objection can be taken.

The justices of the peace for the District of Columbia are appointed by the President of the United States, by and with the advice and consent of the senate, and are commissioned by the President. Their powers and duties are prescribed by the act of Congress, "concerning the District of Columbia," vol. 5, p. 271, s. 11, Whether those powers are judicial or executive, or both, is immaterial.

333*] *Jones, contra.

1. A justice of the peace, in the District of Columbia, is not a judicial officer of the government of the United States.

By the act of Congress, those appointed for the county of Alexandria are to exercise the same powers and duties as justices of the peace in Virginia. The expression in the act of 1792, "officers judicial of the government of the United States," means only the judges of the Supreme and inferior courts of the United States. Justices of the peace in the states are not considered as judicial officers. By the constitution of Massachusetts, the judicial officers are to hold their offices during good behavior, and yet the commissions of justices of the peace are limited to seven years. So the constitution of the United States says, that the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; but by the act of Congress, the justices of the peace in the District of Columbia are to hold their offices only for five years. These justices, therefore, are either not judges, or the constitution has, in this respect, been violated. It is plain, however, that Congress did not consider them as judges. A sheriff sometimes acts as a judicial officer in holding elections; and some of the officers in the executive departments exercise judicial functions in many cases, but they are not, therefore, judges. An act of Congress may give judicial powers to certain officers, but they are not, therefore, judges.

2. He is not an executive officer "of the government of the United States." This description was intended, by the act of 1792, to comprehend only the officers of the superior departments, or those which strictly constitute the government of the United States, in its limited sense. This is to be inferred, because the act goes on to enumerate, by name, all the inferior officers which it meant to exempt. Why enumerate, if the general description comprehended the whole?

3. The circuit court of the District of Columbia has not jurisdiction of this question. The 334*] question who is *to be enrolled in the militia, and the assessment of the fines, are matters submitted exclusively to the courts-martial, which are courts of peculiar and extraordinary jurisdiction, specially appointed for that purpose, by the act of Congress, vol. 6, p. 244, s. 8. The words are, the "presiding officer shall lay before the said court (the battalion court of inquiry) all the delinquencies as directed by law, whereupon they shall proceed to hear and determine." There is no provision for revising the decisions of those courts-martial.

They are final and conclusive, like those of an ecclesiastical court, or a court of admiralty.

If they have jurisdiction, and especially if they have exclusive and final jurisdiction, in the case, the officer who executes their orders is justified. He cannot be considered as a trespasser.

C. Lee, in reply. There can be no doubt but the plaintiff is an officer. There can be as little that he is an officer judicial or executive, or both; and if he is not an officer of the government of the United States, he is not the officer of any other government. There is no distinction between an officer of the United States and an officer of the government of the United States. An officer appointed by the President of the United States, to an office created by a law of the United States, and exercising his authority in the name of the United States, must be as much an officer of the government of the United States, as any other officer in the United States.

The reason of enumerating other officers by name was, because it might, perhaps, be doubted whether they would come under the general description of officers judicial and executive.

As to the jurisdiction of the circuit court. A limited power given to certain tribunals, not extending to all persons, cannot control the general jurisdiction given to that court.

Whenever a peculiar, limited jurisdiction is given to certain persons, and they exceed it, not only their *officers, but they themselves [*335 are liable to an action. They are all subject to the general law of the land. If this were not the case, and a court-martial should compel a man of more than forty-five years of age, for example, to perform militia duty, and continue to fine him from time to time, there would be no redress.

The court-martial, in the present case, had no jurisdiction over the person of the plaintiff. He was exempt, and, therefore, they could delegate no authority to their officer.

February 19. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

In this case two points have been made by the plaintiff in error.

1st. That a justice of the peace in the District of Columbia is, by the laws of the United States, exempt from militia duty.

2d. That an action of trespass lies against the officer who makes distress, in order to satisfy a fine assessed upon a justice of the peace, by a court-martial.

1. Is a justice of the peace exempt from militia duty?

The militia law of the district refers to the general law of the United States, and adopts the enumeration there made of persons who have this privilege. That enumeration commences with "the vice president of the United States, and the officers, judicial and executive, of the government of the United States."

It is contended by the plaintiff, and denied by the defendant, that a justice of the peace, within the district, is either a judicial or an executive officer of the government, in the sense in which those terms are used in the law.

*It has been decided in this court, [*336 that a justice of the peace is an officer; nor can it be conceived that the affirmative of this proposition, was it now undecided, could be controverted. Under the sanction of a law, he is appointed by the President, by and with the advice and consent of the senate, and receives his commission from the President. We know

not by what terms an officer can be defined, which would not embrace this description of persons. If he is an officer, he must be an officer under the government of the United States. Deriving all his authority from the legislature and President of the United States, he certainly is not the officer of any other government.

But it is contended that he is not an officer in the sense of the militia law; that the meaning of the words "judicial and executive officers of the government," must be restricted to the officers immediately employed in the high judicial and executive departments; and in support of this construction, the particular enumeration which follows those words is relied on; an enumeration which, it is said, would have been useless, had the legislature used the words in the extended sense contended for by the plaintiff. A distinction has also been attempted between an officer of the United States and an officer of the government of the United States, confining the latter more especially to those officers who are considered as belonging to the high departments; but, in this distinction, there does not appear to the court to be a solid difference. They are terms which may be used indifferently to express the same idea.

If a justice of the peace is an officer of the government of the United States, he must be either a judicial or an executive officer. In fact, his powers, as defined by law, seem partly judicial, and partly executive. He is, then, within the letter of the exemption, and of course must be considered as comprehended within its proper construction, unless there be something in the act which requires a contrary interpretation. The enumeration which follows this general description of officers, is urged as furnishing the guide which shall lead us to the more limited construction. But to this 337*] *argument it has very properly been answered, by the counsel for the plaintiff, that the long enumeration of characters exempted from militia duty which follows, presents only one description of persons; custom house officers, and those who hold a commission from the President, or are appointed by him: and of these by far the greater number do not hold such commission. The argument, therefore, not being supported by the fact, is inapplicable to the case.

The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty.

It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.

The judgment is reversed, and the cause remanded for further proceedings.

Cranch 3.

THE UNITED STATES
v.
GRUNDY AND THORNBURGH.

Under the act of Congress of December 31, 1792, which declares, that if a false oath be taken in order to procure a register for a vessel, the vessel or its value shall be forfeited, the United States have an election to proceed against the vessel as forfeited, or against the person who took the false oath, for its value. But until that election is made, the property of the vessel does not vest in the United States; and the United States cannot maintain an action for money had and received against the assignees of the persons who took the oath, and who had become bankrupt; the assignees having sold the vessel, and received the purchase money, before seizure of the vessel.

ERROR to the circuit court of the United States for the district of Maryland, in an action for money had and received for the use of the United States, by the defendants, as assignees of Aquila Brown, Jun., a bankrupt; it being money received by the defendants for the sale of the ship Anthony Mangin, which ship the United States alleged was forfeited to them by reason that Brown, in *order to obtain a register for her, as a ship of the United States, had falsely sworn that she was his sole property, when he knew that she was in part owned by an alien. [*338

On the general issue a verdict was rendered for the defendants, and the plaintiffs took three bills of exceptions.

1. The first stated that they gave in evidence to the jury, that on the 25th of November, 1801, and for several months before and after, Aquila Brown, Jun., a citizen of the United States, and Harman Henry Hackman, a subject of the elector of Hanover, were copartners in merchandise, and carried on trade at Baltimore, under the firm of Brown & Hackman, and that Brown, at the same time, carried on trade at Baltimore on his separate account, under the firm of A. Brown, Jun. That before that day, and during the year preceding, the ship Anthony Mangin was built, rigged and equipped, within the United States, for the house of Brown & Hackman, under a contract made for them and under their authority, and was paid for with their funds, and that on that day Brown applied to the collector for a register for that ship, in his own name, and as his sole property, and for that purpose took and subscribed the usual oath, which contains an asseveration that he then was the true and only owner of that ship, and that no subject or citizen of any foreign prince or state was then directly or indirectly interested therein, or in the profits or issues thereof; whereupon a register was granted to him in the usual form. That afterwards, and after the 28th day of the same November, A. Brown, Jun., as well as Brown & Hackman, were declared bankrupts, and their effects severally assigned, the defendants being the assignees of A. Brown, Jun. The plaintiffs, in order to prove that the ship, at the time of taking the oath, was the property of the house of Brown & Hackman, and belonged in part to Hackman, an alien, offered Hackman himself as a witness, who objected to be sworn, alleging that he ought not to be compelled to give evidence against his interest. Upon the *voir dire* he explained his interest thus: that if the plaintiffs

should recover in this action, the funds of the estate of Brown would be diminished by the whole amount recovered. That Brown & Hackman had drawn and indorsed bills of exchange 339*] to a large *amount, which had come to the hands of the United States by indorsement, and he believed himself to be liable therefor in case of failure of the funds of Brown. Whereupon the court was of opinion that he was not a competent witness for the plaintiffs.

2. The second bill of exceptions stated (in addition to the facts contained in the first) that the plaintiffs, in order to prove that at the time of the oath the ship was the property of Brown & Hackman, offered to swear a witness to prove that in a book, purporting to be one of the books of account of Brown & Hackman, in the possession of one of the assignees of Hackman, who refused to produce it at the trial, although it was then in his possession, he saw an entry in the hand-writing of Hackman, purporting to be made on the 28th of November, 1801, charging the freight of the ship, on her then intended voyage, to the debit of Brown, and to the credit of Brown & Hackman. But the court rejected the evidence as inadmissible for that purpose.

3. The third bill of exceptions (in addition to the facts contained in the former bills) stated that the plaintiffs offered to prove, that at the time of Brown's taking the oath and obtaining the register in his own name, the ship was owned in part by Hackman, an alien, and that Brown knew the fact to be so. That afterwards, and before the bringing of this action, Brown became bankrupt, and his effects were assigned to the defendants. That at the time of his bankruptcy, and of the assignment, the ship was in his possession, and that by virtue of the assignment the defendants took her into their possession as part of the estate of Brown, and sold her to a certain Thomas W. Norman, for 18,250 dollars, which sum they received, and at the time of trial had in their possession.

The defendants then gave in evidence that after the sale of the ship to Norman, the United States seized her as forfeited; and libelled her in the district court. That Norman filed his claim, and upon proof and hearing, the judge dismissed the libel. That no action had ever been instituted by the United States against Brown.

Whereupon, the Attorney for the United States prayed the court to direct the jury, that 340*] if they believed the matters *so offered in evidence on the part of the United States, the United States were entitled to recover, in this action, the said sum of 18,250 dollars, which direction the court refused to give; but instructed the jury, that if they believed that any of the matters of fact in the oath of Brown alleged, were within his knowledge, and were not true, the said evidence given by the plaintiffs was not sufficient in law to maintain the present action.

Breckenridge, Attorney General of the United States. The great question in this cause is, whether the property of the ship Anthony Mangin vested in the United States, upon the commission of the act of forfeiture by Brown, without a sentence of condemnation.

This action is founded on the act of December 31st, 1792, "for registering and recording of ships and vessels." Laws U. S. vol. 2, p. 135. We contend that under the 4th section of this act, no sentence of condemnation was necessary to vest the property in the United States. This section, after stating the nature of the oath required in order to obtain a register of the ship, says, "And in case any of the matters of fact in the said oath alleged, which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered (with costs of suit) of the person by whom such oath shall have been made."

A forfeiture by statute is analogous to a forfeiture at common law. At the common law by an outlawry, the property of the outlaw immediately vests in the crown without office found. Co. Litt. 128, b.

The English court, upon the statute of 12 Car. II, c. 18, which creates forfeitures very similar to those of our statute, have decided that by the act of forfeiture, the property is so completely devested from the owner and vested in the crown, that detinue can be maintained for it. 5 Mod. 193, *Roberts v. Withered;* Comb. 361, S. C.; 12 Mod. 92, S. C.; 1 Salk. 223, S. C. And Rookby, *J.*, said, "the property is devested out of the owner, by importation, *but [*341 not vested in him that sues until bringing the action, or seizure." That case has been recognized and made the ground of decision in a late case. 5 T. R. 112, *Wilkins v. Despard*, These cases decide that the right to recover either the specific goods, or their value, does necessarily give to the court the right to determine the question of forfeiture.

If the right of the United States was only inchoate at the commencement of the suit, the judgment in this case would have completed it as effectually as a sentence of condemnation. The United States might have proceeded either *in rem*, or for the value of the ship. They might either seize and libel the ship, or sue the person.

In the case of seizure of a ship under the act of August 4th, 1790, Laws U. S. vol. 1, p. 237, there must be a prosecution in conformity with the regulations of the 67th section of that act; and an important question arises, whether we are thereby prevented from proceeding *in personam* for the value of the thing forfeited. We contend that we may proceed either way; for of what use are the words "or the value thereof," if the recovery must be by seizure and condemnation? The words being in the alternative, leave us that option. In *Roberts v. Withered*, it is said, "that though some persons proceed by way of information upon forfeitures, yet actions of detinue will nevertheless lie." 5 Mod. 194. Suppose the act had declared that the party shall forfeit 1,000 dollars, would not an action lie for this money?

But admitting that the act of 1790 requires a sentence of condemnation to vest the right in the United States, we contend that the 29th section of the act of December 31, 1792, under which the present action is brought, does not. Laws U. S. vol. 2, p. 157.

Although it refers to the act of 1790, it is only for the purpose of designating the courts in which the recovery is to be had; and to the

manner of disposing of the forfeiture. It has no reference to the kind of suit, or to the manner of proceeding, to effect the recovery 342*] *of the object. The words of the 29th section are, "that all penalties and forfeitures which may be incurred, for offenses against this act, shall and may be sued for, prosecuted, and recovered, in such courts, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the act (of 1790) may legally be sued for, prosecuted, recovered and disposed of."

The statute of 12 Car. II, has stronger expressions to show that a sentence of condemnation was necessary to vest the property. Its words are, "under the penalty of forfeiture of ship and goods, one moiety to his majesty, and the other moiety to him or them that shall inform, seize, or sue for the same." Our statute is not only silent as to the mode of recovery, whether by information, seizure, or suit, but contains the words "or the value thereof," (which the British statute does not,) and, therefore, recognizes any mode of recovery by which that value can be obtained.

It is not unworthy of remark, that vessels are, by the act of 1790, rendered liable to forfeiture in three cases, s. 14, 27, & 60, in neither of which is it declared that "the value thereof" may be recovered. The 67th section, if intended to ascertain the forfeiture of ships by seizure and condemnation only, may operate consistently on that act, but it cannot, where an alternative is given to sue for the value.

As we cannot proceed *in rem* without a seizure, if a transfer or sale secures the property in the transferee, or vendee, the law will, in this respect, be defeated.

Admitting that the vendee is safe, the offender is liable to be proceeded against *in personam*, for the value of the property forfeited. If so, his assignees, in case of his bankruptcy, are also; for his creditors have but an equitable lien on his estate in the hands of his assignees; and the United States have a legal right, which, after suit brought, has relation back to the time of the forfeiture.

343*] *With respect to the exceptions to the witnesses, the court, in rejecting the testimony of Hackman, have carried the doctrine farther than it is warranted by any precedent. It was, in fact, deciding that a witness may refuse to give testimony against a defendant, because that defendant is his debtor, and his testimony, by establishing the plaintiff's claim, would diminish the funds out of which the witness's claim might be satisfied.

This interest is certainly too remote and contingent to exclude the witness. It may, perhaps, affect his credibility, but not his competency.

The other witness who was called to prove the entry in the books of Brown & Hackman, was also improperly rejected.

After the rejection of Hackman himself, and after proving the book to be in the possession of the opposite party, who refused to produce it, the next best evidence was the testimony of a person who had seen the entry in the book, in the hand-writing of Hackman.

The judgment of the district court upon the libel is no bar to the present action. That judgment was not given on the point of the forfeiture, but upon the ground that the United States could not follow the thing itself into the hands of a bona fide purchaser, for a valuable consideration, without notice. It does not bar the remedy *in personam*.

P. B. Key and Martin, contra.

1. As to the rejection of Hackman, as a witness.

He was offered by the United States to prove that he was an alien, and was interested in the ship at the time the oath was taken by Brown. The defendant objected, and, upon the *voir dire*, he declared himself interested, and objected to answering against his interest. [Key was about to read an authority, when the Chief Justice told him that no authorities would be required on that point. Johnson, *J.*, said he should *like to see the authority for his [*344 own satisfaction. Marshall, *Ch. J.* When we said there was no necessity for authorities, we meant authorities to prove that a man, in a civil case, is not bound to testify against his interest. But this does not preclude the objection, that the facts stated by the witness, as the ground of his interest, did not prove him to be interested. Key then cited Peake's Law of Ev. 132.]

2. As to the rejection of the witness who was called to prove the entry in the books of Brown & Hackman.

There was no proof that it was one of the books of that firm; nor was any notice given to the defendants to produce it. It was not proved to be in the possession of the defendants, but in that of the assignees of Brown & Hackman, who were different persons. The plaintiffs might have had a *subpœna duces tecum*. The ground of the opinion of the court was, that the testimony offered was not the best evidence, as the book itself might have been had.

3. The important question in the cause is whether, by the act of forfeiture, the property vested in the United States before condemnation.

We admit that the owner of property may maintain trover against a vendee claiming under a third person, and disaffirm the sale; or he may affirm the sale, and bring an action for the price. The present action is grounded on the right of property being in the United States at the time of the sale. The seizure of the vessel was not made by the United States until after the assignees of Brown had sold and delivered her to a third person.

If the present action is not founded on the right of property, the action should have been debt for the penalty, or a special action on the case, grounded upon the statute, and averring every matter necessary to entitle the United States to recover.

*The right of the United States to the [*345 property depends upon the act of 1792. The 4th section, which declares the forfeiture and penalty, is silent as to the remedy. When the act creating a penalty is silent as to its mode of recovery, the action must be debt or case on the statute.

The only remedy, then, which the United States had, was either by a seizure of the ship, or an action of debt, or special action on the case, for the penalty. But the present is an action for money had and received. It is not grounded on a crime or a tort.

The United States have lost their remedy *in rem*, by suffering it to be sold without notice. Upon this point, the sentence of the district court, which has been acquiesced under, is conclusive; for it goes upon the ground that the United States had not the right to the thing at the time of the sale; for if they had, the vendee gained no legal title, and, therefore, could not be protected by the want of notice. But he was protected by want of notice; he must, therefore, have gained a legal title, which could be protected. He could gain his legal title only from the assignees, but they could not convey a legal title which was not in them. At the time of sale, therefore, the legal title must have been in the assignees; and, as there could not be two legal titles to the same thing, at the same time, in different persons, the title could not be in the United States. This is the consequence which inevitably results from the sentence.

Having lost their remedy against the thing their only alternative is an action for the penalty against the person who took the false oath. The act provides no substitute for the process *in rem*, but the action against that person; it gives no right of action against the person who may be in possession of the thing.

No action for the penalty will lie against Brown's assignees. It is in the nature of a criminal prosecution.

346*] *The act gives the United States an election of one of two remedies, but not of both. They may proceed *in rem*, or *in personam*. Until their election is made, the thing itself is not forfeited, for they may never choose to proceed against the thing, but may prefer the remedy against the person.

They have made their election by proceeding *in rem;* having failed there, they could not take the other side of the alternative, and sue for its value. The sentence has been submitted to, and is conclusive until reversed.

Suppose the libel had been dismissed because it was not sufficiently proved that Brown had sworn falsely, or that he knew he was swearing falsely, could the United States turn round, and try the same question again, upon an action against Brown for the penalty? Or, after suing Brown for the penalty, and failing to recover judgment against him, could they seize the ship and try the question over again?

A judgment, until reversed, is conclusive as to the subject matter of it. 2 Burr. 1009, *Moses v. Macferlan.*

At common law a forfeiture does not alter the property, until there is some act done by the party claiming the forfeiture, either *in pais*, or of record.

A forfeiture of lands relates back to the time laid in the indictment; but the forfeiture of goods relates to the time of conviction. In both cases the time must appear of record. Co. Litt. 390, b, 391, a.

In case of *deodand*, nothing is forfeited until it be found by inquest. So in the case of *felo de se*, no part of the personal estate is forfeited to the king before the self-murder is found by inquisition. So in the cases of flight, and of goods waived. 1 Hawk. P. C. 101, 104.

The case of *Roberts v. Withered*, 5 Mod. 193, was decided on the ground that an action of *detinue* was a process *in rem*, and equivalent to a seizure.

*Harper, in reply. [*347

1. As to the exclusion of Hackman's testimony.

It may, perhaps, be safely admitted that if the testimony has an immediate, direct, and certain effect upon his interest, a man may be excused from testifying. But in the present case it depended upon several contingencies. 1st. Whether Brown's estate would be sufficient to pay the claim of the United States; 2d. Whether Hackman's certificate would bar the United States, a point not yet decided, and upon which legal opinions differ; 3d. Whether the United States would choose to resort to Hackman until the effects of Brown were exhausted; and, 4th. Whether there would be any surplus of Hackman's estate. The authority from Peake, 132, is not to the point; for he says that the testimony must go to establish a debt against himself, before the witness can be excused from giving it. And the case which he cites from Strange, 406, shows that it is only a matter of indulgence, and not of right, even in such a case: for although the witness was bail in the action, yet if he was a subscribing witness, the Chief Justice said he would oblige him to swear.

2. As to the testimony respecting the book.

It was proved that the book was in the hands of the assignee of Hackman, who refused to produce it. We could not issue a *subpœna duces tecum*, because the book was a private document; and it not being in the possession of the defendants we could not compel them to bring it in under the act of Congress. Between a bankrupt and his assignees there is a perfect privity as to all matters of contract and interest. The book, therefore, must be supposed to be in the hands of Hackman; and as the court refused to compel him to testify, or to produce the book, evidence of its contents was the next best evidence in our power. As to this case, it was as if the book had been lost or destroyed. If a subscribing witness to a bond be out of the reach of the process of the court, you cannot compel him to testify, but you may give evidence of his hand-writing.

3. As to the main question.

*The defendants are not sued as assignees. The action is against them in their own right, as having received money to which the United States are entitled. We say that they have taken property of the United States, and sold it, and we are entitled to the money. [*348

The forfeiture of the value is to be recovered of the person who took the oath; but this does not prevent the United States from pursuing such other remedies as they might have had by reason of the forfeiture. If, then, the forfeiture gave the United States the right to the thing, they are entitled to the present remedy.

The question is, at what time did the property vest in the United States by reason of the forfeiture?

The case in 5 T. R. refers to, and recognizes, the law as decided in *Roberts v. Withered*, in 5 Mod. The decision there was, that by the illegal act of the party the property was devested out of him. The doctrine of abeyance does not exist in any case: it has been laughed out of existence. The property must be somewhere. If it does not vest in a private owner, it goes to the sovereign, or to the government. If devest-

ed out of the owner, it goes *eo instanti* to the person to whose use it is forfeited. When the forfeiture accrues to a private person, he must do some act to entitle himself. But not so in the case of the king; it vests in him immediately. He is not bound to do any act. In the case of *Roberts, qui tam, v. Withered*, 5 Mod. the right of the informer did not accrue till the action brought; but the whole had gone to the king by the forfeiture. The offense devests the property, but it is not vested in an informer until action brought. In the mean time it is in the king. The informer's right only vests by action.

There is a difference between a forfeiture by statute, and a forfeiture by common law. The common law says, the king shall have it if he will. But the statute says, it shall absolutely vest in the king. By the statute, the king, speaking by the legislature, has determined his will. He has made his election to have the thing. But the statutory remedy does not take away the common law remedy: it is cumulative. The United States are not obliged to resort to the statutory remedy.

349*] *But it is said that the United States had an election, and that no right to the thing vested until they made their election. We may admit it; but we say we have elected the present remedy.

Admit that we elected to seize the vessel. It had escaped: it was gone out of our power. It was still an election, and we are now proceeding in an action for its value. The election will relate back. We have the whole three years to make the election. If we pass the three years, the property goes back to the former owner.

The value is not to be considered as a penalty, but as a debt. We might have brought *detinue* or *trover* for the ship, instead of an action for the value, or a seizure.

We admit the sentence cannot be inquired into; but it does not affect the present question. The decision was not on the point of the forfeiture.

February 22. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

This action is brought to recover money, received by the defendants, for a ship sold by them as the assignees of Aquila Brown, a bankrupt: which ship is considered, in this cause, as having been liable to forfeiture, under the "act for registering and recording ships or vessels." It is founded on the idea that, at the time of sale, the ship was the property of the United States, in virtue of the act of forfeiture which had been committed, and of the proceedings of the United States in consequence of that act.

It appears that in 1801 Aquila Brown, Jun., then carrying on trade in his own name, in Baltimore, obtained a register for the Anthony Mangin, as his sole property; having first taken the oath which the law requires, to enable him to obtain such register. He afterward became a bankrupt, and the Anthony Mangin passed, with his other effects, to his assignees, who sold her for the money now claimed by the United 350*] States. After *this sale, facts were discovered, inducing the opinion that a certain Harman Henry Hackman, a foreigner, was part owner of the vessel, a circumstance within the knowledge of Aquila Brown; and upon this ground she was seized and libeled in the court of admiralty. By the sentence of that court, the libel was adjudged not to be supported, and was dismissed. It is agreed, and is so stated in the reasoning of the judge, which accompanied his opinion, that this sentence was not intended to decide the question of forfeiture; but was founded on the alienation of the vessel before the forfeiture was claimed. Acquiescing in this decision the United States brought the present action. At the trial the judge instructed the jury that this action was not maintainable, although they should be of opinion that the fact alleged in the oath, which was taken to obtain the register, was untrue within the knowledge of the person taking the oath. To this instruction an exception was taken; and upon that, among other points, the cause comes into this court.

The words of the act under which the right of the United States accrues are: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made."

The question made at the bar is, whether, by virtue of this act, the absolute property in the ship or vessel vests in the United States, either in fact or in contemplation of law, on the taking of the false oath; or remains in the owners until the United States shall perform some act, manifesting their election to take the ship and not the value.

So far as respects this question, the effect of the sentence in the court of admiralty is put out of the case, for the court has not decided what the effect of that sentence will be.

It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until *some legal step shall be [*351 taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction, taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.

The cases cited from 5 Mod. and 5 Durnford & East, are certainly strong cases. Whether they can be reconciled to the general principles of English law need not be considered, because the present inquiry respects the construction of an act of Congress, containing words which vary essentially from those used in the acts of the British parliament, on which those decisions were made.

The question, therefore, *does the ship vest absolutely in the United States, so as to make it their property, whether such be the choice of the government or not, or may they elect to reject the ship and proceed for its value*, must be decided by the particular words of the act.

The words, taken according to their natural import, certainly indicate that an alternative is presented to the United States. "There shall be a forfeiture of the ship, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath shall have been made."

Had a special action on the case been brought against the person, by whom the oath was made, stating circumstances on which a forfeiture would arise, and averring an election on the part of the United States to claim the value, it would be a very bold use of the power of construction which is placed in a court of justice to say, that such an action could not be maintained, because the vessel itself was vested in the government, and the value was only given in the event of the vessel being withdrawn from its grasp.

352*] *In addition to the obvious and natural import of the words used by the legislature, the opinion that an alternative is given to the government derives some strength from the consideration, that the forfeitures are claimed from distinct persons. If the ship be forfeited she is claimed from all the owners. In an action for the Anthony Mangin, Harman Henry Hackman could not have defended himself by averring his interest in the vessel, and that only the share of Brown was forfeited; but in an action against Hackman, for the value, the declaration, or information, must have averred that he was the person who took the false oath, and proof that it was taken by his partner would not have supported that averment. They are, then, distinct forfeitures, claimed from different persons. The ship, from the owners; the value, from the particular owner who has taken the false oath.

The United States are entitled to both, or to only one of them. A right to both has not, and certainly cannot, be asserted. If there be a right only to one, the government may elect to take either, but till the election be made, the title to the one is perfectly equal to the title to the other.

It seems to be of the very nature of a right to elect one of two things, that actual ownership is not acquired in either until it be elected; and if the penalty of an offense be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering, materially, the situation in which that person is placed, to say that either is vested in him before he makes that choice. If both are vested in him, it is not an election which to take, but which to reject; it is not a forfeiture of one of two things, but a forfeiture of two things, of which one only can be retained.

That the legislature may pass such an act is certain; but that the one under consideration is such an act, is not admitted by the court.

If the property in the vessel was actually vested in the United States by the commission of the offense, then the judgment of a court, con-
353*] demning the vessel, *or declaring it to belong to the government, would, in fact, do nothing more than ascertain that the offense had been committed; it would not vest the thing more completely in the government, in point of right, than it was vested by the commission of the offense. If, notwithstanding the complete ownership of the vessel, which the argument supposes in the government immediately upon the act of forfeiture, and in virtue of that act a suit for the value might have been maintained, it would seem to follow that a judgment, declaring the vessel to be the property of the United States, would not bar an action for the value, provided the benefit of that judgment had not been received by the United States. The real principle on which an action for the value can be maintained would seem to be, that the ship itself did not belong to the United States in consequence of the false oath, but in consequence of the election to take the ship. If this election be not made, and the government shall elect the value, then the property of the vessel remains in the original owners, and is no obstacle to a suit for the value. But if this opinion be mistaken; if the property in the ship be immediately invested in the government, notwithstanding which the value may be claimed, the court cannot distinctly perceive why the same action might not be maintained, notwithstanding the declaration of a court that the property was in the United States, provided the benefit of their judgment was not obtained. In this view of the case, if the court of admiralty had decreed in favor of the United States, and the Anthony Mangin had been destroyed before the benefit of that judgment had been received, the person who had taken the false oath might still have been sued for the value. This would never be contended; and yet if the absolute ownership of the vessel by the United States does not preclude a right to sue for the value before a judgment be rendered, there is some difficulty in discerning when it will preclude that right. In fact, the idea that one of two things is actually vested in government by an act to which forfeiture is attached, seems incompatible with the idea of a right to elect which of two things shall vest.

It seems, then, to be the necessary construction of the act of Congress that the United States acquired no *property in the [*354 Anthony Mangin until they elected to pursue that part of the alternative given by the statute. Of consequence, the money for which that vessel was sold, was not, at the time, received for the use of the United States; but for the use of the creditors of the bankrupt.

To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case, that an election subsequent to the sale shall carry back the title of the United States to the commission of the act of forfeiture, so as by this fiction of law to make them the real owners of the vessel at the time of sale, and, consequently, of the money for which she was sold?

Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title to the Anthony

Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

The court will not inquire whether an action on the case against Grundy & Thornburgh for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown. But some objections to it may be stated which deserve consideration. It certainly gives no notice of the nature of the claim, a 355*] circumstance *with which, in a case like this, the ordinary rules of justice ought not to dispense. It asserts a claim founded on a crime yet remaining to be proved, not against the person who has committed that crime, or against him who possesses the thing which is liable for it, but against those who, though the assignees of the effects, are not the assignees of the torts committed by the bankrupt. It may change the nature of the defense.

The court suggests these difficulties as probably constituting objections to the action, without deciding on them. The points previously determined show that it is not maintainable in this case, under that alternative of the statute which subjects the vessel to forfeiture.

It remains to be inquired whether it can be maintained under the provision which gives a right to sue for the value.

Upon this part of the case no doubt was ever entertained. Not only must the declaration specially set forth the facts on which the right of the United States accrued, and the law which gives their titles, but the action must be brought against the person who has committed the offense. Discarding those words which relate to other objects, and reading those only on which the claim to the value is founded, the statute enacts, that "in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the value of the vessel, in respect to which the same shall have been made, to be recovered, with costs of suit, of the person by whom such oath shall have been made." It certainly requires no commentary on these words to prove that an action for the value can only be supported against the person who has taken the oath.

It being the opinion of the court that this action is not maintainable under any proof offered by the plaintiffs, it was deemed unnecessary to inquire whether the other exceptions in the record be well or ill founded. *Without declaring any opinion respect-[*356 ing them, the judgment of the circuit court is affirmed.

Judgment affirmed.[1]

1.—The opinion of Judge Winchester, in the case of *The United States v. The Anthony Mangin*, Norman, claimant, referred to in the argument, was as follows:

The libel is grounded on the statute for enrolling and registering ships and vessels.

The proceeding being *in rem*, all the world become parties to the sentence, as far as the right of property is involved; and of course, all persons any wise interested in the property in question are admissible to claim and defend their interests.

The libel states the cause of action, with all the averments necessary to support the affirmative allegation, that a forfeiture has accrued.

The only claimant intervening in this cause, is T. W. Norman, who alleges himself to be a purchaser bona fide for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase; and under such purchase, *i. e.* bona fide, and for valuable consideration, claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits.

On these proceedings, several questions of law have been raised and argued by the counsel; and as the great point in the cause does not appear to have ever received, either in this country or Great Britain, any direct judicial determination, I have, with great diligence, examined into the questions, which, from the breaking the cause, I saw I must necessarily be involved in the determination.

The opinion which I am now to give, though the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court, upon a new, great and important legal question, and which will probably receive, as it ought, the ultimate judgment of the Supreme Court.

It is necessary to keep in different views, the questions of fact in issue, the questions of law arising from those facts, and the parties between whom they arise.

It is to be distinctly remembered, that A. Brown, whose willful perjury is alleged to sustain the forfeiture sued for, is no party to this suit; neither are his assignees, in any shape, parties to this suit, to be directly affected by the judgment. Every consideration, therefore, which would support a prosecution against the actual offender, to recover the penalty of his willful crime, or which might be alleged against those who stand in his situation, as privies in law *quo ad* the forfeiture, must be laid out of the case.

The only parties to this suit are, the United States and the informant, as libellants, and T. W. Norman, as claimant of the ship.

I think it peculiarly necessary to confine my opinion to the state of facts, and the questions of law applying to the parties in court, because it is not necessary for me to decide whether the assignees of A. Brown are clothed with any of the essentials characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had; and the question *de bona fide emptoris*, does arise directly upon Captain Norman's claim, and will determine this case. To that I shall, therefore, immediately proceed.

No seizure was made, or libel filed against the ship, until after Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration; nor until after he had obtained a new register, in his own name, upon that purchase.

It is argued by the libellants' counsel, that Brown was not competent to pass any property to his assignees, nor they to any purchaser under them, as the forfeiture relates back to vest the property from the time of the false oath, and that the claim of the libellants is paramount to that of the claimant.

The defendant's counsel argue, in support of his claim, that the relation back to the time of the offense is never admitted to overreach rights intermediately acquired by third persons.

In commenting upon the case from 1 D. & E. 252, when the argument was first opened, Mr. Martin

357*] *THE MARINE INSURANCE CO. of Alexandria, v. JOHN AND JAMES H. TUCKER.

If a vessel be insured "at and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston, for Baltimore and Alexandria, and sails with intent to go first to Baltimore, and from thence to Alexandria, and, before she arrives at the dividing point, is captured; it is a case of intended deviation only, and not of non-inception of the voyage insured. It depends upon the particular circumstances of the case, whether, if the vessel be captured and recaptured, the loss shall be deemed total or partial.

ERROR to the circuit court of the District of Columbia.

This was an action of covenant, by John and James H. Tucker, on a policy of insurance, dated September 1st, 1801, upon the sloop Eliza,

pressed very strongly the *dictum* of Lord Kenyon, that if the relation back to the time of an offense was admitted as to the property, it would, in every case, equally relate to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases for applying the argument *ab inconvenienti*, and as such I was forcibly struck with it when mentioned.

The manner in which Lord Kenyon is reported to have made this observation plainly shows it to be the declaration of a sudden impression, and which, though correct as applied to some special cases, is not so in the latitude reported, either at common law, the civil law, or in equity supported by policy.

1. At common law, even as to the guilty party, no attainder whatsoever has relation, as to the mesne profits of land, but only from the time of the attainder. 3 Bac. 272; Co. Lit. 290, b, 118, a.

2. By the civil law, and the rules of equity adopted from that code, a subsequent possessor is not only not in a worse situation than those from whom he derives his possession, but even in cases where the original possessor might be bound to restore profit, a bona fide possessor is exempt from any such obligation; as in the case of a bona fide purchaser. *Bona fide emptor non dubie percipiendo fructus etiam ex re aliena, interim suos faciat, non tantum eos qui diligentia et opera ejus proveniunt, sed omnes; quia quod ad fructus attinet loco domini est. Zouch*, 2 J. C. 213.

3. It would not be equitable or just in the abstract, to permit a legal owner to lay by, to avail himself of the ignorance of an innocent holder. And the same considerations of policy, which in England permit the offender and his family to enjoy the profits of lands forfeited for treason, which is a strong and acknowledged case of relation to the offense, lest the land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offense, or only to the time of conviction.

As this reason against relation does not appear to have the force it carried at first view, we must have recourse,

1st. To the principles of decision in analogous cases; in their application, always having regard (as was justly argued by Mr. Harper, on the motion to produce Brown's examination before the commissioners) "that a relation back shall never be admitted to injure the rights of third persons, nor to protect or favor wrong." And.

2d. To the statute under which the forfeiture is claimed in this cause.

The adjudged cases on this subject are six classes of offenses, which incur a forfeiture of real estate; 2 B. C. 267, and seventeen which produce a forfeiture of personal property; 2 B. C. 421. In this numerous classification, the principle which governs each description of cases does not materially differ. I have, therefore, selected only,

1st. The cases of outlawry, and attainder of crimes; and, (as illustrative of these cases,)

2d. Waived goods.

3d. Relation of executions at common law, and since the statute of Charles; and,

4th. (As involving the general doctrine of this case, and to explain the case of *Roberts v. Withered*, cited by Mr. Harper, from 5 Mod. 193; Salk. 223.) A case of villanage which governed that decision.

1. Attainder, or conviction of crimes and outlawry.

Of this description there are two classes, which are adjudged to have relation to the time of the offense committed, and overreach all intermediate alienations, treason and *felo de se*. The case of treason, in which the forfeiture as to land relates to the time of the offense committed, depends upon feudal principles. As the land could not be aliened by the tenant voluntarily, it would be preposterous to admit that to be done, through the medium of a crime, which could not be done by a lawful act; and the power to sell, introduced by subsequent statutes, is construed as applying only to lawful alienations. The reason assigned in some books, that it shall relate to the offense, "because the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which, the same books admit, is only affected from the time of the conviction; and the time charged is traversable, even in the case of land, by third persons claiming an interest therein. 5 Bac. 228; H. H. P. C. 261, 262; 3 Bac. 271; Plow. 488; 8 Co. 170; H. H. P. C. 264, 270; 3 Inst. 230.

It is a proposition universally true, that the forfeiture, upon an attainder of treason, relates but to the conviction as to chattels, unless the case of the offender killed in resisting, or flight, form an exception, which may well be doubted. Indeed says Lord Coke, it hath always been holden, that any one indicted of treason or felony, may, bona fide, sell any of his chattels, real or personal. 3 Bac. 271; Perk. 29; 8 Rep. 171; Skinner, 357; *Jones v. Ashhurst*, 4 Com. Dig.; Forfeiture, B. 4; 2 Inst. 48.

In the case of a *felo de se* it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided. 3 Bac. 272. This is the only case I have ever discovered, in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a drag-net indeed. It may, perhaps, most correctly be considered as a case *sui generis*, and neither for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases.

Those who are curious on this subject, will be amused with the argument of Chief Justice Dyer, on the drowning of Sir J. Hales, and will, probably, be as much convinced by the reasoning of the Chief Justice, as by the logic of the greve digger in Hamlet, to prove that the drowning of Ophelia was *se defendendo*. Plowd. 262.

Outlawry subjects the party to forfeitures, which are well known to depend upon the nature of the suit on which they are prosecuted. Without inquiring when an office is necessary, or may be dispensed with by the crown, I shall mention one case where, even after an outlawry, (of which purchasers might always have notice, as it is a matter of record,) a fair purchaser was protected, even against the crown. It is from Hardres, 101, *The Attorney General v. Freeman*. A. was outlawed, and afterwards made a lease of his lands and afterwards, these lands, among others, were found by inquisition; and this case was pleaded in bar, to bind the king before the inquisition. The court held that a lease, or other estate made by the party after outlawry, and before an inquisition taken, will prevent the king's title, if it be made bona fide, and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made after the inquisition, will take away or discharge the king's title. 5 Bac. 564; Salk. 395; Carth. 442.

These cases are strong to show the general protection afforded by law to fair purchasers, even where the forfeiture is *in rem*, and the offender is not actually devested of his possession, the necessity of which is directly affirmed in the second description of cases to which I have referred, viz.:

2. Waived goods.

"As to waived goods, these belong to the king, and are in him without any office, for the property is in nobody. They may belong in like manner to the lord of the manor by grant, but not by prescription." 5 Bac. 517; 5 Co. 109.

The general principle of these cases is conformable to that quoted by Mr. Harper from 12 Mod. 92, to show, that an offense like that charged

at and from Kingston, in Jamaica, to Alexandria, in Virginia.

358*] *The defendants pleaded, 1st. That the vessel never sailed on the voyage insured. and was not prosecuting the voyage insured at 359*] the time of the capture; and, 2d. *A general performance of the covenants contained in the policy; upon which pleas the issues were joined, and verdict and judgment for a total loss.

*At the trial the defendants took three[*360 bills of exceptions.

*The 1st presents the following case: [*361

The execution of the policy was admitted. The vessel was of the value insured, and belonged to the plaintiffs,*(the defendants [*362 in error), who were British subjects, resident at Alexandria. The vessel was navigated under a British register, and had sailed from Alexandria for *Kingston, in June, 1801, [*363

against Brown, devested the property out of him, and left it, as it were, in abeyance until suit, which vested the property by relation from the act of forfeiture.

A position of greater comprehension, or which, as a general one, should embrace the libellants' case, could scarcely be imagined. Waived goods are in the king without office; that is, even without seizure, the purpose of which, as to legal title to the king, is answered by the office; the property is, as it were, in abeyance; yet this case, so completely applicable in its general principles, contains the strongest possible illustration of the doctrine, that a title by forfeiture, in the case of a personal chattel, begins from suit, seizure, or conviction, and has no relation back; for "the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; for the lord's property begins from the seizure." 5 Bac. 517, Kitchen, 82.

This case is conclusive against Mr. Hollingsworth's argument, that this question is a question of property only, since it proves that property only begins from the seizure, which cannot be lawfully made to affect an intermediately vested right of a third person.

The relation of executions at common law, and since the statute; considering this case as one between the government and the claimant, from analogy to cases of the king's precedency in execution.

By the statute of 33 Hen. VIII. c. 9, it is enacted, that if any suit be commenced or taken, or any process awarded for the recovery of any of the king's debts, then the same suit, or process, shall be preferred before any person or persons.

And as to the king's execution of goods, the same relates to the time of awarding thereof, which is the teste of the writ; as it was in the case of a common person at common law. 2 Bac. 734.

Now to apply this doctrine to the case before the court, and even admitting to this libel the same extent of relation as is admitted at common law upon the king's execution against personal chattels, and as to real and personal by the above recited statute, will it overreach the sale to Captain Norman?

It is generally agreed that an execution executed, though posterior to the time to which the king's extent relates, bars the king's priority; and in the case of *Lechmere v. Thorowgood*, 3 Mod. 236; Comb. 123; it was holden that if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed, for the property of the goods is changed by the subject's execution.

Here, then, we advance one step farther in restricting the doctrine of relation, as it applies to individual interests. It is presumed that the principles of relation upon executions since the statute, are too familiar to require any reference to adjudged cases.

The case of *Roberts v. Withered*, as reported by Salkeld, and copied by Bacon, is in these words: "By the act of navigation, 12 Car. II. c. 18, certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same."

It was adjudged that in this case the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villain distrained; for the bringing of the action vests a property in the plaintiff. When this case was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court than any which occurred in their researches. On a careful examination of that case, I now think it will be found not to bear on the point now to be decided.

In the first place, it may be observed, that the case, as reported, does not afford any ground to presume that any other person than he who unlawfully imported the goods was interested in that suit; but on the contrary it is presumable that it was a suit against the original importer. In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation. And further, it is to be remarked, that the question in that case seems to have been only upon the form of action. It was detinue which is founded on property; and all that that case decides is, that in a case of specific forfeiture, the bringing of a suit vests a property in the plaintiff sufficient to sustain that form of action; for the case to which it is likened, and on which the decision rests, is express to show it does not relate to the interests of others; for, says the book, "in this case the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villain," which case, as I will show, goes not only to the form of action, but to the full length of this case. I will read that case. [Vide Littleton, section 177, with Lord Coke's comment thereon.] So in this case the ship was liable to forfeiture, and might have been specifically recovered from Brown by the government, or any prosecutor under its laws, before a bona fide alienation by him; but if they have waited until such alienation by him, and a third person has honestly bought and paid for the property, they may be answered, in the language of Littleton, "that it shall be adjudged their folly that they did not enter when the offender was in possession;" for, according to Lord Coke, before such seizure they had neither *jus in re*, nor *jus ad rem*, but only a right to sue, which I understood to be Lord Coke's possibility above referred to. From all these cases and principles I infer that the relation of the forfeiture to the time of the offense, in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in cases of forfeiture of chattels, the relation is only to the time of conviction; that the forfeiture to which a party is subjected by statute, of a personal chattel, must be construed with relation to the continuance of his ownership in that chattel at the time of conviction, and cannot be prosecuted *in rem* to affect a bona fide purchaser for a valuable consideration; and this construction I think not only warranted by the statute on which this suit is founded, and which speaks of a recovery of the value of the ship, but also by sound legal principles. The value can only be recovered against the actual offender, and never from a bona fide holder; for against the offender it is the value at the time of the offense; even against a *mala fide* holder it is only of the thing, be the value of that thing greater or less. If any holder bona fide was liable because of his possession, he would not be the less so after he had parted with his possession; but he might be made answerable for the value of the thing in the same manner as if the possession continue with him; but even where he was not strictly a bona fide holder, the remedy is lost if his possession is gone. And it is but just, when two remedies are given to punish an offense, one of which shows a plain intent of the legislature, that it shall follow the offender personally, or in his personal interests, so to construe the other remedies as not to permit them to be extended to involve others who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown, by his false swearing, subjected the ship to forfeiture *de facto*, and that no alienation by him could vest a better title in the vendee than the vendor possessed; and that as he held the ship subject to forfeiture, so any holder under him, or through him, must take subject to that forfeiture, is certainly a strong one.

with a cargo consigned to Bryan & Co., in Jamaica, who were instructed, by a letter from the plaintiffs, to sell the vessel and remit the 364*] *proceeds. The vessel was commanded, ostensibly, by Boaz Bell, but really, by Eli R. Patton, who also went as supercargo, with 365*] orders to sell the vessel at any rate; *but if not sold, to return to Alexandria with the proceeds of the outward cargo. Bryan & Co. used their best endeavors to sell the vessel, but 366*] without effect, and *could get no offer for her, either before or after she sailed from Kingston. Having taken in ten tierces of coffee, the property of the plaintiffs, to be delivered at Alexandria, she cleared out at the custom-house, in Kingston, on the 10th of August, 1801, for the port of Alexandria, with intention to sail, on that day, with convoy then lying at Port Royal, but which convoy did not sail until the 17th.

While waiting for convoy, freight was offered to Baltimore, and the master, having obtained a permit and made a post entry, discharged his ballast, and took on board twenty hogsheads and ten tierces of sugar, for that port, and signed bills of lading accordingly; but this caused no delay as to the time of his sailing, as he waited for convoy; it being known that several Spanish cruisers were hovering on the coast of Jamaica. On the 17th she sailed for Baltimore, with intention to go first to Baltimore, and from thence to Alexandria. On the 22d, whilst sailing, in the usual course from Kingston to Baltimore and Alexandria, she was captured, by a Spanish vessel, as prize, and all her men were taken out by the Spaniards, excepting Bell and one other. In less than three days she was recaptured by a British sloop of war, and carried back to Kingston on the 26th of August, where she was libelled for salvage.

*The rate of salvage, in cases of re- [*367 capture, is fixed by British statutes, and does not exceed one-eighth of the value, at the port of adjudication.

Bryan & Co., as agents of Patton, put in a claim in behalf of the underwriters, alleging that the vessel had been abandoned to them.

The vice-admiralty court decreed restoration, on payment of one-eighth for salvage, and full costs; and directed the vessel to be sold, to ascertain the true value, unless it could be otherwise agreed upon.

The claimant used no endeavors to agree with the captors, as to the true value of the vessel and cargo, otherwise than by a sale; and, on the 1st of October, she was sold for 915 dollars, and the ten tierces of coffee were purchased by Patton, for the plaintiffs, at the price of 1,000 dollars. The costs, charges, and commissions, amounted to 909 dollars, and the salvage to 239 dollars. The agents of the plaintiffs were content, and satisfied with the mode of ascertaining the value by sale, and did not apply for an appointment of appraisers to ascertain the value.

On the 24th of September, 1801, when the abandonment of the vessel was made, by Bell and Patton, she was safe in the harbor of Kingston, but liable for salvage; and the value of the ten tierces of coffee was sufficient to pay the salvage, and all costs and charges.

The register was lost by the capture and recapture, and has never been found. The plaintiffs could not, according to the laws of Great Britain, obtain a new British register, while they continued to reside out of the British dominions.

Baltimore is not in the direct course from

The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true as a general principle; and the exceptions to its operation are those on which I rely to warrant my construction of the statute in providing for a recovery of the value of the ship, as well as to show that in some instances he who has no title at all may yet transfer a valid one to personal chattels.

Robbery can give no title to goods, and upon conviction, there is a judgment of restitution, according to the statute, which fixes the remedy against any person in possession at the time of the conviction; and this is by the express provision of positive law. Yet the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft, before conviction. And if the owner of goods loses them by a fraud, and not a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person; *e. g.*, a pawnbroker, who has fairly acquired a new right of property in them.

If, therefore, he who hath no title at all, may in some cases, nevertheless, give a legal right, *a fortiori*, he who holds by a title defeasible only within a limited time, (for by the statute of limitation, the prosecution, in cases like the present, must be within three years,) may transfer a good title to a fair purchaser for a valuable consideration.

The language of Blackstone is very emphatic: "the right of proprietors of personal chattels is preserved from being devested, only so far as is consistant with that other necessary policy, that purchasers, bona fide, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller."

The statute provides, that in case of a willful false oath in any of the matters required, previous to the obtaining of the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which the same shall have been made, or the value thereof, to be recovered," &c.

It seems to me to be the plain and just construction of this statute, that the willful false swearing does not *ex directo* produce a forfeiture of the ship. The forfeiture is alternative, either of the ship, or the value of the ship, at the election of the government or persons suing; but not of both the ship and the value.

If the government had recovered the value from Brown, there would have been an end of proceeding against the ship. And if the offense charged against Brown, only produces a specific forfeiture by a subsequent election, the argument is cogent, that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity; and conclusive, that Brown's title was not forfeited *de facto*, but forfeitable only, and, therefore, within the principles of the cases of villanage and waived goods, before relied on by me, and expressly by Blackstone, 2 Com. 421.

Further, the forfeiture is of the ship or the value. I have construed this clause somewhat differently from all the counsel, and though this circumstance produces doubts of its correctness, yet, as it has weight with me, and minds of less comprehension may sometimes embrace truths which may escape superior understandings, I think it my duty to mention it. It is this. That the ship is not liable to forfeiture in the hands of any holder, other than the persons false swearing, in any case but where such holder would be liable to a suit for the value.

The words, that there shall be a forfeiture of the ship, &c., or of the value thereof, to be recovered, with the costs of suit, of the person by whom such oath or affirmation shall have been made, plainly show the intent of the legislature, that the penalty and punishment should attach to the offender only. "To be recovered of the person," both grammatically and legally relate to the object to be recovered.

Kingston to Alexandria, after a vessel has entered the Chesapeake Bay.

The plaintiffs received information of the capture and recapture, at the same time, in a letter from Bryan & Co., dated 25th of September, 1801, which also mentions the sale; but it 368*] did not appear at what time the *plaintiffs received that letter. On the 26th of November, they offered to abandon the vessel to the underwriters, who refused the offer. Upon this state of facts, the defendants moved the court to instruct the jury not to find a verdict for a total, but, at most, for a partial loss, which instruction the court refused to give, and the defendants took their bill of exceptions.

The second bill of exceptions did not vary the material facts above stated, but alleged that the vessel sailed from Kingston, with an intention of going to Alexandria, but, also, with an intention of touching first at Baltimore, and there delivering part of her cargo, and from thence to Alexandria. That while prosecuting her voyage, with that intent, and while in the direct course, both at Baltimore and Alexandria, and before she arrived at the dividing point between Baltimore and Alexandria, she was captured, &c. Whereupon, the plaintiffs prayed the court to instruct the jury that there was no deviation at the time of the capture, and that the voyage insured was actually commenced; which instruction the court gave as prayed, and the defendants took their second bill of exceptions.

The third exception was to the refusal of the court to instruct the jury that the loss of the register, by means of the capture and recapture, was not sufficient, in law, to defeat the voyage; but that the loss of that document might be supplied by special documents of public officers, setting forth the circumstances of the loss, so that the vessel might have prosecuted that voyage, without seizure and confiscation, under the laws of Great Britain, for want of a British register.

E. J. Lee, for the plaintiffs in error.

1. The voyage insured was never commenced; and the vessel was not in the prosecution of that voyage, at the time of her capture.

2. The plaintiffs cannot recover for a total loss. If there was, in fact, a total loss, it was caused by the misconduct, or neglect, of the plaintiffs, or their agents, in not doing the best in their power for all concerned.

*3. The plaintiffs had not a right to [*369 abandon at the time when they offered to abandon.

4. The loss of the register was not equivalent to the loss of the vessel.

5. The not communicating to the underwriters the intention of going to, or touching at, Baltimore, was such a concealment as vacated the policy.

1st. Was there an inception of the voyage insured?

The contract of insurance is founded on good faith, and must express the intention of the contracting parties. The object of a policy is to reduce to certainty, and to preserve unaltered, what each party engages to perform. The voyage insured must be truly and accurately described, as to the time and place at which the risk is to commence, the place of departure, and the place, or places, of destination.

Every circumstance relating to the voyage must be stated with the greatest regard to truth. When, therefore, it is intended that the vessel shall touch at an intermediate port or ports, it

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to wit, the ship, or the value thereof; and to the person from whom, and from whom only, the one or the other is to be recovered.

The guilt of false swearing forfeits only such interests as the offender possessed; for, by the express provision of the 16th section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture; and the words of the statute which connect the recovery with the forfeiture in this case, exclude the idea of any recovery from an innocent holder. *Expressio unius esta exclusio alterius.*

If the ship is forfeited by the sole act of the false swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers in public market. Every particular sale would be a particular conversion, and every one through whose hands she may have passed might be sued for the value of the price; but the statute says, that the value shall only be recovered of the offender himself. A party having fairly obtained and fairly lost or departed with his possession, would not, in such case, be liable for the thing, or its value. 3 Com. Dig. 359; 2 T. R. 750. If not liable when his possession has honestly ceased, neither can he be made so when it honestly continues, since his own act cannot vary his responsibility.

Does reason or policy require a different construction?

The government prohibits an act under a penalty against the party offending. They say, we, for this, forfeit the thing in respect to which you have sworn falsely, if it continues in existence, and is yours; but if lost, or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated, if sold, pay the value; if you have fraudulently impaired the thing, pay the value. The one or the other shall be recovered of you, or *you*, the guilty party. But this prohibition contains no threat of punishment against an innocent holder.

No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender, and the law can never require of a purchaser to examine into the secrets of the heart.

It is more the interest and policy of government to increase its wealth and strength by the employment of its ships in trade and commerce, than to augment its revenue by forfeitures. It, therefore, wisely protects the interests of fair shipholders from forfeiture for the crimes of others, while it carefully provides for the punishment of fraudulent contraventions of its laws. Protection is not, by this construction, afforded to guilt or fraud; it is only a shield for innocence.

The remedy remains, as it ought, against him who committed the offense. Government cannot be deprived of its forfeiture by any fraudulent alienation. Such a sale would be void. Skinner, 357. *Jones v. Ashhurst;* 3 Co. Twine's case; 2 Bl. Com. 424.

The possession is legally, and, to effectuate the statutory provision, still in the vendor. Indeed, all the reasoning on this subject is contained in two axioms of the civil law, to which this court may be allowed to refer: *In rem actione tenetur qui dolo desiit possidere.* Zouch, Elem. 197. *Et aliquando, quod fieri non debet, factum valet; firmum et probum quod sit bona fide, improbatur autem quod sit malo fide vel dolo.* Zouch, Elem. 41.

If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interests of commerce, and the security of all shipholders.

I do, therefore, order and decree, that the libel in this case filed, shall stand dismissed, and that the ship, &c., be restored to the claimant.

But as the case involved questions of great dignity, upon which eminent counsel have differed in opinion, and judges may differ, and it was proper, in every view of the case to put those questions in a course of legal adjudication, I shall certify probable cause of seizure, and decree restitution, without costs.

must be stated in the policy. Marshall on Insurance, 227.

This minuteness of description must have for its object the protection of underwriters from those frauds to which they are exposed by their unfavorable situation for obtaining correct information. But this object will be defeated, if the insured are not bound to commence and prosecute the voyage described in the policy.

The voyage insured was from Kingston to Alexandria. The vessel was bound to sail directly to Alexandria, as her only port of destination, with all convenient dispatch, in the regular and usual course from the one place to the other. If she sailed with a determination to go first to Baltimore, and there deliver a cargo of 30 hogsheads of sugar, and afterwards to come from Baltimore to Alexandria, she did not com-
370* mence, *and was not lost in the prosecution of, the voyage described in the policy. If the voyage commenced was not in every respect the same with that insured, the underwriters are not liable.

The voyage commenced was not a voyage from Kingston to Alexandria, but a voyage from Kingston to Baltimore, and from Baltimore to Alexandria.

It is an uncontroverted principle of marine law, that if the voyage is changed, or not performed in the manner described in the policy, the policy does not attach. This principle is established by the case of *Wooldridge v. Boydell*, Doug. 16.

This is not a case of deviation, but of non-inception. In cases of deviation the termini are the same. But it is immaterial whether the termination of the voyage commenced is the same with that insured, when the vessel, in fact and in truth, sails directly for a port not mentioned in the policy, nor contemplated by the parties at the time the insurance was made. If the vessel in this case had commenced a voyage for Baltimore, but with an intention to touch at Alexandria, in her way to Baltimore, it would not have been the voyage insured. So if the captain was under an engagement, when he sailed from Jamaica, to go to Baltimore at all events, before he came to Alexandria.

The termination of the voyage commenced was Baltimore and Alexandria. The vessel was obliged to come to both places. The termini of the voyage were not those described in the policy.

The necessity of commencing and performing the precise voyage described in the policy, is further proved by the opinion given in the case of *Beatson v. Haworth*, 6 T. R. 531, where it is decided, that if a vessel is insured to several ports, she must pursue the order in which the places are named in the policy.

In the case of *Way v. Modigliani*, 2 T. R. 30, the question was, whether the policy ever attached; and, if it did, whether it was not dis-
371*] charged by the vessel's *not sailing upon the precise voyage insured. The case was this: a ship was insured "at and from the 20th of October, 1786, from any ports in Newfoundland to Falmouth, or her ports of discharge in the channel." On the 1st of October the ship left Newfoundland, and went to the Banks, fished there until the 7th and then sailed from the Banks to England; and on the 30th of November, while in the direct track from Newfoundland to England, she was lost. She left Newfoundland for the Banks long before the policy attached, and although on the 20th of October she was in the direct course from Newfoundland to England, and so continued until she was lost, yet, because she sailed from Newfoundland with an intention of going to the Banks, and from thence to England, and actually carried that intention partially into effect, it was determined that the policy did not attach, and that the voyage insured was not commenced. The partial execution of the intent cannot vary the principle, and was not relied upon in that case.

BULLER, *J.*, said, "The first is the substantial ground, namely, that the policy never attached at all. Where a policy is made in such terms as the present, to insure a vessel from one port to another, she must have sailed on the voyage insured, and not on any other. The voyage insured is from a port in Newfoundland to England, whereas the vessel sailed to the Banks. which was a different voyage. This point has been already decided by the case of *Wooldridge v. Boydell*, where it was held, that if a ship, insured for one voyage, sail upon another, although in the same track part of the way, and she be taken before the dividing point between the two voyages, the policy is discharged. That was a stronger case than the present, for there the very intention of sailing upon a voyage different from that insured, vacated the policy."

The actual sailing to a port is only one mode of proving the sailing with an intention of going to that port. If the intention is proved, it is not material by what means. Marshall, 406, (note.) If the voyage is changed, the policy is vacated.

*A voyage may be changed by taking [*372 on board a consignment to a different port; and the consignment will be evidence of the change. Or it may be changed by varying the plan of the adventure before the commencement of the risk; but a deviation takes place in the execution of the original plan. Therefore, an intention to alter the voyage will destroy the contract. Millar, 431.

To vary in the smallest particular from the original plan of the voyage, constitutes an alteration. Millar, 392.

In the present case the plan of the voyage was fixed by the policy, and on the 10th of August the vessel had actually cleared out with an intent to pursue it; after which, she discharged her ballast, and took in 30 hogsheads of sugar, to be delivered in Baltimore. This not only altered the original plan of the voyage, but increased the risk of capture, by increasing the value of the prize.

The case of *Stot v. Vaughan*, cited in Marshall, 232, 4 Williams's Cases, 296, determined by Lord Kenyon, is in favor of the underwriters upon this point.

The case of *Kewley* v. *Ryan*, 2 H. Bl. 343, is the only one which has the appearance of opposition. But that case will be found to be unlike the present in the following particulars:

1. In *Kewley* v. *Ryan*, the vessel sailed from Grenada for Liverpool, which was the voyage insured, but with an intention to touch at Cork, which was in the usual course from Grenada to Liverpool. But, in the present case, the vessel sailed for Baltimore, with an intention to come

round to Alexandria from Baltimore, which is not in the course from Kingston to Alexandria.

2. In *Kewley v. Ryan* the vessel intended only to touch at Cork; but, in the case at bar, the vessel sailed on a trading voyage for Baltimore. *Stitt v. Wardell*, 2 Esp. Rep. 610.

373*] *3. The Eliza altered the plan of the original adventure, by taking in sugar for Baltimore; but in *Kewley v. Ryan*, it does not appear that the original plan was changed.

4. The risk was increased by taking the cargo for Baltimore, but the intention of touching at Cork did not increase the risk.

Independent of these differences between the two cases, it is very questionable whether the determination in *Kewley v. Ryan* is correct upon principle. It establishes a doctrine which enables the insured to defraud underwriters, by making the evidence of intention to vary the voyage depend upon the single testimony of the master, which is apt to bend to the interest of his employers. It too often happens, that insurance cases depend upon the same kind of testimony.

The case of *Kewley v. Ryan* is also in principle contradicted by that of *Middlewood v. Blakes*, 7 T. R. 162; Marshall, 406, note b.

2d. The 2d point is, that if the plaintiffs are entitled to recover any thing, they can recover only for a partial loss; for if an actual total loss has happened, it has arisen from the negligence and misconduct of the plaintiffs, or their agents, in not doing the best in their power for all concerned.

The consideration of this question will involve that of the right of the plaintiffs to abandon at the time they offered to abandon; which is the third point in the cause.

In many instances the practice of abandoning has been extended too far. The insured should in no case be permitted to abandon, where the effects insured, or the greater part of them, still exist, and are in the power of the insured.

The general rule is, that the insured may abandon in all cases where, by means of any of the perils insured against, the voyage is totally lost, or not worth pursuing, or where the thing 374*] insured is so damaged as to be *of little or no value to the owner, or where the salvage is very high, or where what is saved is of less value than the freight, or where further expense is necessary, and the insurer will not undertake, at all events, to pay that expense.

These principles are declared in the following cases: 2 Burr. 683, *Goss v. Withers;* 2 Burr. 1198, *Hamilton v. Mendez;* 7 T. R. 421, *Aguiler v. Rodgers;* 1 Dall, Rep. 11, *Story v. Strettell;* Park, 165; 4 Williams's Cases, 373, 376.

The capture or arrest of a vessel, or any detention, is *prima facie* a total loss, and immediately upon the capture, or at any time while the capture continues, the insured may abandon, and give notice, and thereby entitle himself to claim as for a total loss. But this must be done while the insured knows of the continuance of the capture, and not after he has information of the recovery or safety of the vessel. *M'Master v. Shoolbred*, 1 Esp. Rep. 237; Marshall, 494, 501.

On the other hand, the recapture does not necessarily deprive the insured of the right to abandon. For, if in consequence of the capture, the voyage is lost, or not worth pursuing, if the salvage be very high, or if further expense be necessary, and the insurer will not undertake to pay that expense, the insured may abandon. Therefore, the rule is, that if the thing insured be recovered before any loss is paid, the insured is entitled to claim as for a total or partial loss, according to the situation of the case at the time when he makes his claim. For there is no vested right to a total loss until the insured elects to abandon.

There are two cases which will be cited for the defendants in error. *Pringle v. Hartley*, 3 Atk. 195, and *Goss v. Withers*, 2 Burr. 683, neither of which is like the present.

In the case of *Pringle v. Hartley*, the salvage amounted to a moiety of the value of the vessel insured; and there was no person present to give security, or answer for that moiety.

*The case of *Goss v. Withers* was an [*375 insurance on the ship and goods. One-fourth of the goods were thrown overboard to preserve the vessel and the residue of the cargo. After this the vessel was captured by the French. The master, mate and all the sailors, except an apprentice boy and a landsman, were taken out and sent to France. The ship remained eight days in the hands of the French, and was retaken by a British privateer, and, on the 18th of January, was carried into port for adjudication. Immediate notice was given, and an offer to abandon.

But before her capture, the ship, in a storm, was separated from her convoy, and disabled for proceeding on her voyage, without going into port to refit. The residue of her cargo was spoiled while she was refitting, after the offer to abandon, and before she could be refitted. The salvage was a moiety; the master and mariners were prisoners; the charter party dissolved; the freight, except for the goods saved, was lost, and the voyage was not worth pursuing.

But the situation of the Eliza was very different. She sailed from Jamaica on the 17th of August, was captured on the 22d, recaptured in less than three days, and on the 26th was brought into Kingston, the very port from which she had sailed only nine days before, and where the agents of the insured were. The salvage was only one-eighth, and the coffee on board, belonging to the plaintiffs, would have been more than sufficient in value to pay the whole salvage, and all the charges and costs, which did not exceed 909 dollars, even when attended with the costs of the libel, sale and commissions.

If they had rated the vessel at 3,800 dollars, the sum insured, yet the salvage would have been only 475 dollars.

The point decided in *Goss & Withers* was, that a title to restitution cannot take away a vested right to abandon, if the vessel be unfit to perform the voyage.

There is nothing in the record which shows that at the time of the recapture, the Eliza was unfit to perform the voyage.

The abandonment of a vessel is an extreme remedy, which the insured has in his power, but which he ought *not to be permit- [*376 ted to use, when he has another remedy which will completely indemnify him for the injury he has actually sustained.

This case, we contend, ought to be decided upon the principles which governed that of

Hamilton v. Mendes, 2 Burr. 1198. There the ship was captured on the 6th of May, by a French privateer, and all her hands, excepting two, were taken out. On the 23d she was recaptured by a British ship of war, and sent into a British port, where she arrived on the 6th of June. As soon as the insured heard of the capture, he wrote and offered to abandon to the underwriters. They refused to receive the abandonment, but offered to pay the salvage, and all the losses and charges which the insured had sustained by the capture. The question was whether, on the 26th June, the insured had a right to abandon and recover as for a total loss. The court decided that he had no right to abandon, and that he could recover as for a partial loss only. The principle of that case is, that if the voyage be only temporarily interrupted, the property, upon the recapture, returns to the owner pledged to the recaptor for the amount of salvage. This doctrine is also stated in the case of *Mills v. Fletcher*, Doug. 219, and *Thellusson v. Fletcher*, 1 Esp. Rep. 73.

The actual loss which the insured sustained, was not a total loss, until rendered so by their own negligence or misconduct, or that of their agents. It only amounted to 909 dollars, including salvage. Even if the vessel had been valued at the price insured, viz., 3,800 dollars, the salvage (which by stat. 33, Geo. III. c. 66, cannot exceed one-eighth) would have amounted only to 475 dollars, which, added to the other expenses, would not have exceeded 1,000 dollars.

This sum ought to have been paid by the agents of the insured, who had in their possession funds of their principal, out of which it might have been paid. But it does not appear that they made any effort, or offer to pay it, or to prevent the sale; or any proposition to ascertain the value of the vessel otherwise than by a sale. They did not do the best in their power for all concerned, but calmly stood by and saw the vessel sacrificed, when they had the power of preventing it.

377*] *The insured, therefore, cannot, by abandonment, turn a partial into a total loss. 1 Esp. Rep. 73.

It appears upon the record that the insured were anxious to sell the vessel, and this may account for the want of exertion on the part of their agents to prevent a sale, which would charge the underwriters with the full value of 3,800 dollars.

4th. The loss of the register was not equivalent to the loss of the vessel, and was not an event against which the insurance was made.

But the loss of the register might have been supplied by another document, such as a consular certificate, stating the circumstances attending the loss, which would have enabled the vessel to perform the voyage insured. 1 Rob. 184, *The Betty Cathcart;* 8 T. Rep. 198, *Christie v. Secretan.* The want of a register would not have occasioned a forfeiture of the vessel, but would only have subjected her to the inconvenience of being considered and treated as a foreign bottom.

5th. The not communicating to the underwriters the intention of going to Baltimore vacated the policy, as the risk was thereby increased. Marsh, 347; 3 Burr. 1909, *Carter v. Boehm;* 1 W. Bl. 594, S. C. Millar, 450.

Simms & Swann, contra, contended, 1. That the voyage commenced was the voyage insured; 2. That the insured had a right to abandon and recover as for a total loss.

1. A policy of insurance, like every other written agreement, is to be construed according to the intention of the parties. The understanding in this case was, that the underwriter should take all the risk of a voyage from Jamaica to Alexandria; and, consequently, they took the risk of the voyage from Jamaica to the Chesapeake bay, through which a vessel must pass to arrive at Alexandria.

*We admit the intention to deviate [*378 after entering the Chesapeake, but we insist that the voyage and risk insured had commenced; and that the vessel was in the actual prosecution of that voyage when the loss happened. In such a case, although there was an intention to deviate, the insured had a right to abandon. Park, 314; Stra. 1249, *Foster v. Wilmer;* Burns on Insurance, 107; 2 H. Bl. 343, *Kewley v. Ryan;* 2 New York T. Rep. 274, *Henshaw v. Marine Insurance Company.*

In the case of *Wooldridge v. Boydell*, there was no intention of going at all to the place mentioned in the policy.

The only point in the case of *Stitt v. Wardell*, 2 Esp. Rep. 610, is the difference between touching and trading at a port. In that case there was an actual trading, but here was only an intention to trade.

In *Beatson v. Haworth*, 6 T. Rep. 531, the decision was merely that if the voyage described be to B. and C., the vessel deviates by going to C. first, and afterwards to B., although C. be the nearest port.

In *Way v. Modigliani*, 2 T. Rep. 30, the real ground of the opinion of the court is an actual deviation by the vessel having sailed for and stopped to fish on the Banks, instead of sailing directly from Newfoundland to England.

The opinion of Roccus, cited in a note to Marshall, 406, is contradicted by that of Emerigon, also cited in the same note; and the latter seems to be the better opinion.

If the alteration of the voyage takes place before the risk is commenced, it becomes a different voyage; but if after, then it is only a deviation. Millar, 117.

In the present case the risk commenced at Jamaica, and before the alteration of the voyage was contemplated.

*It was to terminate at Alexandria. [*379 When the *terminus a quo* and the *terminus ad quem* are the same, the voyage is the same.

2. The loss itself was, in fact, total, and unless the insured have been in fault, they ought to recover for a total loss.

The loss of the register alone was sufficient to defeat the whole voyage, and if the vessel had sailed without it, and had been lost, the underwriters would have been discharged by that very fact of the vessel sailing without proper documents. It would so increase the risk of loss by seizure and condemnation, as to vacate the policy. If she had been found sailing without a register, she would have been considered by the British laws as an alien vessel, and if found trading from a British colony, would have been liable to condemnation. Reeve on Ship, 46, 379, 429. Bryan & Co. were not the general agents of the defendants in error.

Their authority ceased when the vessel was dispatched, and had sailed from Jamaica for Alexandria. They were not authorized to sacrifice the property of the insured in their hands, if they had any, to raise money to pay the salvage and expenses. It is true, the master had an implied authority to do what was fit and proper for the benefit of all concerned; but he was not authorized to send out the vessel without a register, and she could never get a new one unless her owners (the insured) should change their domicile. No document could supply the place of that which itself never could have been obtained, and to which the party was not entitled.

The exception is to the refusal of the court to give the instruction prayed. This instruction would have been improper for two reasons.

1. It would have been conclusive of the whole cause; and no such instruction can be given, unless all the evidence is stated, and unless the bill of exceptions avers it to be the whole evidence. This bill of exceptions does not contain the whole evidence, nor such an averment.

380*] *2. The instruction prayed involves the decision of a fact, which the jury only were competent to find, viz., whether the damage amounted to more than half the value of the thing insured. *Mills v. Fletcher*, Doug. 230. This fact is not stated in the bill of exceptions, nor any other fact from which the court can infer it. It contains no evidence that the master had funds to pay the salvage and charges.

The evidence shows the loss to be actually total. The information of the capture, recapture, libel for salvage, and sale to a stranger, all came to the insured at the same time; and there is no evidence of fraud or collusion. The only allegation is, that the master did not do everything in his power to prevent a total loss. But this allegation is unsupported by evidence. Even if, by a sacrifice of the cargo, he had raised money enough to pay the salvage, expenses, costs, charges and repairs, he must have obtained a new crew, and then could not have sailed without a register.

The voyage was completely destroyed; and, upon an abandonment, which the insured had a right to make, relief would have been refused to the underwriters, even in equity. 3 Atk. 195, *Pringle v. Hartley;* Marshall, 485.

C. Lee, in reply. There are two bills of exceptions to the opinion of the court.

1st. To the instruction given in favor of the plaintiff below, that there was no deviation from the voyage insured, and that the voyage insured was actually commenced.

2d. To the refusal of the court to instruct the jury, that if the facts stated in that bill of exceptions should be proved to their satisfaction, they ought not to find a verdict for a total, but at most for a partial loss.

1. The voyage insured was a direct voyage from Kingston, in Jamaica, to Alexandria, in Virginia. But the voyage commenced was a voyage from Kingston to Baltimore, and from 381*] thence to Alexandria. Baltimore *not being in the direct course from Kingston to Alexandria, the voyage commenced was not a direct voyage from Kingston to Alexandria, and, therefore, was not the voyage insured. There can be no necessity of referring to authorities to show that, in a policy, a voyage from one place to another always means a direct voyage in the usual course; because, upon this principle is founded the whole doctrine of deviation. But the cases of *Beatson v. Haworth*, 6 T. Rep. 531; *Delaney v. Stoddert*, 1 T. Rep. 22; and *Middlewood v. Blakes*, 7 T. Rep. 162, show with what strictness it has been maintained.

If the direct voyage was not commenced, the commencement of an indirect, circuitous voyage, will avail nothing. The voyage insured was not commenced. Doug. 16 ,*Wooldridge v. Boydell;* 2 T. R. 30, *Way v. Modigliani*. Even if the risk is diminished by the circuitous course, it is not a justification of the voyage, and will not support the policy. Millar, 377, 382.

The case of *Kewley v. Ryan*, 2 H. Bl. 343, is relied upon by the defendants in error. But the law of that case is doubted by Marshall, 232, who refers to the case of *Stott v. Vaughan*, decided in the King's Bench, in 1794, and is opposed to the case of *Wooldridge v. Boydell*.

Kewley v. Ryan differs essentially from the present case. The intention in the former was only to touch at Cork, in the way to Liverpool. Whether Cork is not usually touched at in such voyages does not appear; but no cargo was on board to be delivered at Cork. The only port of delivery was Liverpool.

In the present case, a considerable cargo was received on freight, deliverable at Baltimore. The intention, therefore, was not merely to touch, but to trade at Baltimore. It was one of the principal objects of the voyage. To touch at a port, differs essentially from delivering a cargo, and trading at a port. 2 N. Y. Term Rep. *Williams v. Smith*, refers to *Stitt v. Wardell*, decided by Lord Kenyon, in 1797. Marshall, 187. After clearing for Alexandria, to receive a cargo for *Baltimore, to be [*382 delivered there for trade, and to sail with intention to go to Baltimore first, was a complete alteration of the voyage insured.

The opinion in *Kewley v. Ryan*, if understood rightly, does not decide this case against the underwriters. The court says, "where the termini of the intended voyage are really the same as those described in the policy, it is to be considered as the same voyage."

The word termini does not mean merely the beginning and end of a thing, but all the limits; and, in regard to a voyage, it means also the intermediate ports of delivery for any part of the cargo.

In the present case the policy expresses but one port of delivery; the voyage commenced was to two, one of which was out of the course to that mentioned in the policy.

The case of *Way v. Modigliani* was not decided on the ground of deviation, but expressly on the ground of non-inception. Upon this point, the opinion of Buller, J., is full.

Wooldridge v. Boydell was not decided on the fact that there was no intention of sailing to the port mentioned in the policy, but upon the fact that the vessel had actually sailed for a different port.

The weight of the case of *Kewley v. Ryan*, therefore, is diminished;

1. Because it stands contradicted.

2. It differs essentialy from the case before the court, and is not decisive.

3. It may be reconciled with the doctrine advanced in this case by the plaintiffs in error, and, if so understood, is in their favor.

383*] *4. If understood as the defendants in error contend it ought to be, it is not law.

2d. The second bill of exceptions states a case which would justify the instruction prayed by the defendants below.

Bryan & Co. were the agents and correspondents of the owners. Patton also was an agent, having gone out in the vessel as supercargo, and the owners are answerable for their negligence.

On the 24th of September, Bell, the master, and Patton, the supercargo, by their protest, abandoned the vessel and cargo to the underwriters, when both were safe in the harbor of Kingston, liable only to a small salvage, and to some expenses; and when the coffee belonging to the defendants in error, and then on board, was more than sufficient to pay all the demands against the vessel. There was no necessity of selling the vessel. Her value might have been ascertained in some other mode. Upon application to the court of admiralty appraisers would have been appointed. But the agents neither attempted to agree with the recaptors for the amount of the salvage, nor applied to the court to appoint appraisers, but suffered the expenses to be increased unnecessarily, by the admiralty process, and by the commissions on the sale.

The agents of the owners ought to have done as much to increase the amount saved, as if no insurance had been made. It was their duty to do the best for all concerned. If they did not, and if by their negligence the loss has been converted from a partial to a total loss, the underwriters ought not to suffer. Their contract was a contract of indemnity against unavoidable loss, and the insured were bound to use the same care and diligence which a prudent man would use in securing his own property.

As to the loss of the register, it would not have been a cause of condemnation. The law cited from Reeves applies only to a vessel which 384*] never had a register, and *not to one whose register has been destroyed by accident.

March 4. MARSHALL, *Ch. J.*, did not sit in the trial of this cause.

The other judges, except CHASE, *J.*, whose ill health prevented his attendance, gave their opinions *seriatim*.

JOHNSON, *J.* Upon the trial of this cause, in the court below, two grounds of defense were assumed by the plaintiffs in error.

1. That the policy had been avoided by a deviation from the voyage insured.

2. That if the insured were entitled to recover at all, it could only be for an average, not a total loss.

In the argument before this court, the first ground was varied, and the plaintiffs in error contended, "that the risk insured was never entered upon."

Without considering the propriety of entering upon the discussion of a question so materially different from that made in the bill of exception, I will only remark that it was judicious in the counsel to abandon an opinion as inconsistent with natural reason as it is with the established doctrine of the law of insurance. An intent to do an act can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance until she reaches the port of divergency, and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British courts from the case of *Foster & Wilmer* to the present time.

The doctrine now insisted on by the plaintiffs in error, was probably suggested by some incorrect expressions attributed to Lord Mansfield in the case of *Wooldridge *& Boydell*. It [*385 is said that the judge in that case expressed an opinion, that "if a ship be insured from A. to B., and before her departure the insured determine that she shall call at C., which is out of the usual course of the voyage from A. to B., this is rather a different voyage than an intended deviation." This opinion was certainly in no wise material to the decision of that case, and is expressly contradicted by the case of *Kewley v. Ryan*, and a case, which I consider with much respect, decided in the state of New York, between *Henshaw* and *The Marine Insurance Company of New York*. We can only vindicate the accuracy of his lordship's opinion in the case which he states, by supposing that his mind was intent upon those cases of intended deviation, in which a *suppressio veri*, or necessary increase of risk, are the grounds of decision.

The ordinary rule for ascertaining the identity of a voyage insured, is by adverting to the termini. A rule which is certainly correct as far as it extends, but in the rigid application of which, it is easy to conceive that cases may occur in which it would bear injuriously upon the insurer. If it has any defect, it is in not extending far enough the claim to indemnity, as the *terminus ad quem* may in many instances be relinquished without any possible increase of risk, or even without varying the risk, except only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown, in Maryland.

Whether the risk insured against in this case ever was incurred, I would test by the question, whether, if the Eliza had arrived in safety, or even had sailed for Europe, the insured might have legally demanded a return of the premium? I presume not. The insurance being at and from the port of Kingston, the risk commenced during her stay in port, and cannot be apportioned when thus blended, but was wholly and indefeasibly vested in the underwriters, although the vessel *had forfeited her pol- [*386 icy by shaping her course for Europe the moment she had left the port of Kingston. In the case before us, she adhered to her ultimate destination, and the forfeiture of her insurance could not have been incurred until after entering the Chesapeake, and actually bearing away farther eastward than was consistent with her course to the Potomac.

2. With regard to the question, whether it be a case of total or average loss, a very few ob-

servations will suffice to satisfy the mind that the judgment below is correct.

If, under every combination of circumstances, the insured is bound to procure money at whatever interest, or to raise it at whatever sacrifice of property, to defray the disbursements for repairs, reshipping a crew, salvage, costs of suit, and every incidental expense, this will be shifting the loss from the insurer to the insured. Should it be admitted, that in the case before us, the insured were under any greater obligation to ransom and refit the vessel than the insurer, the circumstances in evidence are sufficient to excuse him. Unsuccessful attempts had been made to dispose of both vessel and cargo; and as to raising money on bottomry, who would have accepted the security of a vessel embarrassed, by the loss of her register, to a degree the extent of which could not possibly be foreseen? a bond for money to become due on the arrival of a vessel which perhaps might never be able to sail, or if she did sail without her necessary documents, would be exposed to innumerable hazards, and among them the forfeiture of her insurance for that very cause.

It is true, that a case of capture and recapture, where the two events are communicated before an election to abandon has been actually communicated to the underwriters, will not, of itself, sanction an abandonment. Yet, it is equally true, that in a case of capture, a recapture alone will not deprive the party of his right to abandon. The consequences of the capture and recapture, the effect produced upon the fate of the voyage, must govern the right of the parties. This effect is always a matter of 387*] evidence, and must rest much upon *the discretion of a jury. This doctrine is well illustrated in the cases of *Pringle & Hartley*, and *Goss & Withers*.

In the case before us, the information of the capture, recapture and sale, was communicated in the same letter. The loss was then certainly total, and as the insurers cannot charge the insured with any premeditated design to involve the vessel in the difficulties which broke up the voyage, I think they ought to bear the loss.

Much has been said about the liability of the insured for the misconduct of his agents, but as all amounts to a charge that they did not make use of forced means to raise money for the release of the vessel, an obligation not incumbent upon them, it does not appear to me that the extent of the liability of the insured for the acts of the captain or supercargo, after the death-stroke is given to the voyage, need be considered.

WASHINGTON, *J*. There are but two questions in this cause which I deem worthy of particular consideration; for the last exception is, to the refusal of the court to give an opinion upon a matter of fact, and for which no foundation was laid by the evidence spread upon the record, even if it had been proper for the court, in such a case, to give an answer to the question propounded. I also lay out of the case, the award mentioned in the declaration, not only because no breach is assigned which applies to it, but because no opinion was asked of, or given by, the court respecting it.

The first subject which claims attention is, whether, upon the facts stated in the second bill of exceptions, the court below was right in the direction given to the jury, that there was no deviation at the time of capture from the voyage insured, and that the voyage insured was actually commenced. The facts, material to the decision of this point, are, that the Eliza cleared out at Kingston, for Alexandria, and a bill of lading was signed by the master, to deliver her cargo at Alexandria. That after her *clearances were obtained, she took in [*388 a cargo for Baltimore, and bills of lading were signed for delivering the same at that port. That the captain sailed from Kingston with an intention, previously formed, of proceeding first to Baltimore, and there landing part of her cargo, and then to go to Alexandria, but she was captured before her arrival at the dividing point between Baltimore and Alexandria.

It is admitted, that this is not a case of deviation, because the intention formed at Kingston, before the voyage commenced, of going first to Baltimore, was never carried into execution. The only question then is, whether the voyage described in the policy was changed or not? As to this there is no difference of opinion at the bar respecting the legal effect of an alteration of the voyage, on the contract of indemnity; it is, and must be, conceded, that the policy never attached. But the difficulty is in determining what circumstances do, in point of law, constitute such an alteration as will avoid the policy.

The criticisms of the counsel for the plaintiffs in error, upon the rule contended for by the defendants, ought not, in my opinion, to avail them, if that rule be firmly established by uniform decisions: for in questions which respect the rights of property, it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason.

The first case we meet with, upon this subject, is that of *Carter v. The Royal Exchange Assurance Company*, which is cited in *Foster v. Wilmer*, decided in 19 Geo. II. The former was an insurance on a ship from Honduras to London, and the latter on a ship from Carolina to Lisbon, and at and from thence to Bristol. In both, a cargo was taken in to be delivered at an intermediate port; but the loss having happened before the ship had arrived at the dividing point, the insurers were held liable, upon the ground that nothing more was intended than a deviation, which, not being carried into execution, did not avoid the policy.

*The case of *Wooldridge v. Boydell* is [*389 next in point of time. This was an insurance on a ship at and from Maryland to Cadiz. She cleared for Falmouth, and a bond was given to land the whole cargo in Britain. No evidence was given that the vessel was bound to Cadiz; she was taken before she came to the dividing point. At the trial of this cause, Lord Mansfield told the jury, that if they thought the voyage intended was to Cadiz, they were to find for the assured; but if there was no design to go to that port, then they were to find for the defendant, and the ground upon which the court decided the motion for a new trial was, that there never was an intention to go to Cadiz. But it is plain, that if Cadiz had been intended as the ultimate port of destination, the clearing out for an intermediate port, with an intention to

land the cargo there, would not have been considered as anything more than an intended deviation.

Way & Modigliani was decided in 1787, and was an insurance at and from the 20th October, 1786, from Newfoundland to Falmouth, with liberty to touch at Ireland. She sailed on the 1st of October from Newfoundland, went to the Banks and fished till the 7th, and then sailed for England, and was lost on the 20th. The reasons assigned for the decision of this case, give it the appearance of an authority unfavorable to the doctrine laid down in the above cases. But the weight of it is greatly diminished, if it be not destroyed, by the following considerations: 1st. That as there was a clear deviation, it was unnecessary to decide the other point, that the policy did not attach; and, 2d. That this latter opinion seems to have been entertained only by one of the court, and even this judge seems to have relied very much upon the fact, that the vessel sailed to the Banks; 3d. From what is said in *Kewley v. Ryan*, it would appear that the ship, when she left Newfoundland, did not sail for England, and of course the voyage insured never was commenced.

Kewley v. Ryan, decided in 1794, was a policy on goods from Genoa to Liverpool. The ship sailed on that voyage, but it was intended, as plainly appeared by the clearances, to touch at Cork. She was lost, however, before she arrived at the dividing point; and the decision conformed to those given in the preceding 390*] cases, the *terminal of the intended voyage being really the same as those described in the policy.

The case of *Stott & Vaughan*, decided at *Nisi Prius*, in 1794, before Lord Kenyon, seems opposed to the principles laid down in the preceding cases, and, if we have an accurate report of it, is inconsistent with the decisions of the same judge in *Kewley v. Ryan*, and other cases.

Murdoch & Potts, decided in 1795, was, in principle, as strong a case of a change of voyage, as that of *Wooldridge & Boydell*, but equally contributes to explain the general doctrine laid down in all the cases. For in this, the *terminus ad quem* was, most obviously, St. Domingo, where the freight insured was payable, or some port, other than Norfolk, where the ship was to call for the sole purpose of receiving orders.

The last English case which I shall notice, is that of *Middlewood & Blakes*, decided in 1797. It was an insurance on the Arethusa, at and from London to Jamaica, for which place she cleared out; but the captain was bound by orders to call at Cape St. Nichola Mole, in order to land stores there, pursuant to a charter party. She was captured after she had passed the dividing point of three several courses to Jamaica, but before she had reached the subdividing point of the continuing course to Jamaica and that leading to the Mole. The whole court considered this as a case of deviation only, and Lawrence, *J.*, was so strongly impressed with the weight of former decisions, that, not attending to this obvious objection to the plaintiff's recovery, but considering the termini of the voyage intended to be the same with those mentioned in the policy, his first opinion inclined to the side of the plaintiff.

The case of *Henshaw & The Marine Insurance Company*, decided in the supreme court of New York, confirms the principles of the above cases, and would command my respect were it opposed to them.

The rule, tnen, which I consider to be firmly established, by a long and uniform course of decisions, is, that if the ship sail from the port mentioned in the policy, with an intention to go to the port, or ports, also described *there- [*391 in, a determination to call at an intermediate port, either with a view to land a cargo, for orders, or the like, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation, if the intention be carried into execution, or be persisted in after the vessel has arrived at the dividing point.

The next question is, whether the court below erred in refusing to instruct the jury, that if they believed the facts stated in the first bill of exceptions, they were to find an average and not a total loss? The defendants in error contend, that by the capture and recapture of the vessel, under the various circumstances of loss of crew, inability to pay the salvage and expenses, loss of register, &c., the voyage insured was completely defeated, and, therefore, the assured had a right to abandon and demand as for a total loss.

On the other side it is insisted, that the captain might, in a variety of ways, have prevented the sale of the vessel, and that if he had done the best in his power for the interests of all concerned, he might have liberated the vessel from the lien of the captors, and have performed his voyage in safety to Alexandria, without any other inconvenience than this temporary interruption, and the payment of salvage and expenses. If so, that it was not competent to the assured, under these circumstances, to convert a loss partial in its nature into a total one.

Whether the assured had a right to abandon, and recover as for a total loss, or not, was a question of law, dependent upon the point of fact, whether, upon the whole of the evidence, the voyage was broken up, and not worth pursuing; and in consideration of this question, the jury would, of course, nave inquired, amongst other matters, whether the captain had done what was best for the benefit of all concerned. The court might, with propriety, have stated the law arising upon this fact, whichever way the jury might find it, and indeed such would have been their duty, if a request to that effect had been made. But the court very correctly refused to give the direction as prayed, because, by doing so, they would have decided the important matter of fact, upon which the law was to arise, which was only proper for the determination of the jury. In the case of *Mills *& Fletcher*, which turned upon the [*392 question, whether the captain, by his conduct, had not made the loss a total one, Lord Mansfield would not decide whether the loss was total or not, but informed the jury that they were to find as for a total loss, if they were satisfied that the captain had done what was best for the benefit of all concerned.

Upon the whole, then, I am of opinion, that the judgment ought to be affirmed.

PATERSON, *J.* This action was brought on a policy of insurance, which John and James H. Tucker, being British subjects, residents at

Alexandria, had effected on the body of the sloop Eliza, her tackle, apparel, and furniture, to the value of 3,800 dollars, at and from Kingston, in the island of Jamaica, to Alexandria, in the state of Virginia. The policy bears date the 1st of September, 1801.

The first question to be considered is, whether the voyage, on which the sloop Eliza set out, was the same or a different voyage from the one insured? By the terms of the policy, it is stipulated, that the Eliza was to sail from Kingston to Alexandria; and it is stated in the bill of exceptions, that she did sail from Kingston, but with an intention to go first to Baltimore, and there deliver 20 hogsheads and 10 tierces of sugar, and then to proceed to Alexandria, which was the port of destination described in the policy. She cleared out at the custom house in Kingston, on the 10th of August, 1801, for Alexandria, and the master signed a bill of lading to deliver her cargo at that place; after which he took in the sugar, to be delivered at Baltimore. It is contended, on the part of the insurers, that the taking in the sugar to be landed at Baltimore, constituted a different voyage from the one agreed upon, and vitiates the policy; or, in other words, that the voyage which was the subject of the contract, was never commenced. From a review of the cases which have been cited, the principle is established, that where the termini of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage. In the present case the termini or beginning and ending points of 393*] the intended *voyage, were precisely the same as those specified in the policy, to wit, from Kingston to Alexandria, and, in legal estimation, from one and the same voyage, notwithstanding the meditated deviation. The first reported case on this subject is *Foster v. Wilmer*, in 2 Stra. 1249, in which Lee, *Ch. J.*, held, that taking in salt to be delivered at Falmouth, a port not mentioned in the policy, before the vessel went to Bristol, to which place she was insured, was only an intention to deviate, and not a different voyage. And the Chief Justice, in delivering his opinion, mentioned the case of *Carter v. Royal Exchange Assurance Company*, where the insurance was from Honduras to London, and a consignment to Amsterdam; a loss happened before she came to the dividing point between the two voyages, for which the insurer was held liable. The adjudication in Strange was in the 19 Geo. II.; and from that time down to the year 1794, we find no variation in the doctrine. A remarkable uniformity runs through the current of authorities on this subject. In *Kewley v. Ryan*, 2 H. Bl. 343, Trinity Term, 1794, the principle is recognized; and in 2 New York Term Rep. 274, *Henshaw v. The Marine Insurance Company*, February, 1805, it is fortified and considered as settled by the supreme court of that state. In a lapse of sixty years we find no alteration in the doctrine, which is sanctioned, and has become too deeply rooted and venerable by time, usage, and repeated adjudications, to be shaken and overturned at the present day. It has grown up into a clear, known, and certain rule, for the regulation of commercial negotiations, and is incorporated into the law merchant of the land. Where is the inconvenience, injustice, or danger of the rule? It operates in favor of the insurers by a diminution of the risk, and not of the insured, who have the departure in contemplation; for if the vessel, after she has arrived at the point of separation, should deviate from the usual and direct road to her port of destination, the insurers would be entitled to the premium, and exonerated from responsibility. An intention to deviate, if it be not carried into effect, will not avoid the policy. There must be an actual deviation. The policy being "at and from," the risk commenced; there was also an actual inception of the voyage described; for the Eliza sailed from Kingston for Alexandria, was captured in a *direct course to the latter, before she [*394 reached the dividing point; and, therefore, the underwriters became liable for the loss.

The second point in the cause is, whether the insurers were liable for a total or a partial loss? And here a preliminary question presents itself. Was the abandonment made in proper time? When the Tuckers received information of the loss, it became incumbent on them to elect whether they would abandon or not; and if they intended to abandon, it was incumbent on them to give notice of such intention to the underwriters. Our law has fixed no precise period within which the abandonment shall be made, and notice of it shall be given to the insurer; but declares, that it shall be done within a reasonable time. In the case before us, it appears that John and James H. Tucker received information of the capture and recapture of the Eliza at the same time, in a letter from W. & B. Bryan & Co., dated on the 26th September, 1801; but it does not appear when the letter came to hand. On the 26th of November, 1801, the Tuckers offered to abandon the Eliza to the insurers, which offer was rejected. Can it, under these circumstances, be pretended, that the Tuckers were guilty of neglect, or that the abandonment was not made according to the settled rule? It was made within a reasonable time, and no neglect can justly be imputed to them. We must have some facts whereon to build the charge of negligence, for it is not to be presumed; and the intervening period between the date of the letter and the time of abandonment, after making a due allowance for the passage of the letter, does not afford sufficient ground on which to raise the imputation of neglect. This brings us to the great question in the cause, whether the insurers were liable for a total or an average loss. On the 22d August, 1801, the Eliza was captured by a Spanish armed schooner, in the usual course from Kingston to Baltimore and Alexandria, and a day or two afterwards was recaptured by a British sloop of war, and carried into Kingston on the 26th of the same month. The mere acts of capturing and recapturing are not of themselves sufficient to ascertain the nature and amount of the loss sustained. The loss may be total, though there is a recapture. *Hamilton v. Mendez*, 2 Burr. 1198; *Aguilar and others v. Rodgers*, 7 D. & E. 421. Whether the loss be partial or total, will depend upon the particular *circumstances of the [*395 case, which it becomes necessary to take into view. The Eliza was consigned to Bryan & Co. at Kingston, who were authorized to dis-

pose of her; they endeavored to sell her, but without effect: and it is stated, that they could get no offer for her before she sailed from Kingston, nor since that time. Bryan & Co. put on board 10 tierces of coffee, of the value of 1,000 dollars, belonging to the Tuckers, to be delivered at Alexandria; and when she was captured, all the seamen, except Bell, the ostensible master, and one man, were taken on board the Spanish schooner. The Eliza was navigated under a British register during the voyage; which register was lost by reason of the capture and recapture, and has never been found. After the recapture, the Eliza and her cargo were libelled in the vice-admiralty court for salvage; a claim was put in by Bryan & Co. as agents for Eli Richards Patton, the real and navigating master and supercargo; and the sloop and cargo were adjudged to be lawful recaption on the high seas, and ordered to be restored, on paying to the recaptors one full eighth part of the value of the sloop and cargo for salvage, with full costs; and to ascertain the value it was further ordered, that the sloop and cargo should be forthwith sold by the claimants, unless the value should be otherwise agreed upon. The sloop was insured for 3,800 dollars, and sold for 915 dollars; the coffee sold for 1,000 dollars; and the costs, charges and commissions amounted to 909 dollars, which almost absorbed the sum for which the sloop was sold. It is not found, that the sloop had sustained no damage by the capture and recapture; and, considering the difference between 3,800 dollars, the value insured, and 909 dollars, the price for which she sold, the jury might, without other evidence, have presumed that she had received considerable injury. From these facts, taken together, the inference is rational and just, that the voyage was broke up and destroyed, and that the underwriters were liable for a total and not for an average loss. To repel this inference, and remove responsibility from the insurers, it has been urged in argument, that the agents for the Tuckers were guilty of gross neglect and misconduct. If Bryan & Co. ceased to be agents after the 396*] sailing of the sloop, then *the captain became clothed with an implied authority to do what was fit and right, and most conducive for the interest and benefit of all the concerned; and, therefore, whether the agency of Bryan & Co. continued, or, being at an end, devolved by operation of law on the captain, is perfectly immaterial; for the question still recurs, whether the actual or implied agent had been guilty of fraud, negligence, or other improper conduct, which will exonerate the insurers. I am not able to discern any misconduct on the part of the agent, that would exculpate the underwriters, and prevent their being responsible for a total loss. And, indeed, this was a point proper for the decision of the jury, agreeably to the case of *Mills v. Fletcher*, in Doug. 230; and, therefore, the exception taken to the opinion of the court was not well founded. The sloop could not be sold at private sale, and, by reason of the capture and recapture, she might have sustained considerable damage. To sell the coffee, which constituted the cargo for Alexandria, to satisfy the salvage and costs, would have been an imprudent measure; for the redemption would have absorbed the whole proceeds, and then she would have returned to Alexandria without a cargo, as the captain had no funds to purchase one; and besides, she must have sailed without a register, which would have exposed her to great and unnecessary danger. Prudence dictated the sale as a safe step, and most for the benefit of the concerned.

The error set forth in the third bill of exception is, that the court below refused to instruct the jury that the loss of the register, by means of the capture and recapture, was not sufficient, in law, to defeat the voyage from Kingston to Alexandria, and might have been supplied by special documents. Though the register did not impart any physical ability to the sloop, in regard to her sailing; yet, it was a document which tended to communicate safety, as it designated her character, individually and nationally. It is a necessary paper, and operates as a national passport; for, without it, she might be seized as an unauthorized rover on the ocean, and, in certain cases, would have been liable to confiscation. The register is a document *of such a special and important [*397 nature, that its loss cannot be fully made up by other official papers. It would have been a very imprudent step for the captain to have proceeded on his voyage without a register; if he had, he would have been justly charged with improvidence, negligence, and culpable misconduct.

CUSHING, *J.* I consider this as clearly a case of intentional, not actual, deviation; but not as a case of non-inception of the voyage insured.

This is proved by a number of cases cited; and contradicted by none.

What a case of non-inception is, is shown by the case of *Wooldridge v. Boydell*, Doug. 16, where the ship was insured from Maryland to Cadiz, having no intention at all of going there; but that is totally different from the present case, where the vessel was cleared out at Jamaica for Alexandria, with a cargo taken in for Alexandria, and intended to go there.

It is true sugars were taken in for Baltimore, and the captain intended going there first. That amounts only to an intent to deviate; but no deviation unless executed.

This is proved by divers authorities. *Middlewood & Blakes*, 7 T. R. p. 162, B. R.; a ship insured at and from London to Jamaica, and the captain had orders (exactly like the case at the bar) to touch at Cape St. Nichola Mole, to land stores, pursuant to charter party. Upon which, one of the judges (Lawrence) gave an opinion, that if the vessel had been captured before she came to the dividing point between the northern and southern courses to Jamaica, the insurers would have been liable.

And the other judges agreeing with Judge Lawrence, to lay the whole stress of the cause in favor of the insurer, upon the captain's not exercising his judgment at the time, upon which was the best and safest of the three courses, (whose judgment the insurers had a right to have the benefit of,) but taking the northern course, merely in pursuance of orders, to land stores at Cape St. Nichola Mole. All this shows that had the captain exercised *his judg- [*398 ment in going the northern course, as being the best and safest, the whole court would have held the insurer liable, as the vessel was cap-

tured before she came to the dividing point between the course to the cape and to Jamaica.

Another case, more direct and decisive, is *Foster v. Wilmer*, 2 Stra. 1248, 1249, where the ship was insured from Carolina to Lisbon and to Bristol, and the captain took in salt to deliver at Falmouth, before going to Bristol, repugnant to the specification of the policy, yet, being captured before arriving at the dividing point between Falmouth and Bristol, the insurer was held liable, which seems exactly the present case.

The mere taking in goods for another port does not, of itself, make a deviation. It may, however, if it materially vary the risk, and be a circumstance designedly concealed and suppressed, excuse the underwriters. In the present case it does not appear, materially, to vary the risk, any more than in taking in stores to land at Cape St. Nichola Mole, in the case of *Middlewood & Blakes*, varied the risk, which was not suggested by court or counsel, that it did; or the taking in salt to land at Falmouth, in the case of *Foster & Wilmer*. It did not delay the voyage in the present case; the vessel sailed with convoy as soon as it was ready, and was afterwards captured in the proper course, before deviating.

The award may be laid out of the case for more reasons than one. I think it void for uncertainty.

As to the loss, whether total or average, the jury, who had the whole evidence before them, have, in effect, found a total loss, and the voyage broken up. It is not certified by the court, that the bill of exceptions contains the whole evidence; and as strong circumstances (I think conclusive ones) are stated, that show the voyage could not be safely pursued, or could not be pursued at all, in consequence of the loss of register and loss of hands by the capture, either of which, it does not appear, could be supplied, I think we are not warranted to overrule the verdict, or reverse the judgment.

Judgment affirmed.

399*] *THE UNITED STATES *v.* HETH.

The collector of the district of Petersburgh was not, by the act of the 10th of May, 1800, restricted to a commission of two and a half per cent. on the moneys by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States.

THIS was a case certified from the circuit court of the fifth circuit, holden in the district of Virginia, where a question arose upon which the opinions of the judges were opposed.

The question was, whether the defendant, as collector of the customs for the district of Petersburgh, was restricted to a commission of two and a half per cent. on any, or all of the moneys collected and received by him after the 30th of June 1800, on account of bonds previously taken for duties arising on goods, wares, and merchandise, imported into the United States.

This question arose upon the 2d section of the act of Congress, entitled "An act, supplementary to an act, entitled an 'act to establish the compensation of the officers employed in the collection of the duties on import and tonnage;'" passed on the 10th of May, 1800, vol. 5, p. 173. The words of which are, "that in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors for the districts of Alexandria, Petersburgh and Richmond, respectively, two and a half per centum on all moneys which shall be collected and received by them," "for and on account of the duties arising on goods, wares and merchandise, imported into the United States, and on the tonnage of ships and vessels."

Breckenridge, (Attorney General,) in behalf of the United States, observed, that the words of the act appeared to him so plain that they could not be elucidated by argument. He understood the language of the act to be, that only two and a half per cent. should be allowed on moneys received after the 30th of June. Although the collector may have done the greater part of his duty by taking bonds for duties, yet they were neither collected nor paid before that day. It cannot be deemed an unconstitutional act as being *ex post facto*, because the prohibition of the constitution extends to criminal cases only. 3 Dall. 386, *Calder v. Bull.*

*Col. Heth. Although it is a sound [*400 rule of construction, that when the words of a statute have a plain, distinct and reasonable meaning, no recurrence is to be had to intendment, inference, or implication; yet, when the words of a statute admit of two constructions, (as in the present case they evidently do, or they would not now be under discussion,) it cannot be improper to have reference to similar laws, and to inquire how they have been construed.

The first section of the act of 14th Feb. 1795, vol. 3, c. 88, says, "that in lieu of the commissions heretofore by law established, there shall be allowed to the collectors of the duties on import and tonnage, on all moneys by them respectively received on account of the duties aforesaid, arising on tonnage, and on goods, wares, and merchandise, imported after the last day of March next, to wit," "to the collector of Bermuda Hundred," (which office was then holden by the defendant,) "two per cent." This act raised his commission from one to two per cent.; which two per cent. he charged only on the duties that arose on importations made after the last day of March, 1795; and one per cent. only on the money received on bonds, payable after that day for goods imported before.

The act of 3d March, 1797, vol. 3, c. 63, raised the defendant's commissions from two to three per cent. in precisely the same language as that of the last act; and of course, it received from him the same construction, and in both instances that construction was acquiesced in by the treasury department.

The next act upon the subject, and that which next precedes the act in question, is that of 2d March, 1799, vol. 4, c. 129, p. 447, entitled "An act to establish" (a word not used in the titles of the former acts) "the compensations of the officers," &c., the second section of which runs thus: "that from and after the last day of March next, and in lieu of the fees and emolu-

ments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers, and surveyors, the fees following, that is to say," &c. &c., (to the collectors of sundry ports, not including the defendant,) 401*] *"and to the collectors of all other districts, three per cent. on all moneys by them respectively received on account of the duties arising on goods, &c., imported into the United States, and on the tonnage of ships and vessels," whereby the defendant's commissions were established at three per cent.

A difference of phraseology will be observed between this and the two former laws. This section says, "that from and after the last day of March next," certain commissions shall be "allowed and paid" on all moneys received on account of duties arising on goods "imported into the United States," and not as before, "imported after the last day of March next." Yet this difference of phraseology made no difference at the treasury in the construction of this law until very lately.

The next act is that upon which the present question arises; the second section of which says, "that in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors, &c., two and a half per centum on all moneys which shall be collected and received by them, for and on account of the duties arising on goods, wares and merchandise imported into the United States, and on the tonnage of ships and vessels."

There is no difference between the words of this act and those of the act of 1799, excepting that the present act uses the words "collected and received," and the act of 1799 uses the word "received" only. But the word "collected" is believed to be merely an accidental tautology, which cannot alter the meaning of the section.

Neither of the two last, like the former laws on the same subject, confines, by express words, the commissions to the moneys received for duties arising on goods imported after a certain date; but the word after, is placed in a different part of the sentence; yet all these laws received the same construction at the treasury, for at least five months after this last act had passed; a construction which, as the defendant still contends, was perfectly correct.

402*] *The collector can receive no higher or lower commission upon the moneys "collected and received," upon the duties arising on the tonnage of a vessel, than upon the merchandise imported in such vessel.

The section of the law in question confines the change of commissions to the money arising on goods imported after the 30th of June, and on the tonnage of vessels, as strongly as if the words "after the 30th of June," had immediately followed the word "imported."

The participle "arising," must refer to the time when the section is to take effect, *i. e.*, "from and after the 30th of June next." The duties arise when the goods are landed, and when the bonds are taken.

To what time the words "arising" and "imported" relate, is not, perhaps, at first view, very obvious; but the date is found in the preceding part of the section. The only period mentioned throughout is "the 30th day of June."

The true reading of this section must be thus: "There shall be allowed on all moneys to be received for duties arising on goods imported after the 30th of June next." To speak of duties "arising" after the 30th of June, 1800, on goods imported and landed before that day, would be absurd; for the duties "arise" as soon as secured, though not received till a distant period. The word "imported" stands without any sign of time, and may be past, present or future, with equal propriety, unless resort be had to inference, and to the context. The language, to have been precise, should have been either "which may have been imported," or "to be imported." The word, however, standing without the explanatory signs, must receive that construction which is most consonant to justice, reason, and common sense.

By the 63d section of the collection law of 2d March, 1799, it is enacted, "that the duties imposed by law on the tonnage of any ship or vessel shall be paid to the collector, at the time of making entry of such ship or vessel; and it shall not be lawful to grant any permit, or to *unlade any goods, wares, or mer- [*403 chandise whatever, from such ship or vessel until the said tonnage duty is first paid."

It being admitted by the Attorney General, that the import duties and the tonnage duties must go hand in hand, no one can be at a loss for the time when the duties on the goods imported in any ship or vessel arose. It would be absurd to say that the defendant was entitled to 3 per cent. upon the money received for the duties on the tonnage of the vessel which arrived and entered on the 20th of June, and only two and a half per cent. upon the moneys which might fall due, and be collected and received by him after the 30th of June, for and on account of the duties which had arisen on the 20th of June, upon the goods imported in the same vessel.

Had it been the intention of Congress to have raised the commissions of some collectors, and to have reduced those of others, for like services performed under a former law, they would have said, "that from and after the 30th day of June next, the commissions hereby allowed, shall be upon all moneys by them respectively received, for and on account of the duties on goods, &c., which may be then due to the United States, and outstanding upon bonds, or which shall arise on goods, &c., imported into the United States.

But had such been the language of the law, it would have been unconstitutional, because *ex post facto*, and tending to impair the obligation of the contract which was made between the United States and the collectors, by the act of 1799. Yet the construction now contended for by the Attorney General, will give the law the same effect as if its language had been as just stated; for it will take from the collector one-half per cent. on the amount of bonds, which were outstanding at his office on the 30th of June, 1800, and which, of course, had been taken under the preceding act of 1799, by which his commission was established at three per cent.

This construction will also involve both absurdity and oppression.

*Suppose a person, on the 29th of [*404

June, 1800, had secured duties, by bonds, to the amount of 500 dollars, payable at eight, ten and twelve months; and that ten other citizens had made entries on the same day, the duties on which amounted only to 49 dollars each, which, being under 50, they were each obliged to pay down, and upon which the collector immediately received his commission of three per cent.; yet, if the late construction of the treasury be correct, the collector was entitled to receive only two and a half per cent. upon the bonded duties, although his responsibility and services were much greater than in the other cases, in which he received his three per cent. on duties which arose at the same time, on goods imported at the same time, and in the same vessel, and although the bonds were taken under the same law of 1799, which expressly established a commission of three per cent. from and after the last day of March, upon all moneys received for duties arising on goods imported into the United States until a new provision should be enacted and go into operation; that is, in effect, until the 30th day of June, 1800; for it never could have been the intention of Congress, that compensation laws should apply to other cases than such as should originate after such laws should go into operation.

Another case will show how the present construction of the treasury might have proved extremely oppressive to the defendant. Suppose that when he rendered his quarterly account to the treasury, up to the 1st of April, 1800, there were then outstanding bonds for duties in his office, to the amount of 150,000 dollars. He had a right to calculate upon receiving, in the course of the year, 4,500 dollars for his commissions thereon, and to make his engagements accordingly. After making such engagements, the law interferes to the utter ruin, perhaps, of the collector, who relied upon the faith of his government. If Congress have a right to take away one sixth part of the collector's compensation, for services already rendered, they may take the whole. The laborious and responsible part of those services is performed when the bonds are taken. It consists in receiving the entries of merchandise, examining invoices, classing and estimating duties, and taking bonds, with responsible sureties, &c. Indeed, the residue 405*] of the services is mere matter *of form in many instances, for the bonds so taken are lodged in the bank where the moneys are "collected and received," though the collector acknowledges the receipt of them in his weekly returns. It can never be permitted to the United States, after these services are rendered, to say, we have changed our mind; instead of three per cent. you shall have but two and a half per cent. Such a conduct on the part of an individual would be treated with contempt and indignation; or were this a case between a state and one of its citizens, and the state should come into this court for relief, the court would not hesitate to compel the state to perform its contract. The constitution of the United States, art. 1, section 10, says, "no law impairing the obligation of contracts shall be passed."

If the treasury construction prevails, it will, in almost every instance, confine the operation of the act of 1799 to three months, instead of allowing it to operate until the next law took effect; for one-third of all the bonds taken in July, 1799, for duties on European goods, and all the bonds taken for duties on wines and teas, did not fall due till July, 1800.

Suppose the law had contained such a clause as this, "that from and after the 30th day of June next, in lieu of the duties heretofore imposed by law, on goods, &c., imported from Europe, subject to a duty of twelve and a half per cent. *ad valorem*, there shall be charged only a duty of ten per cent. *ad valorem*, upon all such goods, &c., imported into the United States."

Suppose a ship from London had arrived on the 13th day of June, 1800: that all the cargo had been duly entered and discharged before the end of the month, except one consignment of considerable value, and that, after the expiration of fifteen working days, such goods had been taken from on board, and stored agreeably to law. Upon the 1st of July, the assignee appeared before the collector, with his entry duly made out, and his sureties ready to enter into bonds for the duties. The collector contended for the duties at twelve and a half per cent. *ad valorem;* the consignee offered to secure the duties at ten per cent. *ad valorem.* Would this court say that he was not bound to pay the twelve and a half per cent. duties, because, from *neglect or design, he did [*406 not secure the payment of the duties, and take away his goods when the other importers did?

The difference of phraseology between the two former and two latter laws, on the same subject, was not the effect of a design to benefit one collector, and to injure another; but was merely owing to the different manner in which different men will ever express themselves, in defining the same subject matter.

Breckenridge, (Attorney General,) in reply.

No argument, in favor of the defendant, can be drawn from the act of 1795, vol. 3, p. 168, for the words there are expressly "on goods, &c., imported after the last day of March;" but the words of the present act differ very materially; instead of saying, on goods imported after the 30th of June, it says, on moneys collected and received after the 30th of June. The difference of phraseology used by the legislature, when legislating on the same subject, evidently implies a difference of intention.

The word "arising," makes no difference in the construction of the sentence. It would have the same meaning if that word were entirely left out. The expression "duties on goods" is the same, in effect, as the expression "duties arising on goods." That part of the sentence is only descriptive of the subject, or fund, out of which the moneys were to be received. The words of the act of 1797, vol. 3, p. 392, which gave the defendant a commission of three per cent. are "on all moneys received on account of the duties arising on tonnage, and on goods wares and merchandise, imported after the last day of March, in the present year." Here is the same remarkable difference in language, which was observed in the act of 1795; and which adds strength to the argument, that the variation of the expressions was not accidental, but intended to convey a different signification.

The words of the act of 1800 are not that the collector shall receive only two and a half per cent. on the duties arising on goods imported after the 30th of June, but on all moneys col-

lected and received, after that day, on goods imported at any time. Moneys due, by bonds, 407*] *are not moneys collected and received. The actual collection and receipt of the money was the only act which could entitle the collector to his commission, under either law; and if collected and received after the 30th of June, only two and a half per cent. could be demanded.

JOHNSON, *J.* This is an amicable suit, instituted to try the question, whether the defendant, lately collector of the port of Petersburgh, was, after the 30th day of June, 1800, entitled to retain three per centum on the amount of sums received by him after that time, upon bonds for duties taken between that period and the last day of March, 1799.

The claim of the defendant is founded upon the act of March 2d, 1799, "to establish the compensations of the officers employed in the collection of the duties," &c. And the opposition, on behalf of the government, is founded on the act of May 10th, 1800, supplementary to the one before mentioned.

The whole difficulty results from the vague signification of some of the expressions made use of in the latter act; which, so far as may be material to the present decision, are contained in the following extract from the 2d section: "That in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors for the districts of Alexandria, Petersburgh and Richmond, respectively, two and a half per centum on all moneys which shall be collected and received by them," "for and on account of the duties arising on goods, wares, and merchandise imported into the United States, and on the tonnage of ships and vessels."

On behalf of the United States it is contended, that the rights of the collectors of duties, with regard to their compensation, are absolutely submitted to the will of Congress; that Congress has uniformly increased or diminished that compensation, as circumstances suggested the expediency of such a measure, without regarding any supposed limitation of their right 408*] to do *so, imposed by the claims of their officers; that it has been the uniform policy of the government to apportion the commission to the actual receipt of money; and, therefore, whatever may have been the proportion of their labor or responsibility, their right to compensation was not consummated before the actual receipt of the duties, and the amount of their commission remained liable to be increased or diminished at the will of Congress; that in passing their act of May 10th, 1800, they had a right to give it a retroactive operation; and the latter words of the 2d section, "arising on goods imported," will bear, and ought to receive such a construction.

At the same time that I admit the correctness of the prefatory observations of the Attorney General, my mind is led to adopt a conclusion unfavorable to the construction which he contends for.

The rights of the collectors of duties, as to their compensation, are certainly submitted to the justice and honor of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens; a confidence which experience leaves no room to distrust in our own; would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.

That it is the policy of the United States, in granting compensations to her revenue officers, to limit the consummation of their right to the actual receipts of money, is evident from a view of all her acts on that subject. But it is observable that every end of that policy is answered in this case, because the claim of the defendant is founded upon the actual receipt of money *arising upon bonds taken while the [*409 compensation was at three per cent. His claim has no relation to the amount bonded, but to the amount actually received upon the bonds taken prior to the last act.

Upon considering the question, therefore, upon the construction of the act, I confine myself to the single inquiry, how far the government has exercised its power, in reducing the compensation to the defendant, from three to two and a half per cent.

The words of the act, "arising on goods imported," although in themselves very indefinite in point of time, will receive a precise signification in this respect, by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it be necessary that the court should make an election between these words, in order to complete the sense, its choice will be immediately determined by recurring to two well known rules of construction, viz., that it ought to be consistent with the suggestions of natural justice, and that the words should be taken most strongly "*contra proferentem.*"

But there are other considerations which will lead to a conclusion, without supplying any supposed deficiency in the wording of the sentence. There is nothing, either in the terms made use of, or in the professed object of the law, necessarily retrospective; but the general intention of the act, as well as the signification of the word arising, both point to a future operation. Besides which, where it can be shown that a government has once adopted a certain rule of justice for its conduct, it is fair to infer, that in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed; and in the act of March 3d, 1797, which varies the compensation of the revenue officers in several particulars, that alteration is expressly restricted to take effect only with regard to future importations. I am of opinion that the defendant shall have judgment.

*WASHINGTON, *J.* The point sub- [*410 mitted by the circuit court of Virginia to this court is, whether the defendant, as collector, was restricted to a commission of two and a half per cent. on any, or all of the moneys col-

lected and received by him, after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods, &c., imported into the United States.

The solution of this question must depend upon another: does the 2d section of the act of the 10th of May, 1800, extend to duties which arose upon goods imported before, and received after, the 30th of June in that year, or is it to be restricted to duties arising on goods which should be imported after that period?

I am strongly inclined to the opinion, that every part of this section is future, and that a literal construction will render it entirely prospective upon the whole subject. The time at which the substitution of two and a half for three per cent. is to take place, as well as that of collection and receipt, are certainly future, and there is, I think, as little doubt that those receipts can only apply to duties which should arise after the same period, the word arising being clearly future in relation to the time specified in the section. The word imported, though past in relation to the duties which were to arise on the goods imported, may, nevertheless, be future in relation to the period when the charge of commissions was to take effect, and I think it ought to be so construed in this case, because the duties arise either immediately upon the importation of the goods, or upon the performance of some acts which, in contemplation of law, are immediately to follow the importation.

This construction is, I think, considerably strengthened by a reference to former laws upon the same subject.

The act of March, 1797, is plain and express upon this point, by fixing the commissions allowed by that law to moneys received on goods imported after the last day of that month. The 2d section of the act of March, 1799, was obviously intended to increase the commissions 411*] *of some collectors, and to vary the relative compensations which had been allowed to the several collectors by the former law; but there is no reason to believe that it was intended to change the objects for which this compensation to the collectors generally was to be allowed. Yet this law does not, in express terms, confine the commissions to duties arising on goods imported after the specified day, as had been done in the preceding act, but is worded, in this respect, precisely like the law immediately under consideration.

It is hardly to be imagined that over and above the increase of commissions allowed by the last law for services after the 31st of March, to be wholly rendered, the legislature intended to increase the commissions allowed by the act of 1797, for services which had been in part performed before the 31st of March, 1799, without an expectation of such increase, and where nothing remained to be done but to receive the money. Yet this would be the case, if the increase be not restricted to goods imported after the specified day. The change of expression in the latter law, I take to be perfectly accidental; and, in construing one of them by the other, both being in *pari materia*, I feel myself constrained to read the latter as if it had been expressed thus: "That after the last day of March, 1799, there shall be the following commissions allowed on all moneys received by the collectors respectively, on account of duties arising on goods, &c., imported into the United States, after that day," &c.

The 2d section of the act of 1795 was clearly intended to diminish the compensation of some, and to increase that of other collectors, and can, with as little reason as in the former case, be construed to change the objects for which this compensation was allowed. Such a construction would have the effect of raising the compensation of some collectors, and depressing that of others, for services partly performed at the same time, and in some instances, where those which remained to be done, in order to consummate the right to the commissions, were transferred from the collectors to the banks. This would, I think, be unreasonable, and *in the instances of diminished commis- [*412 sions would be unjust.

That the services performed preparatory to the collection or receipt of the duties were considered, by the legislature, as equal, at least, to the receiving of the money, is proved by the 4th section of the law of 1799, which provides, that whenever any collector should die, or resign, the commissions to which he would have been entitled on the receipt of all duties by him bonded, shall be equally divided between the collector resigning, or the legal representatives of the deceased collector, and his successor, whose duty it is made to collect the same.

I cannot, therefore, consent to such an interpretation of this law, as to give it a retrospective operation, so as to deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation, and to be in their nature severable, from the ultimate act of the money being received or collected, provided those acts are in reality performed.

My opinion is, that the defendant is entitled to three per cent. on all moneys collected and received by him, after the 30th June, 1800, on account of bonds previously taken, for duties arising on goods imported into the United States.

PATERSON, *J.* The basis of this action is the statute of Congress of the 10th of May, 1800; and the question is, whether the defendant is restricted to a commission of two and a half per cent. on moneys collected and received after the 30th of June, 1800, by virtue of revenue bonds, executed previously to that date. The words of the statute are, "that in lieu of the commission, heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors of Alexandria, Petersburgh, and Richmond, respectively, two and a half per cent. on all moneys which shall be collected and received by them, for and on account of the duties arising on goods, wares, and merchandise imported into the United States, and on the *tonnage of ships and ves- [*413 sels." The defendant was late collector of the customs for the district of Petersburgh, in the state of Virginia. Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will

alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. The word "arising" refers to the present time, or time to come, but cannot, with any propriety, relate to time past, and embrace former transactions. As to the word "imported," it may comprehend the past or future, or both, according to the subject matter, and the words with which it is associated. Thus the words "arising," coupled with the words "on goods imported," shows, that the whole clause has a future bearing and aspect, and will not justly admit of a retroactive construction. According to this view of the subject, the commission of two and a half per cent. is to be restricted to moneys received by the collector of Petersburgh, on account of the duties arising on goods, wares, and merchandise which shall be imported after the 30th of June, when the act went into operation. To fortify the foregoing construction, it may be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers.

CUSHING, *J.* The question referred to this court by the circuit court is, whether the defendant, as collector, by the act of the 10th of May, 1800, was restricted to a commission of two and a half per cent. on any or all of the moneys collected and received by him, after the 30th June, 1800, on account of bonds previously taken for duties arising on goods, wares and merchandise imported into the United States.

There was a prior act of Congress, entitling the defendant to three per cent. on all moneys 414*] received on account *of duties arising on goods imported into the United States, within his district; which act was in full force during the time those duties arose, and until the subsequent act in question of the 10th of May, 1800, was to come into operation, which was the 30th of June following; and the question is upon bonds previously taken for duties arising on goods imported before the 30th of June. Upon this question I am of opinion, that the collector has a right to the three per cent. allowed by the former law, on all moneys secured by bonds previously taken as aforesaid, for duties arising on goods imported before the 30th of June, 1800; and that he is not restricted by the latter law to two and a half per cent. And that the general and true intent of the latter law was to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to have a retrospective effect, to devest vested rights of the collector; it being unreasonable, in my opinion, to give the law a construction which would have such a retrospective effect, unless it contained express words to that purpose.

Whether the words "from and after the 30th of June," are in the beginning, middle, or end of the sentence, the meaning, in this respect, appears to me the same; to give the collector a new allowance on goods imported after that time.

When the former duties were secured by bond, the laws, I think, consider them, as far as regards the collector's allowance, as collected and received; the principal services being already done by securing the duties by bond.

MARSHALL, *Ch. J.*, being one of the judges whose opinions were opposed in the court below, dia not sit at this hearing.

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*MANELLA, PUJALS & COMPANY [*415
v.
JAMES BARRY.

If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority, from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders.

ERROR to the circuit court of the United States, for the district of Maryland.

The action was brought by the plaintiffs in error, to recover from the defendant, Barry, the price of three cargoes of tobacco, purchased and shipped by Barry, for account of the plaintiffs, but which were captured on their way to Spain, and condemned. The ground of the claim was, that Barry had not strictly pursued his instructions as to the shipments.

The transcript of the record contained two bills of exceptions.

In the first bill of exceptions, all the material facts of the case were stated, but the exception was taken only to the opinion of the court, who refused to suffer a witness to be sworn to prove the jury, to what was the true translation of a certain part of the Spanish instructions, as to which the parties differed, although the plaintiffs and defendant consented that the witness should be so sworn. This opinion, it is understood, was founded upon the idea, that the court, and not the jury, was the proper tribunal to decide the meaning and construction of all written evidence.

The facts stated in the first bill of exceptions, and which were referred to in the second, presented the following case:

On the 27th of January, 1798, Bernardo Lacosta, of Cadiz, in Spain, for and on behalf of the plaintiffs, who were also Spanish subjects, wrote and transmitted to the defendant, by the hands of Juan Alonzo Menendez Conde, a letter in the Spanish language, the following translation of which, purporting to be made by a sworn translator, was read in evidence to the jury.

*"*Cadiz, 27th January, 1798* [*416

"To Mr. JAMES BARRY, *Baltimore.*

"*My Most Esteemed Friend:*

"I derive a particular satisfaction in introducing to you the bearer of this letter, Mr. Juan Alonzo Menendez Conde, who goes to Baltimore as agent of the house of Messrs. Manella, Pujals & Co., of this place, principally interested in the

NOTE.—*Agency; agent's authority; how far principal bound*—see note, 7 L. ed. U. S. 725.

importation of tobacco for this kingdom. The confidence I have always had in you, and the friendship you have on all occasions manifested for me, warrant the conclusion that you will view this measure as your own, and will execute it with your wonted zeal and efficacy. Being an undertaking of considerable magnitude, a proportionable degree of economy should be observed in the purchases, the shipments and the reimbursements, because the least neglect may cause an enormous loss. By the last accounts from America, I find that tobacco has risen to a great price, but I hope this was only momentary. However, upon a reasonable calculation, it will not answer them at more than ten dollars per quintal, in America; these are the limits to which they can go without exposing themselves to too much loss. You will, however, consult the bearer, Mr. Menendez, or he with you, and in case you should determine on an advance of one-fourth or one-half a dollar more, to prevent delay, you may do so if you think proper, being fully convinced if you can do it for less, that you will omit nothing that may advance the interest of my friends. With this, the said Mr. Menendez takes an order for twenty thousand quintals to be shipped for this place in seven or eight vessels, and not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law.

"For the greater perspicuity the shipments will be made in the following manner:

"1. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them to this place, alternately to me, to Messrs. Gahn and Company, and to Messrs. Pablo, Greppi, Marliani and Company.

417*] "*2. Your letter, by the vessel, will state that the consignment is made on your account; that you order her to Cadiz, where you hope that the consignees may be able to sell, but that if the government should not permit the sale, or the English prevent her entry, that then the vessel is to proceed to Genoa.

"3. That the captain carry no other letters than those relating to the cargo, but he must have one for Charles Longhy, of Genoa, to whom the consignment will be made, in the supposed case of not being suffered to enter this port, or be permitted to sell here.

"4. Should the captain be prevented entering here, he will put into the nearest Spanish port to this, and send an express to the consignee.

"5. The captain will bring the charter-party, and the letter to cover the shipment; that, as well as the bill of lading, should specify two freights, one for Cadiz, and the other as though the vessel was in fact destined for Genoa.

"6. In the invoice by the vessel, you will insert in all the charges except the commission, which is understood shall be five per cent., to be hereafter added.

"7. By the way of England you will transmit the true invoices, adding thereto your commission.

"8. Great care should be taken, in the *role d' equipage*, as to the birth, age, size, &c., of the seamen, and that it agree in date and number with the shipping articles.

"9. Admitting that the vessel cannot enter here, there must not be any excess of freight on her going to another Spanish port; but this condition must be confidential with the captain, and must not appear in any document.

"10. The vessels should have Mediterranean passes, and, in a word, all other necessary documents, that we may have no difficulties with the privateers there; and if you could have the papers examined by the French, *Eng- [*418 lish and Spanish consuls, in your country, it appears to me it might serve as a great protection.

"11. The bills of lading will be remitted by triplicates by the way of London or Lisbon, to Messrs. Pablo, Greppi, Marliani & Co., of this place.

"As to your reimbursements you may draw as follows, to wit: 80,000 dollars on Don Juan de la Chappeaurouge and Urgulla, of Hamburgh; 40,000 on John Gore & Co., of London; 40,000 on Lora & Co., of Amsterdam; 40,000 on A. E. and I. E. Metzeuca & Koosen, of Lisbon—200,000; which sum you will dispose of according to your wants, advising the persons on whom you draw, that it is on account of and by order of Messrs. Pablo, Greppi, Marliani & Co. You will take special care to avoid drawing too large a sum at once, and that the bills on those places be at ninety days' sight; it being always understood that in case you are able to negotiate upon Spain, you will draw on that country in preference, on Manella, Pujals & Co., of this place, and at sixty days' sight, and then you will specify whether it is to be paid in cash or in *vales reales*. Although I have already mentioned that the insurance should be made here, yet you will make that charge in the invoice sent as though it had been effected by you. I refer you to the verbal communications of the bearer on this subject, who is sent on purpose to superintend the shipments; and you will, upon the whole, act for the advantage of the interested, taking care to keep this business secret in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen.

"You will determine the quality of the tobacco to be shipped, with the said Mr. Menendez. It should be well assorted, very sound and dry, though it does not appear necessary that it should be all of the best quality.

"In order to avoid every unforseen accident, in case any of the said houses should not accept the draughts above mentioned, which I do not apprehend, you will point out to the holders to present them to Messrs. Greppi, Marliana & Co., who will accept and domicile *them [*419 with our friends of the same place, as has been agreed on, and the said Messrs. Greppi have written to this effect to their correspondents. But we all flatter ourselves that this case will not occur.

"I remain, as always, your affectionate friend
(Signed) "BERNARDO LACOSTA."

This letter was delivered by Menendez on the 22d of March, 1798, to the defendant, who, in pursuance thereof, purchased 1,528 hogsheads of tobacco, containing, in the whole, 1,838,393 lbs., and amounting exclusive of charges, to the sum of 180,824 dollars and 77 cents, and including charges, other than freight, insurance and commissions, to the sum of 204,077

dollars and 77 cents. This tobacco was shipped in the following manner:

On the 28th of April, 1798, 62 hogsheads, amounting, with costs and charges, to 8,846 dollars and 36 cents, by the Moorish brig Muqueni, regularly documented as a Moorish vessel, and navigated by subjects of the Emperor of Morocco, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 18th of May, 1798, 270 hogsheads, amounting to 27,868 dollars and 35 cents, by the brig Minerva, a Danish vessel, regularly documented as such, navigated by Danish subjects, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Pablo, Greppi, Marliani & Co., at Cadiz.

On the 26th of May, 1798, 500 hogsheads, amounting of 60,914 dollars and 56 cents, by the ship Polly and Nancy, an American vessel, regularly documented as such, and navigated by citizens of the United States, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

420*] *On the 10th of July, 1798, 100 hogsheads, amounting to 13,876 dollars and 48 cents, by the schooner Felicity, an American vessel, regularly documented as such, and navigated by American citizens, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 23d of July, 1798, 117 hogsheads, amounting to 17,269 dollars and 77 cents, by the brig Susanna, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Pablo, Greppi, Marliani, & Co., at Cadiz.

On the 16th of August, 1798, 288 hogsheads, amounting to 43,064 dollars and 54 cents, by the ship Henrietta, an American vessel, regularly documented, and navigated by citizens of the United States, for the account and risk of Don Carlos Longhy, of Genoa, and consigned to Bernardo Lacosta, at Cadiz.

And on the 8th of November, 1798, 191 hogsheads by the brig Fly, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

The Moorish brig Muqueni was captured by the British, and condemned at Gibraltar, together with her cargo, as enemy's property.

The Danish brig Minerva was captured by the French, and, together with her cargo, condemned as good prize, by a French consul at Malaga, in Spain.

The ship Henrietta was captured by the British, and, with her cargo, condemned at Halifax as enemy's property.

The other four vessels arrived safe, and their cargoes were received by the plaintiffs, and applied to their own use and profit. The bills drawn by the defendant, to the amount of 204,073 dollars and 72 cents, were duly paid, and 421*] the proceeds came to the hands of *the defendant, and were applied to the purchases of the tobacco.

The cost and charges of the tobacco which arrived safe, exceeded the sum to which it would have amounted at 10 dollars per quintal, by the sum of 5,478 dollars and 27 cents.

The defendant produced the letters of Menendez, of which the following are translated extracts:

"City of Washington, 28th May, 1798.

"Mr. James Barry, Baltimore; Esteemed Sir: By your favor of 27th inst., I am informed relative to the purchases of tobacco, and the affreightments entered into for its shipment, all of which you have executed with that zeal and efficacy which you are accustomed to, and I therefore approve of the exactitude of your operations. At same time, I flatter myself that you will continue successively with equal activity, until the total compliance of 20,000 quintals ordered; and you may rest assured, as to my particular errand, that the payments shall be realized in London."

"Washington, 29th May, 1798.

"Under date of yesterday I wrote you a letter, approving of all your operations relative to the tobacco purchases, and affreightment for its shipment. The contents thereof I now confirm, you having done everything to my entire satisfaction, and as I would have expected from your exactitude and zeal. On the score of placing the funds in London, you may rest satisfied, because you well know that this is the principal object which has compelled me to go to Spain. I hope that in the next order we shall be able to effect the purchases to more advantage, and with less trouble."

*"Capes of Virginia, on board the ship [*422 Polly and Nancy, 14th June, 1798.

"Dear Friend,

"The 4th instant we sailed from Alexandria, and ever since have we been in the river, detained by calms and contrary winds, which has made me very impatient.

"By the last accounts which I have observed in the newspapers, I am persuaded that war is as much as declared between the United States and France. This novelty troubles me much, for which reason, if it be agreeable to you, and equally convenient, to have the future shipments made on Danish or Swedish flags, and in the name of Charles Longhy, of Genoa, you acting as his agent, you may do it so by declaring in the bills of lading and invoices, that the cargoes are for the account and risk of said Longhy, and by giving letters to the said captains for Messrs. Greppi, Lacosta, or Gahn, of Cadiz, of the following tenor:

"'Gentlemen, in virtue of orders I have received from Mr. Charles Longhy, of Genoa, to remit him a cargo of tobacco, on his proper account and risk, I have loaded in the ship ——, captain ——, [so many] hogsheads of tobacco, and I have given orders to said captain to touch at your port, (if not blockaded,) and to call upon you with a view to get permission from your government to sell a parcel; should the captain succeed in entering your port, and that you can obtain leave to dispose of the whole or part of his cargo, you will please to do so, for the best advantage of the said Mr. Longhy, remitting him the proceeds to Genoa. And in case that you cannot obtain a sale, you will please to direct the captain to proceed on to the said port of Genoa, supplying him with the means therefor,' &c.

"In this way it will be proper for you to charge your commission in the invoice. I contemplate that by making the further shipments in this mode, the property will go with more security, said Longhy, being a neutral subject; and should the vessel be met by French cruisers, 423*] *the cargoes would go secure, as the property would not appear to be American. I also believe that nothing of this would affect the insurances; and at all events it is best, because the insurances will be done on neutral ships and neutral property, so that the property also sounds as neutral. Should you, since my departure from Baltimore, have chartered any American vessel, you can make the shipment in the same way; because, in case a French cruiser should capture the vessel, the cargo may be saved on account of its not appearing to be American property; so that the only thing subject to condemnation, in that case, will be the vessel and her freight; whereas, if the property goes in your name, both vessel and cargo will be condemned, if under American colors; but if on a Danish or Swedish vessel, then the cargo only would be condemned. Therefore, whenever you can meet a Danish or Swedish vessel, and by making the shipment as for account of Longhy, the neutral subject, there can be no risk. Therefore, it appears to me very proper and consistent, in order to obviate these risks, in every case, that the further shipments do not sound in your name, but in that of said Longhy; or if not, in that of Messrs. Gahn & Co., of Cadiz, or of Mr. Gould, your brother-in-law, provided the French and the Portuguese come to a good understanding, which I am informed is the case, and that matters have been accommodated between them.

"Finally, you know, better than I do, the critical circumstances of the day, and for this reason I am satisfied you will be attentive in making choice of the mode which may be best calculated to save any shipment you may make. I can only say that of this vessel, I have much fear and apprehension, notwithstanding she sails fast.

"In case you should act conformably to what I have here mentioned as to further shipments, I, from this moment approve thereof; and that it may appear, and to save you from any accident that may occur, as also to prove that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order that at no time whatever you should be chargeable with the consequences.

424*] *"You will encharge the captains to wait the opportunity of a fresh N. W. wind, in order the sooner to get clear of the coast, and the danger of cruisers, the same we had in view. You will also direct them to make for the first port of Spain, be it which it may, as the great object is to save the cargoes."

This letter was received by the defendant before the shipment by the Henrietta was made.

On the same 14th of June, 1798, Menendez wrote a letter also to Robert Barry, the nephew, and principal clerk and assistant of the defendant in his business, of which the following are translated extracts:

"By what I wrote your uncle under this same date, you will be informed of all that I have recommended. In addition to which, I shall mention to you, that you will perceive in the copy of the private instructions what I am directed to do on the score of the tobacco shipments, and you will see in one article thereof, that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of the neutral subject. In the present day it may be said, that war is declared between these states and the French Republic; for which reason we may view the thing in a different light.

"When you make up the general invoice, you will recollect to charge in that which you are to forward to Bernardo Lacosta, two and a half dollars per quintal of tobacco, over and above the real costs and charges, adding a note to the bottom thereof, that you do not charge insurance, nor loss on the reimbursements, such being to be done in Europe, and that you do not know to what amount they may ascend. The general invoice containing the real costs and charges you will remit to Mr. Joseph Anthony de Sola, administrator general of the King's tobacco stores at Cadiz, or directed in my name, which letter for me will always come to the hands of said Sola. You already know that the other fictitious invoice is intended to be exhibited at Madrid, but that no other person shall know any thing of the other that is to contain the real cost and charges, by which only we the concerned *are to be gov- [*425 erned. The invoice you are to remit to Bernardo Lacosta, in which the two and a half dollars per quintal is to be overcharged, is also to be delivered to Joseph Anthony de Sola, which you will remind him of."

This last letter was received by Robert Barry, within a few days after its date, and before the shipment by the Henrietta, and was by him delivered to the defendant.

It was also proved that Menendez, on his first arrival at Baltimore, declared to the defendant that he had private instructions not contained or specified in the said letter of the 27th of January, 1798; and that those private instructions authorized, among other things, a shipment of the tobacco to be purchased, in neutral vessels generally, without confining the same to American vessels. That Robert Barry saw in the possession of Menendez, soon after his arrival in Baltimore, a written paper in the Spanish language, purporting, and declared by Menendez to be a paper containing such private instructions. That Menendez read a part of them to Robert Barry, who looked at the paper at the same time, and saw that he read correctly, and that what he read was of the purport aforesaid.

That at the time of taking up the Moorish brig and Danish barque, the defendant found it impossible to procure suitable American vessels. That Menendez knew of, and approved, the shipments in the Moorish brig and Danish barque at the time they were made. That the defendant constantly communicated with Menendez, during his stay in Baltimore, on the subject of the said purchases and shipments, and therein acted with his entire approbation and concurrence. That Menendez urged the necessity of making the shipments of the tobacco speedily, even if the price should be greater than 10 dollars per quintal, calculating, as he said, that if the tobacco should arrive in Spain at 15 dollars, the concern would clear 100,000

dollars, and that for his share or interest therein, which was one tenth, he should clear 10,000 dollars. That the aggregate of all the purchases of tobacco, excluding insurance, freight and 426*] commissions, *did not exceed ten dollars and a half per quintal, and that Menendez approved the prices at which they were made.

That Danish and Moorish vessels were neutral vessels, and that the tobacco was really shipped for the actual account and risk of the plaintiffs.

Whereupon, says the first bill of exceptions, "the plaintiffs, by their counsel, offered to swear a witness to prove to the jury, that the said paper, at first read in evidence to the jury by them, as a true translation of the said letter of the 27th of January, 1798, is not a correct translation of the said letter, in that part of it which is contained in the following words, '*para presentiar la expedicion*,' and that the true construction of the said words is, 'to be present at, or assist in, the shipments,' and not 'to superintend the shipments,' as in the said paper is stated; to the swearing which witness, for the purpose aforesaid, the defendant, by his counsel, consented, but the court would not admit such evidence to be given to the jury on the trial of such issue, to determine the true import and legal construction of the said words." To which opinion the counsel for the plaintiffs excepted.

The second bill of exceptions began as follows: "And upon the aforegoing statement, prefixed to the first bill of exceptions in this case, the plaintiffs, by their counsel, prayed the directions of the court, that if the jury believed the matters so offered and given in evidence by the plaintiffs, then the plaintiffs are entitled to recover, on their action, the amount of the price, costs and charges of the tobacco, shipped as aforesaid on board" the Moorish brig Muqueni, the Danish brig Minerva, and the American ship Henrietta, and also the sum of 5,478 dollars and 27 cents, being the excess in the price, costs, and charges of the four cargoes shipped by the defendant, and received by the plaintiffs as aforesaid, over and above the price limited by the letter of the 27th of January, 1798. "But the court were of opinion, and did direct the jury, that by that letter, the defendant was authorized to make the shipments of tobacco on board of other than American ves- 427*] sels, or *vessels belonging to citizens of the United States, agreeably to the laws thereof, and that the shipment of the tobacco in the Moorish and Danish vessels, as stated in this bill of exceptions, (the said vessels being admitted to be neutral vessels as aforesaid,) was not in violation of the instructions in the said letter, and that the plaintiffs have not sustained the present action for the recovery of damages for such shipments on the said Danish and Moorish vessels, against the said defendant. And the court were also of opinion, and did accordingly direct the jury, that by the said letter of instructions, the defendant was authorized to make the shipment of tobacco in the ship Henrietta, as above stated in this bill of exceptions, and to consign the said tobacco for the account and risk of the said Don Carlos Longhy, as stated in the said bill of exceptions. And the court were also of opinion, and did direct the jury, that if the defendant had not such discretion by the said letter, yet if the jury believed that the said several shipments of tobacco, on board the said Moorish and Danish vessels, and the said American ship Henrietta, were made as hereinbefore stated, by the direction, and with the approbation of the said Menendez, or were afterwards ratified by him as agent of the plaintiffs, as herein before stated, the plaintiffs have not sustained their present action for the recovery of damages for such shipments. And the court were of opinion, and directed the jury, that the evidence was sufficient in law to establish that the said shipments were made by the direction of the said Menendez, as agent of the plaintiffs, and were also ratified and confirmed by him as agent as aforesaid. And the court were also of opinion, and directed the jury, that the price of ten dollars and a half for each quintal of tobacco, limited by the said letter of the 27th of January, 1798, for the purchase of tobacco by the defendant, was the price that the defendant might give in America, exclusive of charges of every kind, and that as the price of the said tobacco, shipped by the defendant, did not average so much as ten and a half dollars per quintal, the plaintiffs have not sustained the present action to recover damages for the excess of price given including charges." To which several opinions the plaintiffs excepted.

*The verdict and judgment were for [*428 the defendant, and the plaintiffs brought their writ of error into this court.

Harper, for the plaintiffs in error, observed, that the duty which he was now called upon to perform, was more painful than any which had occurred in the course of his professional practice. He was called upon to urge a claim against an honorable and respectable man, to the amount, perhaps, of his whole fortune. A claim founded upon no charge of dishonorable conduct or intentional injury, but upon an excess of authority in undertaking to judge for the plaintiffs, where the plaintiffs meant to judge for themselves. A loss has happened, and the question is, upon whom shall it fall? If the defendant has violated his instructions, though with the purest intention, he has taken the responsibility upon himself.

The first point made in the court below was, that the jury, and not the court, was to ascertain the true translation of the Spanish instructions.

The question, what ideas a man meant to convey, is a question of fact to be decided by a jury. But what is their legal effect is matter of law.

To enable the jury to say what ideas are by the custom or usage of a nation, annexed to certain words or phrases, they must inquire by witnesses.

But this is a question not material to the merits of this case, and admitting, for the sake of argument, that the court was the proper tribunal to translate the instructions, two questions will arise:

1. Whether the defendant has deviated from the strict letter and prohibition of his instructions? and,

2. Whether, if he has, he was justified by any authority contained in the letter of Lacosta, or by the orders and assent of Menendez?

429*] *1. He has deviated from the letter of his instructions in shipping the tobacco in Danish and Moorish vessels, which could not be commanded by American captains.

The words of the instructions are, "you will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law," evidently contemplating none but American vessels, and the obvious reason was to guard against British captures. For this purpose, it was believed that the property would be safer in American than in foreign ships. American produce, in foreign vessels, would be considered prima facie by the British, as enemy's goods.

2. In the case of the Henrietta, he violated his instructions, by not shipping the tobacco for his own account and risk, but for that of Longhy, of Genoa. That the property should be shipped in his own name, as a citizen of the United States, is the alpha and omega of the instructions.

It is true that we were in a state of limited hostility with France. But it being, in fact, Spanish property, and Spain being the ally of France, there was no danger of French condemnation. At that time, too, Great Britain hoped and expected that the United States would have joined her in the war. There was less probability, therefore, that she would commit depredations upon American property, than upon that of any other nation. That Genoa was either a province of France, or a very humble and submissive ally. To ship the property, therefore, as that of a Genoese, was to place it in the most dangerous situation possible as to British cruisers. This was done, no doubt, with good intentions, but with a weakness of judgment truly astonishing, and in direct violation of instructions.

2. The 2d question is, was he justified by any part of the letter in substituting his own judgment for that of his principals, in opposition to the positive injunctions of his instructions? He was to exercise his judgment only in cases not provided for by those instructions; but where they were precise and positive, he had no discretion. The great object of the whole letter 430*] *was, that the property should not appear to belong to a foreigner. Language is useless if it is not to be regarded. No man can be safe in commerce, if his orders are not to be obeyed. All confidence will be destroyed, and commerce must cease. The general expressions of the letter cannot be supposed to revoke all the specific orders, and give unlimited powers. For what purpose were those specific orders given, if a general and unlimited authority was conferred? The general expressions mean no more than this: We depend upon your fidelity and judgment in executing our orders. All the parts of the letter are to be taken together, so as to give effect to the whole.

He has not pursued his instructions with respect to the price. *Expressio unius est exclusio alterius.* By naming a price, they must be understood as restricting the defendant to that limit.

The defendant, then, is not justified by any thing in the letter itself. Is he justified by the authority of Menendez?

It is not proved that Menendez was an agent; or that, if he was, he had any power to dispense with the precise instructions contained in the letter of 27th of January. His declarations are not evidence, unless he is first proved to be an agent. It does not appear what authority he had. His private instructions might be very limited. It is not to be presumed that he had authority to vary the particular instructions contained in the letter. If he had, can it be believed that the defendant did not require him to produce them? He knew that he was about to act contrary to his instructions, and that he was taking a great responsibility upon himself. He ought to have taken a copy. The burden of proof lies on him.

But why not produce the testimony of Menendez? The cause has been pending five years in the court below. [It was answered that he had gone to Spain; that a commission had been sent there, but the commissioners refused to act, or the witness kept out of the way.] Does the letter itself show such an authority *vested in Menendez? It calls [*431 him agent, and refers the defendant to his verbal communications. But how agent? for what purpose? To see that their orders were duly executed; and to make verbal communications not inconsistent with written orders.

If agent, will that convert the letter into a set of hints instead of instructions? If he was their general agent, with full powers, why write particular instructions to the defendant? The agent would have kept the instructions in his pocket. They would have been written to him, and not to the defendant.

But how was he agent? 1st. As to the price; 2d. To superintend the shipments, within the limits of the instructions; 3d. To select tobacco of the proper quality to suit the Spanish market. His duty and authority were like those of a supercargo. He was an agent, even if he had only a particular authority. In order to constitute an agent, it is not necessary that he should have general powers. If his powers are not to be considered as restricted, we must violate that rule of construction which would give effect to the whole instrument, if possible. "*Para presentiar la expedicion.*" The word *expedicion* means shipment, not the whole enterprise. He was to communicate with the defendant, as to the whole enterprise, but not to control it. But supposing the expression to mean, that Menendez was to superintend the enterprise, it can only mean that he should see that the enterprise was conducted according to the instructions, and not that he should sanction a violation of them. It was to see that they should be fulfilled, not disobeyed. But the phrase *para presentiar*, does not mean "to superintend;" it only means that he should assist. It is translated into the French language by the word *assister*, to be present at, to partake of. But if we take the English meaning of the word assist, the question occurs, how assist? Certainly, according to the instructions. The very next sentence in the letter contradicts the idea of a general agency. The words are, "and you" (in the singular number) "will, upon the whole, act for the advantage of the interested." The discretion, if any, was given to the defendant himself, and not to Menendez. *He [*432 was only to be consulted and advised with. In any point of view in which it can be placed, it does not justify the idea, that a power was given

to control the orders to give the property an American character.

W. Pinckney and Martin, contra. The points of this case are few, and float upon the surface. They depend upon the construction of the orders, and the authority of Menendez. Menendez was not the casual bearer of the letter of instructions to the defendant, but sent on purpose; his sole business was to superintend this transaction. The defendant agreed to undertake the business; he entered upon his duty, and endeavored to discharge it with fidelity. This action is, therefore, grounded on the ungracious idea, that in performing his duty to the best of his judgment, he has erred. The defendant is not charged with fraud or intentional injury. It is, therefore, an action *stricti juris*.

When the nature of this transaction is considered, the fraud meditated upon the Spanish government by the double sets of invoices, and the neutral cover attempted for the property, the plaintiffs come with an ill grace into a court of justice to charge a loss upon the defendant, for a mere error of judgment, while acting with honor and fidelity, and exercising his discretion for their advantage to the best of his ability.

If there was any ambiguity in the letter, it was the fault of the plaintiffs; and to take advantage of it now, would be fraudulent. If that ambiguity was intended, it would be base and dishonorable. The plaintiffs ought to have explained themselves. The defendant, at 3,000 miles distance, could not consult them, and he cannot be chargeable for an error, if any, upon a point of the instructions in itself ambiguous.

Verba fortius accipiuntur contra proferentem.

The demand consists of three items;

433*] *1. The excess of price beyond that limited by the instructions.

2. The price of the cargoes shipped in the Moorish and Danish vessels.

3. The cargo of the Henrietta, not shipped in the defendant's own name, but in that of Don Carlos Longhy, of Genoa.

1. We had supposed that the question of price had been abandoned.

We contend that the price limited, meant clear of all charges, subsequent to the purchase in this country. The limitation was to guide the defendant in his purchases; but he could not say at the time of purchase what charges might arise upon it before it would be in his power to ship it.

We contend, also, that it meant the average of the whole, and not of any particular parcel.

2. The demand for the cargoes shipped in the Moorish and Danish vessels, rests on the allegation that the defendant was bound by his instructions to employ American vessels only.

The only word in the instructions relative to this point, has been misinterpreted by the counsel for the plaintiffs. He has supposed that the orders were to find "captains of fidelity, American born." But the letter only directs him to "seek" such, but he was not bound to find them. The bill of exceptions shows that he sought for American vessels, but they could not be found. It is on the letter, not on the spirit of the instructions, that the plaintiffs will put their case.

The defendant was bound to prevent delay; if he could not find American captains of the description mentioned, he was not justified in waiting. The only condition was, that the shipment should not be made in less than six vessels. In no other part of the letter are the *vessels designated; yet there is another [*434 part where it might have been expected. The simulated insurance was to be made in America, the real in Europe. The conditions of the real insurance are stated; but it is not one of them, that the property should be shipped in American vessels. There was no necessity to discriminate between American and other neutral vessels. The policy of Great Britain was to conciliate all neutral nations, particularly the northern. And having never given up the principle upon which American as well as British naval greatness depends, the right to take belligerent property out of neutral ships, she would search for it as strictly in American, as in Danish or Moorish vessels.

But our vessels were not absolutely neutral as to France. Our flag was suspected of covering enemy goods by one party, and was the object of plunder, if not of hostility, to the other.

There was no reason, therefore, for preferring our vessels. The insurance would be made upon property in neutral vessels generally.

But it is said, that it would be a suspicious circumstance, that American property should be shipped in any other than American vessels. This is by no means a strong argument; because our tonnage is not always sufficient for our commerce.

3. As to the shipment by the Henrietta. Was it justified either by the instructions or by the authority of Menendez?

The great object of the instructions was to cover the property as neutral. The defendant was bound to keep this constantly in view. When, therefore, in August, 1798, America had ceased to be neutral, he was not only not bound to ship the tobacco in his own name, but would have been liable to an action if he had. The reason of shipping it in his own name had ceased. He was no longer an unsuspected neutral, but a belligerent. Affairs with France had come to a crisis. Actual hostilities had commenced. The state of things was materially changed. What was he to do? He could not consult his *principal. If in such cir- [*435 cumstances he acted with good faith, and according to his best judgment pursued the spirit of his instructions, they who would subject him to an action ought to blush.

It would be strange, indeed, if he should not, in such a case, have some discretion. Every agent must, in the nature of things, have a discretion to vary from the precise letter of his instructions, to carry into effect their general intent.

But he has this discretion in express terms: "You will, upon the whole, act for the advantage of the interested." We do not contend for an unlimited discretion. We admit that it is limited by the general scope and spirit of the instructions. If he had given a belligerent character to the property, then, indeed, he would have been liable. The injunction to keep the business secret, was only "to prevent a rise in" the American "market." It applied only to the transactions in this country. Let us then

see how the defendant conducted himself in this unforeseen state of things. As he could not consult his principals, he took the advice of Menendez, their acknowledged agent, who had come for the sole purpose of superintending this expedition, who the plaintiffs said in their letter would communicate verbally with the defendant upon that subject, who was the bearer of the particular instructions to the defendant, and who alleged that he had private instructions from the plaintiffs, and authority to give the orders which he gave.

If the letter to the defendant was ambiguous, who so capable of explaining its meaning as Menendez, the confidential agent of the plaintiffs? Their letter to the defendant, by Menendez, was a letter of credit and confidence. The defendant was bound to place confidence in the representations of Menendez. If he exceeded his authority, they, and not the defendant, must suffer. How could the defendant know when he was imposed upon by Menendez? What reason had the defendant to doubt the truth of his verbal communications, when the plaintiffs themselves had referred him to those verbal communications? He had no cause of suspicion; the advice of Menendez was reasonable, it 436*] was judicious, *and consistent with the general scope of the enterprise. If the law will not protect a man acting honorably under such instructions, and in such circumstances, the law is a system of fraud.

Don Carlos Longhy, of Genoa, was the person pointed out by the plaintiffs themselves, as the person to whom the tobacco should be ostensibly consigned in a certain event. He was, therefore, a person in whom the plaintiffs could place confidence. He was a neutral, while the defendant was not. When Menendez ordered the shipment to be made in his name, the defendant had no cause to suspect that he exceeded his authority. But if he did exceed his authority who ought to suffer? The plaintiffs who placed their confidence in him, or the defendant who was required by the plaintiffs to give him credit?

But we are asked, who have we not examined Menendez as a witness? We answer, that a commission has been sent to Spain for that purpose; the commissioners have refused to act, and have sent back the commission. But the question may be retorted upon the plaintiffs. Why have they not examined Menendez? Nay, why have they not brought their action against him? If any injury has been done, he is the author of it. He directed, and he approved all the acts of the defendant.

But the plaintiffs themselves have affirmed the very conduct of the defendant of which they complain. The two shipments by the Felicity, and the Susanna, were made in the same manner as that by the Henrietta, and were received by the plaintiffs. By what rule can they affirm his conduct when it turns out for their benefit, and disaffirm the like conduct when a loss has happened?

P. B. Key, in reply. We admit that words are to be construed most strongly against him who uses them, and that where ambiguity exists, the construction will be against him who ought to have explained himself. But the question is, whether any ambiguity exists; whether this is not a clear limited agency. The defendant *was limited as to the subject, the [*437 price, the consignment, the name of the shipper, the vessels, the captains, and the crew; there was nothing left but a discretion bounded by these limitations; and the authority of Menendez did not exceed that of the defendant.

They had either a general discretionary power, or they were limited by the letter of their instructions. If they had a general discretion, why give special and precise instructions?

It is plain that no vessels were contemplated by the plaintiffs but American vessels. We do not contend that the strict letter of the instructions directs the defendant to find captains, American born, but we say that such is the spirit and meaning of the instructions. That the whole transaction, from beginning to end, was to bear the appearance and stamp of the American character. But how unnatural must it appear, to see an American cargo shipped on board a Moorish vessel. This circumstance is so singular, as in itself to be a strong ground of suspicion, especially as our vessels are seeking for employment in every part of the world.

But in the case of the Henrietta, the very letter, as well as spirit, of the instructions, has been violated.

The instructions are precise and positive, that the defendant should ship the tobacco for his own account and risk.

To justify a departure from these positive orders, it is incumbent on the defendant to show a clear authority in Menendez to dispense with them. No such authority has been proved, and none can be presumed. The specific instructions contradict such a presumption. For why give the defendant special orders, if the whole general agency was in Menendez? Or why were they sent to the defendant, if he was not to be bound by them? The fair presumption is, that the verbal communications referred to, were to be only a further detail of the same plan, and not a general dispensation from the orders already given.

*The general expression which is re- [*438 lied on, that the defendant should, "upon the whole, act for the advantage of the interested," is in the same breath qualified by the directions to keep it secret, that the business was on account of foreigners, and by the positive injunction that it should always appear to be on his own account as an American citizen. This is in perfect conformity to the request in the beginning of the letter, "you will view this measure as your own," and shows most clearly their determination to risk their property under an American cover only. The same limitation also applies to the reference which the plaintiffs make to the verbal communications of Menendez; it is included in the same sentence, and is evidently intended to apply as well to those verbal communications as to the general power to act for the advantage of the concerned. The defendant, therefore, had no right to presume that Menendez had authority to alter the principal character of the risk, and to compel the plaintiffs to accept a Genoese, instead of an American cover.

The defendant derived no sanction to his conduct from the plaintiffs' receiving the cargoes of the Felicity and the Susanna; that circumstance was unknown to the defendant at the time of the shipment by the Henrietta.

The limitation of price meant to include all the costs and charges in America. The words are, "it will not answer them at more than ten dollars per quintal in America." The costs and charges in America make part of its price in America.

It is no argument to say, that the defendant could not regulate his purchases, if the price, including those charges, was to be limited, because those charges were uncertain.

The usual and customary charges were well known to the defendant, and he was bound to calculate his purchases accordingly. If, indeed, any accidental and unusual charge had been necessarily incurred, this would have been properly chargeable to the plaintiffs, but the letter evidently meant that the tobacco should 439*] *not amount to more than ten dollars a quintal, including customary charges.

Upon the whole, then, we contend, that the defendant has violated not only the letter, but the spirit of his instructions, and that he was not justified by the authority of Menendez.

February 26. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The Court has endeavored to bestow on this cause the attention to which it is alike entitled, by its own importance, by the situation of one of the parties, who is a stranger to our language and our laws, and by the ability and zeal with which it has been argued at the bar.

The action claims from the defendant the value of three cargoes of tobacco, purchased by him as the agent of the plaintiffs, which were captured on a voyage to Europe, and condemned as prize. The foundation of the claim is, that he deviated from the instructions which were given for the government of his conduct, and is, therefore, liable for the loss which has been sustained.

That an agent is bound to pursue the orders of his principals, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law which has not been drawn into question; and the only inquiry in this case is, has the defendant obeyed or deviated from his instructions? The circuit court was of opinion that they sanctioned his conduct, and it is the propriety of that opinion which is now to be reviewed in this court.

It depends on the true construction of the letter of the 27th of January, 1798, written by Bernardo Lacosta, on behalf of the plaintiffs, of which Juan Alonzo Menendez Conde was the bearer, and on the testimony which is stated in the bills of exceptions.

440*] *This letter introduces Menendez as the agent of the plaintiffs, who were principally concerned in the importation of tobacco into Spain, and declares a confidence that the defendant will embrace the business as his own, and execute it with his wonted attention.

After some general observations which relate to the proposed transaction, and which seem to be founded on the idea that the defendant and Menendez are to be associated in the business, the letter becomes more definite. The writer says, "with this the said Mr. Menendez takes an order for 20,000 quintals (of tobacco) to be shipped for this place in seven or eight vessels, and in not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews conform to the most rigorous ordinances. For greater clearness the shipments (*les expediciones*) will be made according to the following formalities: 1st. You will lade the vessels in your own name, stating that they are on your own account and risk as an American citizen, and consign them," &c.

This instruction is followed by ten others, which seem principally designed to conceal the real character of the cargoes, and to facilitate their escape from cruisers.

At the close of these instructions, the following words are added: "I refer you to that which the bearer will communicate to you verbally, respecting this business, who is sent on purpose to superintend the shipment, (*va solo para presenciar la expedicion,*) and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen."

In the execution of this commission, the defendant shipped two cargoes, the one on board a Danish and the other on board a Moorish vessel, each of which was captured and condemned as prize, the one by the French, and the other by the English.

*These shipments were made with [*441 the full approbation of Menendez, and it is in proof that American vessels were not, at the time, to be procured.

Before the order was completed, the government of the United States adopted such measures, for repelling the hostile aggressions of France, as to justify an opinion, that open and declared war between the two nations would soon take place. Under the impression of these measures, Mr. Menendez considered the American name as no longer affording a neutral character to the cargo, and directed it to be shipped on account and risk of Charles Longhy, of Genoa, who was a correspondent of the plaintiffs. These instructions were complied with.

The tobacco so shipped, which came safe, was received without complaint; but a large quantity, shipped in the Henrietta, was captured by a British cruiser, carried into Halifax, and there condemned as prize.

For the price of these three cargoes this action is brought. The inquiry respecting the two first will rest both on the instructions given to the defendant, and on the power of Menendez: that respecting the last rests solely on the power of Menendez.

It is alleged that the orders under which the defendant acted enjoined him to employ only American vessels, and that in employing those of other neutral powers he violated these orders. But there is certainly not one syllable in the letter which contains any instruction to the defendant relative to the employment of vessels, or which confines the transportation of the tobacco to be purchased to American vessels. The court thinks it a fair construction of the letter, that full powers in this respect were confided to Menendez, and that Barry

might counsel with him, but was to comply with his directions. Menendez is declared to be the agent of the plaintiffs, and the full extent of this term is not limited in any part of the letter. He brings with him an order for 20,000 quintals, to be shipped in six, seven, or eight vessels, under which condition the insurance is to be made in Spain.

442*] *These are not instructions to Barry; they are communications to him of the instructions given to Menendez, so far as was necessary for his understanding the views of the plaintiffs, and facilitating those views, under the authority of Menendez. The order, of which Menendez was the bearer, was for himself; and the degree of aid expected from Barry is described in the letter. Barry might have been unable, or unwilling, to undertake the business. In any event of that kind, the enterprise was not, certainly, at an end; but Menendez might obtain other assistance. From the nature of the case, therefore, as well as from the expression of the letter, the order was in the possession and power of Menendez, the agent, to whom directions relative to the shipment of the tobacco, in a certain number of vessels, had been given, and who is declared to have been sent to America for the purpose of superintending those shipments. Having made this explanation of the business confided to Menendez, the letter adds, "you will take care to seek captains of fidelity, American born," &c. Those inquiries Barry, an American merchant, could make much more successfully than Menendez, a foreigner, and, therefore, was directed to make them. But respecting the character of the vessel to be employed, no agency, on the part of Barry, was necessary, further than to comply with such directions as he might receive, and no directions respecting the vessels to be employed were given him, because those directions were given to Menendez. The instructions to Barry, to seek for American captains, are founded not upon instructions to employ American vessels, which were given to him, for none such were given, but upon the instructions which were given to Menendez. They are founded on the idea, that American vessels would be employed; but as circumstances might render the employment of them ineligible, it was reasonable to suppose that some discretion would be allowed to Menendez in this respect; accordingly, the private instructions, as stated in the bill of exceptions, only directed him to employ neutral vessels.

The idea that the power on this subject was completely in Menendez, and not in Barry, is confirmed, by observing that in the extended and minute rules, which are, for greater clearness, laid down for his government respecting the transportation of the tobacco, not one 443*] syllable *is said concerning the character of the vessels in which it was to be shipped, a direction which would certainly not have been omitted, had the subject not been confided to the general agent. It is also apparent, from the letters in the bill of exceptions, that the subject was so understood by both Menendez and Barry. When to these circumstances it is added, that American vessels were sought for at the time, and could not be obtained, it seems to the court perfectly clear, that with respect to the tobacco shipped in the Moorish and Danish vessels, the conduct of the defendant, being sanctioned by Menendez, was free from all exception.

The claim for the cargo of the Henrietta stands on stronger ground, because the defendant was explicitly instructed to lade the vessels in his own name, stating that the cargoes were shipped on his own account and risk. On this part of the case, the defendant must seek for a justification in the full powers of Menendez, to vary the orders given to him. These orders have been said to be free from all obscurity, and in themselves they unquestionably are so. Barry could not have doubted the positiveness of his instructions to ship the tobacco as his own property. The defense he sets up is, that he was justified in conforming to the directions of Menendez, varying those instructions.

An examination of this defense leads to a still more critical investigation of the letter of the 27th of January.

It has been already observed, that Menendez is stated in the letter, introducing him to Barry, to be the agent of the plaintiffs, and the bearer of their orders for the tobacco which was to be purchased. As it was not unreasonable to expect that a person, crossing the Atlantic in this character, would have some discretionary power to change instructions with a change in circumstances, so as to be enabled to adapt his conduct to those circumstances, ready faith would be given to all expressions which would convey this idea; and if no such power was intended, no expressions ought to have been used which could excite and cherish the idea.

The rules stated to Mr. Barry, as those by which his conduct would be governed, are declared to relate to the *part he was [*444 expected to take in the "expedicion," which the court translate transportation, or conveyance, of the tobacco to Europe. One of these being that the tobacco was to be shipped in his own name, it follows that this part of the subject was included in the Spanish term "expedicion." All these rules conclude with a reference to verbal communications, to be made by the agent himself, who is expressly declared to go to the United States for the sole purpose of attending to this very part of the transaction, "*va solo para presenciar la expedicion.*" This reference to the verbal communications of Menendez, unqualified by any restriction whatever, is a declaration of complete confidence, placed at least in his veracity, by the plaintiffs, and is a full authority given by them to Barry to credit the representations which he should make. How else is it to be understood? What right could Barry have to say to those who had referred him to the verbal communications which their agent should make to him on a particular subject, that he did not believe those communications?

It is argued that although no limitation is expressed to the credit which Barry was to give to the representations of Menendez, yet it must be necessarily understood that he could not change those things which were expressly directed; that the verbal communications referred to were to be conformable to, not subversive of, the written instructions; that on the idea of a power to alter the written instructions, it was useless to give them, and was only

necessary to send out Menendez with a full authority to govern the whole transaction.

But in the course of human affairs, it is not unusual for a principal to give, in detail, his ideas of the line of conduct to be observed by his agent, and yet to allow a departure from that line of conduct under particular circumstances.

It would not have been extraordinary had these rules for the conduct of Barry been followed by a declaration that, in a total change of circumstances, as in the event of America's becoming a belligerent, he was to ship the tobacco, not as American, but as neutral property. Had Barry been the sole agent, this right to exercise his discretion, if intended to be **445***] placed in him, would have *been mentioned in his letter. But Barry was neither the sole nor the principal agent. He was known to the plaintiffs only by recommendation, and while he was employed, because an American merchant could make the proposed purchases to greater advantage, and because an American name was required to cover the property. Menendez was the confidential agent, known to and trusted by the plaintiffs, who brought with him the order for the purchases, and came on purpose to attend to the conveyance of the tobacco to Europe. In the instructions to Menendez, therefore, would any discretion relative to the transportation of the tobacco be found, and it was enough that Barry was referred to his verbal communications.

The words would follow the reference to the verbal communications of Menendez, though not those which decide the opinion of the court, are not absolutely unimportant; they are, "and you will, upon the whole, act for the advantage of the parties interested." To what do these words, "upon the whole," refer? Unquestionably to the verbal communications as well as to the written instructions. They were both to regulate the conduct of the defendant. The caution which follows these words is understood, by the counsel for the plaintiffs, to limit their extent, and to direct, that in acting for the advantage of the interested, he was yet to keep secret that the tobacco belonged to foreigners.

There is, unquestionably, great force in this observation; and if the justification of Barry rested solely on the power given him in this clause, to act for the best, it would be doubtful how far it would avail him. The court, however, considers those words principally applying to the purchases, and as indicative of an expectation that a state of things would remain, in which the tobacco was to retain the character of American property, rather than as limiting the powers of Menendez over this part of the subject, in the event of such revolution as would make America a belligerent. The court forbears to make a critical examination of the words, because its opinion is formed on the character in which Menendez came to America, as stated in the letter introducing him to Barry. That letter warranted the belief that he was **446***] the principal *and confidential agent of the plaintiffs; that he had particular instructions for the government of his conduct, and that Barry was to receive and trust his verbal communications, especially on the subject of expediting the tobacco to Spain. It is impossible to read the letters from Menendez to Barry, which form a part of the bill of exceptions, without feeling a conviction that this was the understanding of the parties. He approves the conduct of the defendant, in the style of a man whose approbation gave a sanction to it, and when he directs the shipments to be made in the name of Charles Longhy, of Genoa, he says, "if you act conformably to what I have here mentioned, as to further shipments, I, from this moment, approve thereof, and that it may appear, and to save you from any accident that may occur, as also, that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order, that at no time whatever, you should be chargeable with the consequences." Such was the opinion which the confidential agent of the plaintiffs, in possession of their private instructions, entertained of his own powers.

He was not mistaken in their extent; at least the defendant had no right to believe him mistaken. On his arrival, he declared to Barry that he was in possession of private instructions, distinct from those which were contained in the letter of the 27th of January. He produced those instructions. The chief clerk of Barry read so much of them as related to vessels; and they did not require that the shipments should be made in American, but in neutral vessels; and in the letter of Menendez to the chief clerk, dated on the 14th of June, and accompanying that of the same date addressed to the defendant directing him to ship the tobacco as the property of Charles Longhy, of Genoa, he says, referring to a copy of his private instructions, "you will see that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of a neutral subject." What right had he to suspect that the confidential agent of the plaintiffs, to whose verbal communications they referred him, had forged instructions which he produced as those of his principals?

The counsel for the plaintiffs question the existence of these private instructions, and demand their production. *But how were [***447** they to be authenticated? Only by Menendez himself. Are not then their contents to be proved by the declarations of Menendez, by his stating them, and by the chief clerk of Barry, who read a part of them.

To the court, it appears, that in such a case as this, the proof respecting them is as ample and satisfactory as ought to be required.

After taking this extensive view of the case, of the powers of Menendez, and of the confidence the defendant was bound to repose in him, it only remains briefly to observe, that the directions he gave were not such as to awaken suspicion.

On the 14th of June, 1798, when these instructions were given, America had ceased to be a neutral power. War, it is true, was not formally declared, but it had commenced in fact, and hostilities were authorized by that department of the government which is invested with the power of making war. In such a state of things, the course which prudence would have dictated to the plaintiffs, had they been themselves in the United States, certainly was to cover the tobacco as neutral, not as American property; and when their agent, possessing pri-

vate instructions, directed the property to be shipped as neutral, not as American, the defendant would have been culpable in thwarting him.

It is scarcely necessary to add, that Menendez stated himself to be, and probably was, something more than an agent. He declared himself to be interested in the cargoes. This declaration, under all the circumstances of the case, was not to be discredited. Upon that, however, the judgment of the court is not founded. The letter of the 27th of January, represented him as the principal and confidential agent of the plaintiffs, whose verbal communications were to be trusted. He declared himself to possess particular instructions respecting a transaction which he came to superintend, and under those instructions he gave orders which the defendant has obeyed. The court is of opinion, that in so doing the defendant is justifiable, and no error has been committed in the court below in so instructing the jury.

448*] *Upon the other part of the exceptions, the price given for the tobacco, it is unnecessary to say more than that there is no error in the opinion of the court.

Affirmed.

EX PARTE BURFORD.

A warrant of commitment by justices of the peace must state a good cause certain, supported by oath.

JOHN Atkins Burford, a prisoner confined in the gaol of the county of Alexandria in the District of Columbia, petitioned this court for a habeas corpus, to inquire into the cause of his commitment, alleging that he was confined under and by color of process of the United States, and praying for a *certiorari* to the clerk of the circuit court of the District of Columbia, for the county of Washington, to certify the record by which his cause of commitment might be examined, and its legality investigated. To the petition was annexed a copy of his commitment, certified by the gaoler of Alexandria county.

Hiort, for the petitioner, observed, that he was aware of the decision of this court in the case of *Marbury v. Madison*, ante, vol. 1, that a mandamus would not lie in this court when it operated as an original process; but there is a vast difference between a mandamus and a writ of habeas corpus. The former is a high prerogative writ, issuing at the discretion of the court, but this is a writ of right, and cannot be refused. The constitution of the United States, art. 1, s. 9, declares, "that it shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

By the 14th section of the judiciary act of 1789, vol. 1, p. 58, it is enacted, "that all the before-mentioned courts of the United States" (including the Supreme Court) "shall have 449*] power to issue writs of scire facias, *habeas corpus, and all other writs," &c. "And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment." If a single justice of this court has the power, it would be a strange construction of the law, and of the constitution, to say that the whole court cannot exercise the same power.

The reason why this court would not exercise its appellate jurisdiction in a criminal case, was stated in the case of *The United States v. More*, *ante*, p. 159, to be because no mode of exercising it had been appointed by law, the writ of error extending only to civil cases. But if this is an exercise of its appellate jurisdiction, the mode by habeas corpus is expressly provided by the statute for that purpose.

March 4. MARSHALL, *Ch. J.* There is some obscurity in the act of Congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the habeas corpus. But the case of *The United States v. Hamilton*, 3 Dall. 17, is decisive. It was there determined that this court could grant a habeas corpus; therefore, let the writ issue, returnable immediately, together with a *certiorari*, as prayed.

Upon the return of the habeas corpus and *certiorari*, it appeared that, on the 28th of December, 1805, Burford was committed to the gaol of Alexandria county, by a warrant under the hands and seals of Jonah Thompson, and ten other justices of the peace for that county; which warrant was in the following words:

Alexandria county, ss.

Whereas John A. Burford, of the county aforesaid, shopkeeper, has been brought before a meeting of many of the justices of the peace for the said county, and by them was required to find sufficient sureties to be bound *with him in a recognizance, himself in [*450 the sum of four thousand dollars, and securities for the like sum, for his good behavior towards the citizens of the United States, and their property; and whereas the said John A. Burford hath failed or refused to find such sureties; these are, therefore, in the name of the United States, to command you, the said constables, forthwith to convey the said John A. Burford to the common gaol of the said county, and to deliver him to the keeper thereof, together with this precept; and we do, in the name of the said United States, hereby command you, the said keeper, to receive the said John A. Burford into your custody, in the said gaol, and him there safely keep, until he shall find such sureties as aforesaid, or be otherwise discharged by due course of law. Given under our hands and seals, this 28th day of December, 1805.

To any constable, and the gaoler of the county of Alexandria.

On the 4th of January, 1806, the circuit court of the District of Columbia, sitting in the county of Washington, upon the petition of Burford, granted a habeas corpus; and upon the return, the marshal certified, in addition to the above warrant of commitment, that Burford was apprehended by warrant, under the hands and seals of Jonah Thompson and thirteen other justices of the county of Alexandria, a copy of which he certifies to be on file in his office, and is as follows:

Alexandria county, ss.

The undersigned, justices of the United States, assigned to keep the peace within the said county, to the marshal of the district, and all and singular the constables, and other officers of the said county, greeting:

For as much as we are given to understand, from the information, testimony and complaint of many credible persons, that John A. Burford, of the said county, shopkeeper, is not of good name and fame, nor of honest conversation, but 451*] an evil doer and disturber of the *peace of the United States, so that murder, homicide, strifes, discord and other grievances and damages amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby. Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the country aforesaid, but that you attach, or one of you do attach, the body of the said John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient surety and mainprize for his good behavior towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided.

And this you shall in no wise omit, on the peril that shall ensue thereon, and have you before us this precept. Given under our hands and seals, in the county aforesaid, this 21st day of December, 1805.

The circuit court, upon hearing, remanded the prisoner to gaol, there to remain until he should enter into a recognizance for his good behavior for one year, himself in the sum of 1,000 dollars, and sureties in the like sum.

Hiort, for the prisoner, contended, that the commitment was illegal, both under the constitution of Virginia, and that of the United States. It does not state a cause certain, supported by oath.

By the 10th article of the bill of rights of Virginia, it is declared, that all warrants to seize any person whose offense is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted.

By the 6th article of the amendments to the constitution of the United States, it is declared, "that no warrants shall issue but upon probable cause, supported by oath or affirmation."

452*] *By the 8th article it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him; and the 10th article declares, that excessive bail shall not be required.

In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of that arrest, but of his commitment to prison. The question is, what authority has the gaoler to detain him? To ascertain this we must look to the warrant of commitment only. It is that only which can justify his detention. That warrant states no offense. It does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him of their own knowledge, or suspicion, or upon the oath of any person whomsoever.

It does not allege that witnesses were examined in his presence, or any other matter whatever, which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for the malicious prosecution? or whom could he indict for perjury?

There ought to have been a conviction of his being a person of ill fame. The fact ought to have been established by testimony, and the names of the witnesses stated. Boscawen on Convictions, 7, 8, 10, 16, 110; Salk. 181.

But the order was oppressive, inasmuch as it required sureties in the enormous sum of 4,000 dollars, for his good behavior for life.

If the prisoner had broken gaol, it would have been no escape, for the marshal is not answerable, unless a cause certain be contained in the warrant, 2 Inst. 52, 53; and the reason given by Blackstone, 1 Com. 137, why *the warrant must state the cause of [*453 commitment, is, that it may be examined into upon habeas corpus. And in vol. 4, p. 256, speaking of the power of a justice to require sureties for good behavior, he says, "But if he commits a man for want of sureties, he must express the cause thereof, with convenient certainty, and take care that such cause be a good one. *Rudyard's Case*, 2 Vent. 22.

Swann, on the same side, was informed by the court, that he need not say anything as to the original commitment by the justices, but might confine his observations to the recommitment by the circuit court upon the habeas corpus.

He observed that the circuit court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited its duration to one year. It passed no new judgment, but merely remanded the prisoner; it heard no evidence; it was not a proceeding *de novo;* it gave no judgment; it convicted the prisoner of no offense. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality.

The Judges of this court were unanimously of opinion, that the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath. If the circuit court had proceeded *de novo*, perhaps it might have made a difference. But this court is of opinion, that that court has gone only upon the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain. If the prisoner is really a person of ill fame, and ought to find sureties for his good behavior, the justices may proceed *de novo*, and take care that their proceedings are regular.

The prisoner is discharged.

454*] *HOPKIRK v. BELL.

The treaty of peace between Great Britain and the United States prevents the operation of the act of limitations of Virginia upon British debts contracted before that treaty.

An agent for collecting of debts merely, is not a factor within the meaning of the 13th section of that act.

THIS was a case certified from the circuit court for the fifth circuit, and Virginia district, in chancery sitting, in which the opinions of the judges (Marshall, *Ch. J.* and Griffin, *Dist. J.*) were opposed upon the following question:

"Whether the act of assembly of Virginia for the limitation of actions pleaded by the defendant was, under all the circumstances stated, a bar to the plaintiff's demand founded on a promissory note given on the 21st day of August, 1773?"

The certificate contained the following statement of facts agreed by the parties, viz.:

That David Bell, the defendant's testator, had considerable dealings with the mercantile house of Alexander Spiers, John Bowman & Co., (of which house the plaintiff was surviving partner,) in the then colony of Virginia, by their factors who resided in that colony, and on the 14th of March, 1768, gave his bond to the company for 633*l.* 8*s.* 11*d.* ½, conditioned for the payment of 316*l.* 14*s.* 5*d.* ¾, on demand. That he also became farther indebted in a balance of 121*l.* 0*s.* 4*d.* ½, on open account for dealings afterwards had with the company by their said factors. That on the 21st of August, 1773, Henry Bell, the defendant, made his writing or promissory note, under his hand, attested by two witnesses, in the following words, to wit: "I do hereby acknowledge myself to stand as security to Messrs. Alexander Spiers, John Bowman & Co., of Glasgow, for the sum of four hundred and thirty-seven pounds, fourteen shillings and ten pence, current money of Virginia, being a debt due them by my father, David Bell. Given under my hand, this twenty-first day of August, one thousand seven hundred and seventy-three. I am not to pay the above till it is convenient."

455*] *That the said Alexander Spiers, John Bowman & Co. were, at that time, British subjects, merchants, residents in Glasgow, in the kingdom of Great Britain, and have never been resident within the limits of the then colony, now state of Virginia, and that James Hopkirk, the surviving partner, now is, and always has been, from the time of his birth, a British subject, resident in the kingdom of Great Britain, and was never within the limits of the commonwealth of Virginia. That the company had a factor or factors resident in the commonwealth of Virginia on the 21st of August, 1773, when the note was given, and from that time to the commencement of the American war, viz., on or about the first of September, 1776. That the company had neither agent or factor in this country, authorized to collect their debts, from the commencement of the war in 1776, until the year 1784. That on or about the 10th of September, 1784, and ever since, an agent has resided in this commonwealth, authorized by power of attorney, generally to collect all debts due to the company in this commonwealth.

That by the fourth article of the definitive treaty of peace, between the United States and His Britannic Majesty, made on the third of September, 1782, "it is agreed, that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted." And by the second article of the convention between His Britannic Majesty and the United States, made on the 8th of January, 1802, "the said fourth article," (of the treaty of peace,) "so far as respects its future operation, is recognized, confirmed, and declared to be binding and obligatory," "and the same shall be accordingly observed with punctuality and good faith, and so as that the said creditors shall hereafter meet with no lawful impediment to the recovery of the full value in sterling money, of their bona fide debts."

That by the acts of the Virginia assembly, passed on the , and the practice of the courts, British creditors, their agents, and factors, were prevented from suing with effect for their debts in the courts of this commonwealth, from the *day of April, [*456 1774, until the year 1790, and that this suit was commenced on the 4th of Jan. 1803.

By the fourth section of the Virginia act of limitations, p. 107, actions upon the case on accounts are to be brought within five years after the cause of action. By the twelfth section there is a saving of persons beyond seas; but by the thirteenth section it is provided, "that all suits hereafter brought in the name or names of any person or persons residing beyond the seas, or out of this country, for the recovery of any debt due for goods actually sold and delivered here, by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this act for bringing the like suits, and not after, notwithstanding the saving herein before contained, to persons beyond the seas at the times their causes of action accrued."

C. Lee, for the plaintiff. The question is, whether the act of limitations, which had once begun to run was an impediment removed by the treaty?

This raises another question; did the treaty of peace repeal the laws of the several states which operated as legal impediments to the recovery of British debts, or was an act of each state necessary for that purpose?

It may be conceded without injury to this case, that the act of limitations began to run against this claim before the war, and that the war did not suspend its operation, but that it continued to run in the same manner as against a person who is in the country at the time the cause of action accrues, and who goes beyond seas before the limitation is complete, or against a woman who was sole when the cause of action accrued, and who married within the five years.

The plea of limitations can defeat the remedy only. The debt remains. But if the bar had been complete, yet it was for ever removed by the treaty.

This was a bona fide debt, contracted before the treaty, and the act of limitations is a legal impediment which it is endeavored to oppose to its recovery. But the *treaty says [*457 that the creditor shall meet with no legal impediment; and the constitution of the United

States declares the treaty to be the supreme law of the land. The act of limitations, therefore, must yield to the treaty.

In the case of *Ware v. Hylton*, 3 Dall. 199, this court, upon very solemn argument, decided, that the treaty not only repealed all the state laws which operated as impediments, but nullified all acts done, and all rights acquired, under such laws, which tended to obstruct the creditor's right of recovery.

Similar adjudications were also made in the cases of *Hamilton v. Eaton*, in 1796, by Ch. J. Ellsworth and Judge Sitgreaves, in North Carolina. *Page v. Pendleton*, in 1793, by Chancellor Wythe, Wythe's Reports, 127, and by this court in *The State of Georgia v. Brailsford*, 3 Dall. 1.

The second article of the convention of 1802, between the United States and Great Britain, Laws U. S. vol. 6, Appendix, 49, was produced by the difference of opinion at the board of commissioners for carrying into effect the sixth article of the treaty of 1794. The ideas of the United States, as to the effect of the treaty in removing all impediments arising from legislative acts, are expressed in the answer to Cunningham's claim, in page 51, of the printed report of the proceedings of the board.

The basis of the convention was the American construction of the sixth article of the treaty of 1794. A sum of 600,000*l.* sterling was stipulated to be paid by the United States for all losses under the sixth article of the treaty of 1794, and the creditors were to recover from their debtors whatever they could in the ordinary course of justice; all legislative impediments having been removed by the treaty of peace, which is recognized and confirmed by the convention.

458*] *March 4. *The Court* ordered the following opinion to be certified to the circuit court.

Upon the question, in this case, referred to this court from tne circuit court, it is considered by this court that the said act of limitations is not a bar to the plaintiff's demand on the said note; and this court is of opinion, that the length of time from the giving the note to the commencement of the war, in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States, of 1783, does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar: and is also of opinion, that the agent merely for collecting debts, mentioned and described in the said state of facts, is not to be considered as a factor within the meaning of the said act of assembly, so as to bring the case within the proviso of said act.

By this the court is not to be understood as giving an opinion on the construction of the note, as to the time of payment.

WILLIAM MALEY *v.* JARED SHATTUCK.

The commander of a United States ship of war, if he seizes a vessel on the high seas without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon, and hold the original captor liable for the whole loss.

A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation.

ON the 20th of August, 1804, Jared Shattuck exhibited his libel in the district court of the United States, for the district of Pennsylvania, in the following form:[1]

*To the Honorable Richard Peters, [*459 Esq., judge of the district court of the United States, in and for the district of Pennsylvania.

The libel of Jared Shattuck, merchant, most respectfully showeth,

That your libellant, being a subject of his majesty the King of Denmark, some time in or about the beginning of the month of May, in the year of our Lord 1800, at St. Thomas, one of his said majesty's West India islands, loaded a certain schooner or vessel called the Mercator, being an unarmed merchantman, fitted out at St. Thomas aforesaid, for trade only, and being then and there bona fide the property of your libellant, with a cargo of merchandise, consisting of provisions, wines and dry goods, for the sole and bona fide account of your libellant, said cargo amounting to 13,920 dollars, or thereabouts, on a voyage to Jacmel and Port Republican, in the island of St. Domingo, which he consigned to Toussaint Lucas, also a Danish subject, then and there master of the said schooner Mercator, who was instructed by your libellant to dispose of the said cargo at Jacmel or Port Republican aforesaid, to the best advantage, for account of your libellant, invest the proceeds in coffee of good quality, and return therewith to the said island of St. Thomas. And your libellant further saith, that on or about the 6th day of the said month of May, the said Toussaint Lucas sailed in the said schooner from tne said island of St. Thomas, upon the said voyage, for Jacmel and Port Republican, having on board the said cargo, and also a private adventure belonging to the said Toussaint Lucas, together with all such necessary papers and documents, for ascertaining the property and neutrality of the said vessel and her cargo as are usually carried by vessels belonging to Danish subjects; and proceeded on his said voyage until on or about the 14th day of the said month of May, when, in endeavoring to enter the said port of Jacmel, the said schooner Mercator was met with by a certain schooner, called the Experiment, a public armed vessel belonging to the government of the United States of America, and commanded by William Maley, a lieutenant in the navy of the said United States, who unlawfully, and in violation of the law of nations, took possession of the said schooner Mercator, and put *on board of her a prize-master, and [*460 four seamen, who carried the said schooner Mercator, and her cargo, to places unknown to your libellant. And so it is, may it please your

1.—As there are so few forms of admiralty proceedings in print, it is hoped that a recital of a considerable part of the record in this case will be acceptable to the profession; particularly as it is not a libel *in rem*, but for restitution in value, for not bringing in the vessel and cargo for adjudication.

honor, that neither the said William Maley, nor any person or persons acting under him, have brought the said schooner Mercator, or her cargo, to legal adjudication in any court of the United States, having admiralty jurisdiction.

To the end, therefore, that complete justice may be done to your libellant in the premises, may it please your honor to direct a monition to issue out of this honorable court, directed to said William Maley, Esq., commanding him forthwith to proceed in due form in this honorable court, against the said schooner Mercator, and her cargo, in order to obtain a legal adjudication of the same in due course of admiralty proceedings, or in default thereof, to appear before your honor, at such time and place as to your honor shall seem fit, to answer your libellant in the premises, and show cause why, by the said honorable court's final sentence and decree, he shall not be adjudged to make restitution in value, and pay to your libellant the whole amount of his loss aforesaid, with full damages and costs, and that such further justice may be done to your libellant in the premises, as to this honorable court shall ever seem meet, and your libellant shall ever pray, &c. PETER S. DUPONCEAU,
For the libellant.

To this libel Maley appeared,[1] and filed the protest following:

To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania.

The protest of William Maley, Esq., late commander of the schooner Experiment, a public armed vessel of the United States of America, appearing here in court, to avoid all, and all manner of contempt, contumacy 461*] and *default, under this his protest, against the libel filed by Jared Shattuck, merchant.

This protestant, saving and reserving to himself all, and all manner of exception to the manifest uncertainties, imperfections and insufficiencies, in the said libel contained, and protesting that he ought not, in any wise, to be required to appear thereto, or to proceed against the schooner Mercator, and her cargo, as is therein prayed, nevertheless, for the reasons aforesaid, and as cause why the said libel should be dismissed without further appearance or answer, avers, propounds and says,

That true it is that the said protestant, while commanding the said schooner Experiment, a public armed vessel of the United States of America, under a lawful commission and authority from the government of the said United States of America, did, on or about the 15th day of May, 1800, meet on the high seas, and take possession of the said schooner called the Mercator, in the said libel mentioned, and put on board an officer and four seamen. But this protestant denies that by so doing, he acted unlawfully and in violation of the law of nations; for he avers, propounds, and says, that since the passing of the act of the said United States of America, entitled "An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," and before the said 15th day of May, 1800, that is to say, on the day of , in the year 1799, the said schooner, called the Mercator, being an American registered vessel, owned, hired and employed by a person or persons resident within the said United States, or by citizens thereof, resident elsewhere, sailed and departed from the port of Baltimore, within the said United States, and at the time of her being met and taken possession of by this protestant as aforesaid, and before her return within the said United States, was proceeding directly, or from some intermediate port or place, to Jacmel, a port or place within the island of St. Domingo, within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, she was steering a direct course for the said port of Jacmel, and not for Port-au-Prince, whereas the letter of instructions *from the said Jared Shattuck, [*462 the libellant, and all the other papers exhibited to this protestant, by Toussaint Lucas, the master of the said schooner Mercator, or found on board thereof, falsely, fraudulently, and colorably represented and declared, among other things, that the said schooner was bound on a voyage from the island of St. Thomas to Port-au-Prince, a place then in the power and possession of the British troops, and not within the territory or dependencies of the French Republic. And this protestant further avers, propounds, and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, the master thereof appeared to be a Frenchman, (although this protestant has since heard, but does not admit, that he is an Italian,) and the crew consisted chiefly of Portuguese and Italians; nor was there then, nor at any time before, or since, exhibited to this protestant, any burgher's brief or briefs, or other evidence whatsoever, that the said master, or crew, or any part thereof, had become burghers of the said island of St. Thomas, or were otherwise naturalized subjects of the King of Denmark, without which this protestant avers, that the said master and crew could not lawfully command and navigate a Danish vessel, according to the laws and usages of Denmark. And this protestant further avers, propounds, and says, that the said Jared Shattuck, the libellant, alleging himself to be the owner of the said schooner Mercator, and her cargo, and to be a burgher of the island of St. Thomas, (neither of which allegations is admitted by this protestant,) was born in the state of Connecticut, one of the United States aforesaid, nor did it satisfactorily appear to this protestant, (considering the many other proofs and causes of suspicion to the contrary,) at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, nor has it so appeared at any time since, that the said Jared Shattuck, the libellant, had, by any lawful act of expatriation, or otherwise, at any time, become a subject or citizen of any other government or nation, and ceased to be a citizen of the said United States, owing fidelity and allegiance thereunto; but admitting it to be true that the said Jared Shattuck, the libellant, was an inhabitant of the said island of St. Thomas,

1.—It does not appear that a monition issued. The appearance of Maley seems, by the record, to have been voluntary.

this protestant did then, and does still, verily believe, that the said Jared Shattuck had re- 463*] paired to the *said island of St. Thomas, or remained there, for the purpose of carrying on an illicit and clandestine commerce with ports and places within the territory and dependencies of the French Republic, during the hostilities which were then waged between the United States and the French Republic, and also between the King of Great Britain and the said French Republic. And this protestant further avers, propounds, and says, that believing, from all the appearances, circumstances, and reasonable and just causes of suspicion, herein before averred and propounded, touching the original American character of the said schooner Mercator, the voyage on which she was actually proceeding, the false destination declared and represented in the said letter of instructions, and other papers exhibited and found on board, the description of the master and crew, and the birthplace and original allegiance of the said Jared Shattuck, the libellant, that the said schooner Mercator was a registered vessel of the said United States, voluntarily carried or suffered to proceed to a French port or place as aforesaid, and to be employed as aforesaid, contrary to the intent, and in defiance of the prohibitions of the said of the Congress of the United States, entitled "An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof." This protestant, in obedience to the said act of Congress, and to his official instructions, took possession of the said schooner as aforesaid, with a view to such further examination and proceedings as the law of nations, and the laws of the United States, should warrant, justify, and require. But this protestant avers that such possession was taken lawfully, upon the just and reasonable causes, motives and designs aforesaid, and with the utmost care, caution and solicitude, that the said schooner Mercator, and her cargo, should thereby suffer no injury, damage or spoliation; and that the real national character, and the real commercial objects of the said schooner Mercator, of her pretended owner, and of the said master and crew, while prosecuting her said voyage, should be more fully examined, and satisfactorily ascertained, without any unnecessary detention or delay. This protestant, at the time of placing on board of the said schooner Mercator, an officer and four seamen as aforesaid, did not remove, nor take therefrom, the said master and crew of the said schooner Mercator, 464*] or any of *them, nor remove, take away, cancel or destroy any of the papers and documents of said schooner Mercator, and her cargo, but ordered the officer, so put on board of the said schooner, having on board her said master and crew, and all the documents and papers of the said schooner and cargo, to make the best of his way to Cape François, there to deliver all his letters to Silas Talbot, Esq., then commodore and commander of the public vessels of the said United States, upon that station, and to wait the orders of the said Silas Talbot, with express instructions, also, to pay particular attention to every thing belonging to the said schooner Mercator, and her cargo, seeing that nothing should go to waste, and to deliver the said schooner to the said master thereof, if the said Silas Talbot, commodore and commander as aforesaid, should clear her. And this respondent further avers, propounds, and says, that in a short time, not exceeding the space of six hours, or thereabouts, after the said schooner Mercator had parted from the said schooner Experiment, destined for Cape François, as aforesaid, under the orders aforesaid, the said schooner Mercator was captured on the high seas, as prize, by a British private armed vessel of war, called the General Simcoe, commanded by Joseph Duval, who thereupon forcibly took the said schooner Mercator and her cargo from and out of the possession, care, custody and control, as well of the said master and crew of the said schooner Mercator, as of the said officer and men who had been put on board of her as aforesaid, by this protestant, and who were, thereupon, taken out of and removed from the said schooner Mercator, into and on board of the said British privateer; and the said schooner Mercator and her cargo sent to the island of Jamaica, under the charge of a prize-master and men belonging to the said British privateer, without the assent, connivance, assistance, negligence, or fault, whatsoever, of this protestant, or of the officer and men whom he had put on board of the said schooner Mercator as aforesaid, for the causes, and with the intentions, aforesaid. And this protestant further avers, propounds and says, that the said schooner Mercator and cargo, being so as aforesaid captured on the high seas, as prize, and sent to the said island of Jamaica, by the said British privateer, a libel, in due form of law was exhibited and filed by the said captors, in the court of vice-admiralty, lawfully established in the *said island of Ja- [*465 maica, (being a court of competent jurisdiction in all matters of prize,) alleging and charging that the said schooner Mercator and cargo were the property of France, or of the King of Spain, or of some person or persons being subjects of France, or of the King of Spain, or inhabiting within some of the territories of France, or of the King of Spain, and were good and lawful prize, inasmuch as hostility and war then notoriously subsisted between the King of Great Britain, on the one part, and the said French Republic and the King of Spain, on the other part; and thereupon the said captors, in their said libel, prayed that the said schooner Mercator and her cargo might be adjudged lawful prize, and be confiscated and condemned. And this protestant further avers, propounds and says, that, notwithstanding the denial of the said Jared Shattuck, in his said libel contained, he, the said Jared Shattuck, received speedy and full notice that the said schooner Mercator and her cargo were captured as prize, and sent into the said island of Jamaica as aforesaid, and there prosecuted by the said captors as prize, in manner aforesaid; and, thereupon, a claim was exhibited, and a defense made, by and for the said Jared Shattuck, the alleged owner of the said schooner Mercator, and her cargo. And upon hearing of the parties, by their respective advocates, and upon examining all the ship's papers and documents, together with other evidence and proofs in the cause, the judge of the said court of vice-admiralty was pleased to adjudge and decree, that the said schooner Mercator, and

her general cargo, were good and lawful prize, and did therefore adjudge, order and decree, that the same be condemned and confiscated to the use of the said captors, &c. From which sentence the said Jared Shattuck, the libellant, prayed leave to appeal, which was granted. But this protestant avers, that this appeal has not been duly prosecuted by the said Jared Shattuck, but has been altogether waived and abandoned.

And this protestant further avers, &c., that at the time of the capture of the said schooner and cargo, by the British privateer as aforesaid, and at the time of the libel and of the condemnation, and of the appeal as aforesaid, peace and amity notoriously subsisted between the United States of America and the King of Great Britain and the King of Denmark; and also be-
466*] tween *the said King of Great Britain and the King of Denmark, and their respective citizens and subjects: and, therefore, this protestant avers, that if the allegations contained in the libel of the said Jared Shattuck had been true, sentence of condemnation and confiscation, as prize, could not, and would not, have been pronounced as aforesaid, against the said schooner Mercator, and her cargo, by the said court of vice-admiralty, having competent jurisdiction upon all matters of prize, as aforesaid, and therein proceeding according to the law of nations and the faith of treaties.

Wherefore, this protestant prays that the said libel may be dismissed with costs, &c.

A. J. DALLAS, for the protestant.

The replication of Shattuck was as follows:

To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania.

In the case of the schooner Mercator, and her cargo, Toussaint Lucas, master.

The replication of Jared Shattuck, late owner of the said schooner Mercator, and her cargo, to the protest of William Maley, Esq., late commander of the public armed schooner of the United States, Experiment.

This replicant, not confessing or acknowledging any of the facts, matters and things, by the said William Maley, in and by his said protest set forth, propounded and alleged, and also saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said protest contained, and to the informality thereof, and protesting on his part, that the said William Maley ought to have appeared absolutely and not under protest, and made direct answer, upon oath or affirmation, to the charges in this replicant's libel contained, or to so much thereof as he has been advised to be material for him to reply unto; doth aver, allege, propound and say, that this
467*] replicant was born in *the state of Connecticut, in the year 1774, and when he was between fifteen and sixteen years of age, viz., about the end of 1789, or beginning of 1790, the United States then being at peace with all the world, he migrated to the island of St. Thomas, one of the dominions of the King of Denmark and Norway, with a view to settle and establish his permanent residence in that island. That he served his apprenticeship there, with a mercantile house, for about six years, and, from his first arrival, has constantly and permanently resided, and now continues to reside, there. That on the 10th of April, 1797, the United States being still at peace with all the world, he became a naturalized Danish subject, and burgher of the said island, and shortly afterwards intermarried with an inhabitant of that place, by whom he has several children, all living in that island. That he did acquire, and now holds real estate there, and is there permanently settled and established, and carries on the trade and business of a merchant.

The replication then goes on to deny that he went or remained there for the purpose of illicit trade. It avers, that during the war between France and Great Britain, which terminated by the treaty of Amiens, he was largely concerned in trade, at and from St. Thomas to foreign ports, and had a number of vessels navigating under the Danish flag in the West India seas. That several of his vessels were taken as well by British as French cruisers, carried into their respective islands, and there acquitted, and his neutral character, and that of his property, was acknowledged by the tribunals of both nations.

That in May, 1800, he loaded the Mercator, as mentioned in his libel, and sent her on a voyage to St. Domingo, consigned to the said Toussaint Lucas, who was also a bona fide subject. That the original destination of the vessel was for Port-au-Prince, *alias* Port Republican, a place then in the power, and under the dominion of the negro General Toussaint, not of the British troops, as stated in Maley's protest. That at that time commerce was lawfully carried on between the United States and ports of St. Domingo, which were in the power of General Toussaint. That on the 3d of May, 1800, he gave *written instructions to Lucas [*468 to proceed with his vessel to Port-au-Prince, but as she was ready to sail, he was informed that the forces of General Toussaint had taken Jacmel from General Rigaud, who held for the French Republic. That Jacmel is a port of the island of St. Domingo, which lies between the island of St. Thomas and Port-au-Prince, and is in the way between the former and the latter. That the distance from Jacmel to Port-au-Prince is by land only between thirty and forty miles, but by sea upwards of one hundred leagues. That conceiving it to be advantageous to try the market at Jacmel, before proceeding to Port-au-Prince, he gave verbal directions to Lucas for that purpose.

It denies that any thing false or colorable was intended, and that any of the Mercator's papers were false or colorable, and that he gave any orders to Lucas to deny or conceal his intention of going into Jacmel.

It admits, that after the passage of the act of Congress, "further to suspend," &c., and before the 15th of May, 1800, the Mercator was an American registered vessel, owned by a citizen of the United States, and sailed from Baltimore, but denies, that when taken by Maley, she was navigating contrary to the laws of the United States.

It avers, that on the 26th of November, 1799, he purchased her bona fide at St. Thomas, for the sum of 8,500 dollars, which he had actually paid and took a bill of sale, which was on board at the time of her capture. That from the day of purchase until her capture, he was bona fide the sole owner, and that no other person had any

interest in her or her cargo. That almost the whole shipping of the island of St. Thomas consists of vessels built in the United States, and in the island of Bermuda, and brought to the former island for sale.

That at the time of her capture, the Mercator was navigated as a bona fide Danish vessel, and had on board every paper and document which the law required to prove her neutrality; and especially that she had, 1st. The king's passport, in the usual form; 2d. The certificate of measurement; 3d. Her muster roll, or official list of her crew; 4th. The bill of sale; 5th. The 469*] burgher's *brief of her captain, Toussaint Lucas; 6th. Her clearance; 7th. The invoice and bill of lading of her cargo, duly attested, as to the ownership and neutrality thereof; 8th. The captain's instructions or sailing orders; and, 9th. A certificate, upon oath, of several respectable merchants of the island, attesting the fact of Shattuck's citizenship and residence in the island. That the crew consisted of eleven persons, viz., the master, the mate, seven seamen, the cook and a boy, who were all by birth Italian or Portuguese. That the master was a native of Leghorn, in Tuscany, was a Danish subject, and had resided seven years in St. Thomas. That very few Danish seamen are to be had in the Danish islands; and that, except the officers of government, there are very few Danes in the islands of St. Thomas and St. Croix, the inhabitants being chiefly native English and Americans, with some French and other foreigners.

It denies, that by the laws of Denmark, a vessel cannot be lawfully navigated by others than Danish or naturalized Danish sailors, and avers, that the crew may be subjects of any nation whatever, provided that in time of war, not more than one-third thereof be native subjects of one or other of the belligerent powers. It denies that any of the crew of the Mercator were subjects of any of the belligerent nations; and that at the time of her capture, there was any reasonable cause of suspicion that she was an American vessel carrying on an illicit trade. It submits to the court, whether Maley had a right, by the law of nations, to arrest a vessel on the high seas, sailing under the protection of his Danish majesty's royal passport, under pretense of a violation of a municipal law of the United States.

It suggests that Maley acted *mala fide*, and offers to prove that he was in the habit of violating the law of nations, and the instructions of his government, with respect to neutral vessels and property, and that he was dismissed from the service of the United States, principally on that account.

With respect to the capture by the British privateer, it admits that the Mercator was so captured, while under the protection of the 470*] United States and their national *flag, but does not admit that it was without the connivance or fault of Maley, or the officer whom he put on board. It admits the condemnation as prize; but avers that it was the duty of the officer and men to have resisted the capture, and to have demanded of the court of vice-admiralty, at Jamaica, restitution of the vessel and cargo, on the ground that the same had been unlawfully, and in violation of the respect due to the national vessels of the United States, and to the flag thereof taken from the possession, and from under the protection, of the commander of one of the public vessels of war of the United States.

It admits that Lucas filed a claim for the vessel and cargo, before the vice-admiralty court at Jamaica, and that they were condemned as prize, but alleges that the sentence of condemnation was contrary to the evidence. It admits also that an appeal was entered, and exhibits an exemplification of the proceedings. It denies that Lucas was bound to exhibit a claim, or to appeal from the condemnation, and that Shattuck was bound to prosecute the appeal, but avers that the whole should have been done by or in behalf of the United States, to whom alone the vessel and cargo would legally have been restored, as having been taken from their possession, and from under their protection.

It avers that Shattuck, as soon as he received notice of the capture and condemnation, gave information thereof to the Governor General of the Danish West India Islands, and to Richard Soderstrom, charged with the consular functions for the King of Denmark, in the United States, who communicated the information, without loss of time, to the government of the United States, and claimed reparation. That the government of the United States expressed a wish that the appeal should be prosecuted, in compliance with which Shattuck, without delay, forwarded the necessary papers to England; but when they arrived, he was informed by his proctors that it was useless to prosecute the appeal, because the prize money had been distributed, and the prize agent had died insolvent.

*It denies that the vessel and cargo [*471 would not have been condemned if they had been really and bona fide neutral property, and avers, that they really were such as stated in his libel, and does not admit that he is precluded by the sentence of the court of vice-admiralty of Jamaica from showing the same.

It concludes, "that for aught that has been said and alleged by the said William Maley, in his protest aforesaid, this replicant ought not to be precluded from obtaining the benefit of the prayer of his said libel; he therefore prays, that the said William Maley may, by the interlocutory decree of this honorable court, be ordered to appear absolutely, and without protest, before your honor, so that further justice may be done by this honorable court in the premises, as to right shall appertain."

(Signed) JARED SHATTUCK.

Jared Shattuck, being duly sworn according to law, on his oath doth say, that all and singular the facts, matters and things, by him in the foregoing replication stated, as far as they relate to his own acts, and matters within his own knowledge, are true; and inasmuch as the same relate to the acts of others, he verily believes them to be true.

(Signed) JARED SHATTUCK.

Sworn before me the 26th of May, 1804.

(Signed) RICHARD PETERS.

The rejoinder of Maley was as follows:

This rejoinant saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said replication contained, and not confessing or acknowledging any of the facts, matters and

things by the said Jared Shattuck in and by his said replication set forth and alleged, but denying the same, saith, that the facts in this rejoinant's protest set forth are true and 472*] sufficient to excuse him *from further appearance and answer to the libel of the said Jared Shattuck.

(Signed)

A. J. DALLAS, for William Maley.

Whereupon it was adjudged, ordered and decreed, that the libel be dismissed with costs.

From which decree Shattuck appealed to the circuit court.

Upon the appeal, the circuit court[1] being of opinion that the appellant was entitled to restitution, with damages and costs, reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely without protest, before the district court, to whom the cause was remitted for further proceedings.

In the district court, upon the remission of the cause, the following entry was made:

And now, to wit, this 9th day of August, 1805, the said William Maley, by Alexander James Dallas, his proctor aforesaid, having appeared absolutely as aforesaid, comes here into court, and for answer to the libel of the said Jared Shattuck, propounds and says, that the facts by this respondent in his said protest set forth are true, and to the intent that justice may be done in the premises, this respondent prays that the said Jared Shattuck may be called upon to declare, on his solemn oath, to whom, and when, and in what manner, he paid for the said vessel called the Mercator, and whether the original American owner hath any interest therein, or in the restitution in value, by the said libel prayed for; and whether any correspondence, and what, took place between the said Jared Shattuck and the captain of the said vessel, or any other person, after she was carried into Jamaica; and whether any correspondence, and 473*] *what, took place between the said Jared Shattuck and any persons, and whom, relative to the prosecution of an appeal from the decree of condemnation in Jamaica; and whether the said Jared Shattuck made any, and what application, and when, to the American government, relative to the capture of the said vessel by this respondent, as aforesaid, &c.

A. J. DALLAS, for the respondent.

And thereupon the said Jared Shattuck, under all legal protestations and reservations, for replication to the answer of William Maley, above mentioned, saith, that all and singular the facts, matters and things by him this replicant in his libel, and in his replication to the answer under protest of the said William Maley, filed in this honorable court, are true. Without this, that the facts by the said respondent, in his said answer, under protest set forth, are true.

He therefore humbly prays, that this honorable court, by its final decree in this cause, will be pleased to order, adjudge and decree, that the said defendant, William Maley, make restitution to this replicant of the value of the schooner Mercator, her rigging, tackle, apparel, &c., and of her cargo at the time of her capture by the United States' armed schooner Experiment, under the command of the said respondent; and that the said respondent pay to the said replicant the amount of the damages by him suffered, by reason and in consequence of the capture and loss of the said schooner Mercator, and her cargo; the said value and damages to be inquired of, estimated, and reported, to this honorable court by the clerk, taking to his assistance two merchants, in the usual form; and that the said respondent pay the costs of this suit, &c.

PETER S. DUPONCEAU, proctor for libellant.

The clerk having returned an estimate of the value and damages, amounting to 41,658 dollars and 67 cents, Maley filed the following exceptions to that report.

*1. That the respondent is charged [*474 with the expense and papers and outfits, advances to mariners, provisions and stores for the voyage, and labor of sailors before the shipping.

2. With the certificate of neutrality of property, duties at St. Thomas, commission-shipping the cargo, and insurance, without proof that any insurance was actually paid.

3. With expenses at Jamaica, and for copies of the proceedings in the court of admiralty, and of the appeal papers.

4. With expenses of Mr. Soderstrom.

5. With too much interest.

6. That there was no proof of the actual price of the schooner other than the bill of sale on board.

7. That there was no proof of the value of the cargo other than the invoice on board.

In the district court judgment was entered, by consent, in favor of the libellant, for the amount reported by the clerk, saving all exceptions upon the appeal.

In the circuit court the following answer of Shattuck to the exceptions to the report of the clerk was filed.

To the first exception he answers, that these expenditures of outfits, &c., made after the purchase, and after the sailing of the vessel, increased the value thereof, and are properly charged as a part of the said value.

The same were allowed in the case of the *Charming Betsey;* confirmed by a decree of this court, (circuit court,) and not appealed from.

2d. To the second exception he answers,

*1. As to the insurance, that it is a [*475 regular mercantile charge, the owner being considered as his own insurer. That it is generally admitted in mercantile accounts. That it is peculiarly admissible in the case of an unjust capture like the present, however it might be in a case of lawful capture, or capture with sufficient probable cause.

2. The commission on shipping is also a regular mercantile charge; the said commission, the duties of exportation paid at St. Thomas, and the certificate of neutrality, would have been charged on the goods, had the vessel arrived at the port of her destination. The present being a case of unjust capture, the respondent conceives that the commissioners would have been justified in allowing to him all the loss of possible profit, and to have taken into view the profit which he could have made, had the vessel arrived at the port of her destination, whereas they have only indemnified him for his actual losses, and he conceives that he ought not to be debarred from any part of his said indemnity.

1.—Holden by Judge Washington in May, 1805.

3d. To the third and fourth exceptions he answers, that the said expenses are reasonable, and the like were allowed and confirmed in the case of the *Charming Betsey*.

4th. To the fifth he answers, that the interest is not overcharged.

5th. To the sixth and seventh he answers, that the evidence of the papers found on board is sufficient in law, in prize causes, unless contradicted by other evidence. That it is confirmed in this case by the oath of the party contained in the pleadings in this cause. And as to the ship, is again confirmed by the oath of the same party, taken a second time on special interrogatories of the appellant, William Maley.

The answer of Shattuck, upon oath, to the several interrogatories contained in the answer of Maley to the libel, stated, that he purchased the schooner Mercator at St. Thomas, on the 26th of November, 1799, of one John Liddel, of Baltimore, for the sum of 8,500 dollars, 476*] *which, at the time of purchase, he actually and bona fide paid to the said John Liddel in Spanish milled dollars. That the original owner has not at present, nor has had at any time since the purchase thereof by the respondent, directly or indirectly, by way of trust, cover or otherwise, any interest therein, nor in the restitution in value, or damages prayed for in the libel.

That to the best of his recollection, the said schooner was taken by the British privateer on the 15th of May, 1800; was carried into, and arrived at Jamaica, and libelled on the 23d of the same month, and condemned as lawful prize on the 28th of June following. That the respondent was informed of the capture by a letter from Lucas, and that Dick, M'Call & Co. had taken the necessary steps to defend the property. That he was informed afterwards, by the arrival of a Mr. Grigg, in the beginning of August, 1800, that the schooner was condemned, and that an appeal had been entered. That the respondent had no opportunity of writing to Lucas during the trial. That immediately upon receiving notice of the condemnation, he applied to the Commandant General of the Danish West India islands to use his endeavors to obtain reparation from the American government, to which he received an answer, (which is lost,) together with a letter for the Secretary of State of the United States, which he forwarded.

That being advised that the United States were the proper party to prosecute the appeal and fearing that his further interference might prove prejudicial to his interest, he did not prosecute the appeal until he received from Mr. Soderstrom a copy of a letter from the Secretary of State of the United States, to him, dated the 26th of November, 1800, by which he understood that the government of the United States wished him to prosecute his appeal, in consequence of which he wrote for that purpose to his correspondents in London, by whom he was informed that they had taken the necessary steps to procure a reversal of the decree of condemnation; but that in the mean time the proceeds of the sales of the prize had been paid to the prize captain, who had died insolvent, so that no redress was finally had.

477*] *On the 29th of January, 1806, the circuit court affirmed the sentence of the district court, except as to the first and second items in the report of the clerk, and decreed restitution of the value and damages, amounting to 33,244 dollars and 67 cents, and costs.

From this sentence Maley appealed to this court.

The libellant also appealed as to so much of the sentence as disallowed those two items of the clerk's report.

Breckenridge, (Attorney General,) for the appellant, and Harper, Key and Martin, for the appellee.

Argument for the appellant.

Two grounds were taken by the Attorney General:

1st. That Maley had committed no act *mala fide*, but was in the performance of an authorized public duty, and was therefore justified.

2d. That the claims to reparation is without merit, and without law.

1. The act being done in the execution of a public duty, cannot, in our courts, be considered as done *mala fide*.

It was the policy of the times to prevent our citizens, whether resident here or abroad, from trading directly or indirectly with the French; and that policy ought to be kept in view when the several acts of Congress on this subject are under consideration. These acts are in vol. 4, p. 129, June 13th, 1798, and p. 244, 9th Feb. 1799, and vol. 5, p. 15, 27th Feb. 1800. These laws being all *in pari materia*, are to be taken into one view, and although some of them had expired, yet it is proper that they should be considered when deciding upon the construction of subsequent statutes on the same subject.

All the acts went successively to cut off the intercourse more effectually. The fifth section of the act of February, *1799, authorizes the President to give instructions to the commanders of the public armed ships to stop, examine and send in ships suspected. Vol. 4, p. 247. This was going a step further than the act of June, 1798, which did not authorize any such instructions. [*478

The act of Feb. 1800 (vol. 5, p. 15,) goes further still, and extends the prohibition of intercourse to citizens of the United States residing abroad; and expressly prohibits the island of Hispaniola, excepting such ports as should be excepted by the proclamation of the President.

Under the act of 1799, the President caused the instructions[1] of 12th of March, 1799, to be issued to the commanders of the public armed vessels of the United States, by which their attention was particularly called to the practice of covering the illicit trade under the Danish flag. The direction not to injure or harass the fair, neutral commerce, implies a right to stop and examine; and if, upon such examination, they should have reasonable cause to suspect that the vessel was engaged in violating the law, the instructions, as well as the law, required them to seize and send her in for adjudication. There was, therefore, a clear right (at least a right which our courts cannot deny) to detain the vessel a reasonable time for examination, and if it was a doubtful case, to send her for further examination to the commanding officer on that station.

1.—See these instructions at length, cited in the case of *Barreme v. Little*, 2 Cranch, 171.

That there was probable cause sufficient to justify such a measure, (however it might be in a case of actual seizure, and sending in for adjudication,) can scarcely be doubted.

1. Shattuck was a native American citizen, resident in a place respected by our government. The certificate of the merchants of St. Thomas, respecting his burghership, naturally led to suspicion. It appears, by the letters in the record, that although his neutrality had been respected in Tortola, yet it had not been respected in Jamaica.

479*] *2. The vessel was known to have been built in the United States and to have lately belonged to American citizens. She had sailed from Baltimore after the passing of the act of Congress.

3. The ship's papers showed her destination to be to Port-au-Prince, a place not prohibited; but she was stopped as she was entering Jacmel, a forbidden port.

An attempt is made to account for this, by verbal orders, but there is no proof of them; and it does not appear that Lieut. Maley was informed of such orders at the time of the detention, nor of the fact that Toussaint had possession of the place.

But if Maley had known of the verbal orders, the reason assigned by Shattuck for those orders, was, in itself, a strong ground of suspicion. The reason was, that he had heard that Toussaint had possession of Jacmel. If the vessel and cargo were bona fide Danish property, he might, with equal safety, have traded there while the place was in possession of Rigaud, as while in that of Toussaint. The reason could only apply to American property, upon the presumption that the United States would take off the prohibition, when it should be known that Jacmel was no longer under the acknowledged jurisdiction of France.

4. All the material papers were not produced. The master did not produce his burgher's brief, showing him to be a Danish subject; and a Danish vessel cannot lawfully sail, but under a Danish master.

The attestation of his burgher's brief is dated long after the vessel was stopped.

It must be remembered, that Maley did not seize the vessel as a prize, or as a forfeiture, but only detained her for further examination. The question, therefore, is not whether there was probable cause of seizure, but probable cause for further examination.

The master was not dispossessed of his vessel; none of the crew were taken out; her papers were not removed; no violence or outrage was 480*] committed. But *while detained for further examination, the vessel was seized by a stronger hand, and carried away by a superior force.

If it be objected that no resistance was made; it is answered that none could be made. The vessel was not armed; and the officer was bound by his instructions to permit the right of search by all the belligerents except France.

If it be said that Maley ought to have claimed the vessel in Jamaica, the answer is, that he had no right to seize, unless it was really an American vessel. If she was a fair neutral, Shattuck's claim must prevail.

If she was an American vessel she would not be condemned; if she was any thing else, he was not interested.

Maley's possession, therefore, was lawful and bona fide. If a loss has happened, it has been produced by the *vis major* of another, to whom the injured party ought to look for reparation. 4 Rob. 284, Maley's possession being bona fide, he cannot be answerable for the *mala fide* act of another.

He detained the vessel only six hours; and she was sailing towards Port-au-Prince, the ostensible place of her destination, when captured by the British ship of war.

Even if Maley was mistaken, but acted with good faith, he is not answerable for the loss. 1 Rob. 18, *The Betsey*.

That was an American ship and cargo, taken by the English at the capture of Guadaloupe, in April, 1794; and retaken by the French, in June following. The American claimants libelled the English captors for restitution in value. The captors defended themselves by an allegation that the ship had broken the blockade.

Sir William Scott, after deciding that there was no defense, on the ground of breach of blockade, stated the question to be, whether the original captors were exonerated of their responsibility to the American claimants. *"It is to be observed," says he, "that [*481 at the time of recapture America was a neutral country, and in amity with France. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal bona fide possession? And, 2d. whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal? For on both these points the law is clear, that a bona fide possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. This is the law, not of this court only, but of all courts, and one of the first principles of universal jurisprudence."

He then notices two cases very much in point: "*The Nicholas and Jan* was one of several Dutch ships taken at St. Eustatius, and sent home, under convoy, to England, for adjudication. In the mouth of the channel they were retaken by the French fleet. There was much neutral property on board, sufficiently documented," and a demand of restitution, in value, was made by the neutral owners, on the first captors. One of the grounds of the demand was, that the captors had willfully exposed the property to danger by bringing it home, when they might have resorted to the admiralty courts in the West Indies; but on this point the court was of opinion, that under all the circumstances, they had not exceeded the discretion necessarily intrusted to them by the nature of their command.

It was also urged against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on those grounds the English courts rejected their claims.

The other case which he cites, *The Hendrick and Jacob*, is still more like the present. A Hamburghese ship was erroneously taken as Dutch, and retaken by a French privateer, and was lost going into Nantz.

482*] *On demand for restitution against the British captor, the lords of appeal decided, that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French recaptor had a justifiable possession, under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands. That if the property had been saved indeed, the claimant must have looked for redress to the justice of his ally, the French; but since that claim was absolutely extinguished, by the loss of the goods, the proprietor was entitled to indemnification from the original captor.

After citing these authorities, Sir W. Scott inquires, whether, in the case then before him, the original seizure was so wrongful as to induce that strict responsibility which attaches to a tortious and unjustifiable possession.

He then states some grounds of suspicion which might have appeared to the captors, as to the fairness of the neutrality, and proceeds to inquire whether any conduct of the captors, after the first seizure, had rendered them liable to the strictest responsibility. "On this point," says he, "I must distinctly lay it down, that the irregularities to produce this effect must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors." In the conclusion of his opinion, he says, "if the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice."

So we say in our case, there is no reason that the American officer, who merely stopped the vessel for examination, should pay for British injustice.

2. That the claim to reparation is without merit, and without law.

483*] *Shattuck was himself the cause of the suspicious circumstances which led to the detention of the vessel by Maley, who would have been guilty of a neglect of duty and disobedience of orders, if he had done otherwise than he did. There was no improper conduct on his behalf, and the whole detention was only six hours. The British were bound to restore the vessel and cargo without salvage, and with damages and costs, if it was really the property of a neutral; and this would have been done, without doubt, if Shattuck had prosecuted his appeal, and been able to prove his property. But having acquiesced in the decree of condemnation as enemy property, he can never deny the fact. It is conclusive evidence against him. If not conclusive, it is still evidence of probable cause of suspicion. Upon the evidence which caused Maley to suspect, the court of admiralty condemned. This is surely sufficient to justify his detention of six hours for examination.

Argument for the appellee. Unless the taking was lawful, or with probable cause, the captor is liable for all the loss. This principle is admitted by the argument for the appellant.

The case of the *Charming Betsey*, 2 Cranch, 64, was stronger in favor of Captain Murray than this is in favor of Lieutenant Maley; and yet, in that case, this court decided that Captain Murray was a trespasser, and liable for damages and costs.

It is no answer to say, that the loss does not appear to have been the consequence of Maley's act. If the taking was unlawful, he is liable at all events. It is like the case of deviation, which throws the loss upon the assured, although the loss was not the consequence of the deviation. It is sufficient if it exposed the property in any manner to a liability to danger. But here it is evident that the loss would not have happened, if the vessel had not been detained. She was within an hour's sail of Jacmel, and would have gone in with safety.

*Two questions present themselves [*484 for consideration.

1st. Was the capture lawful? and,

2d. Was there probable cause?

A third question may also arise, whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted to by the counsel for Maley.

1. The first question is, whether the capture was lawful? On this point the case of the *Charming Betsey* is conclusive. It was there decided by this court,

1st. That the non-intercourse law did not extend to vessels built in the United States, and bona fide sold before the act of trading. In the present case the vessel was sold before the existence of the act under which her seizure is now attempted to be justified.

2d. That the sale must appear to be made with intent to evade the law.

3d. That a native citizen of the United States may so far change his national character, as to take him out of the operation of that act. The present appellee is the same person whose property was in contest in that case; and although that fact does not appear on this record, yet it appears that he is a person in exactly the same circumstances.

But the sentence of the vice-admiralty court in Jamaica is said to be conclusive evidence against Shattuck.

But the sentence is only conclusive evidence that she was good prize to the British. It does not state for what cause. It contains no direct reference to the libel, or other parts of the proceedings. If it refers to the libel, the property is there stated to be French or Spanish, or to belong to some other enemy of Great Britain. If you look into the proof exhibited in that court, it shows it clearly to be the property of Shattuck. *At all events, neither the [*485 record, nor the proceedings in Jamaica, show it to be American property, violating the laws of the United States, which is the only case that could justify the capture by Maley. If it was Spanish property, he had no right to touch it. If it was a French vessel, unless armed, he had no right to seize it. So that if the sentence is conclusive evidence, it is as conclusive against Maley as it is against Shattuck.

But it is said he ought to have prosecuted his appeal; and, not having done so, he has been guilty of negligence. So far from this is the truth, that he was not bound to resort at all to

the British captors. It was the duty of Maley, or the United States, to resort to them. His remedy was against Maley. He was not bound to look further. It can be no ground of a charge of negligence to say, that he has done more than he was bound to do.

2. Was there probable cause?

On this point too the case of the *Charming Betsey* is conclusive. The grounds of suspicion in this case are not so strong as they were in that.

But probable cause is no ground on which to deny restitution of the thing itself, or its value. It only excuses from damages for the tort. It is no bar to a reimbursement of actual loss. Shattuck asks only for restitution and expenses; and this is the least that a friendly nation ought to give.

3. As to the items in the statement of the value and expenses, which have been excepted against.

All the outfits of the vessel and expenses of shipping the cargo, together with the outward duties, in addition to the first cost, constituted the value of the vessel and cargo at the time of seizure, and ought to be allowed. The premium of insurance also was a proper charge. For, although no insurance was actually made, yet Shattuck was to be considered in the light of his own insurer, and the risk was worth the 486*] premium. *There is evidence in the record that it is a customary charge in such cases.

Argument, in reply. This case is not like that of the *Charming Betsey*. In that case the loss was produced by Captain Murray's own act. But in this, the loss is not the immediate effect of the act of Maley, but of the commander of the British privateer, who is liable to Shattuck for the injury he has sustained. To convert an originally lawful act into a trespass, by subsequent misconduct, that misconduct must proceed from the party himself, and not from the act of another, whose conduct he cannot control.

In the case of the *Charming Betsey*, the court decided in express terms that, "her papers were perfectly correct." In the present case, some of the papers were false and delusive, and others were not shown, or were not found.

The sentence in Jamaica is conclusive evidence that the property was not neutral Danish property, which is the very ground of the present libel. Unless, therefore, the admiralty court of one nation can reverse the sentence of an admiralty court of another nation, that sentence in Jamaica is conclusive against Shattuck's title. If he had prosecuted his appeal, and reversed the sentence, he would have obtained indemnification. By his instructions from his government, Maley was bound to act on reasonable suspicion. They gave him notice of the practice of covering this illicit trade with the Danish flag. When, therefore, he found a recent sale of an American vessel to a person pretending to have become a Danish subject, and residing in a place notorious for its abuse of its neutral flag; when he found the vessel attempting to enter a prohibited port, with an ostensible destination to a port not prohibited; when no evidence was exhibited to show that the master of that vessel was a Danish subject; and when his instructions required him "to be vigilant, that vessels really American, but covered by Danish papers and bound to or from French ports, do not escape *you," how [*487 is it possible to say that he had not "reason to suspect?"

Although any one of these circumstances alone might not afford "reason to suspect," yet the combination of the whole certainly did.

With respect to the claim of insurance, the case of the *Charming Betsey* is full in point. It is admitted that no insurance has been paid. And the court in that case expressly said, that "a public officer, intrusted on the high seas to perform a duty deemed necessary by his country, and executing, according to the best of his judgment, the orders he has received, if he is the victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages." The claim for insurance not paid is certainly a claim for speculative damages. The direction of the court to the assessors was, "to take the prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid."

The consideration of the other items is submitted to the consideration of the court.

March 3. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

In this case each party has appealed from the sentence of the circuit court. Maley complains of that sentence because it subjects him to damages and costs for the value of the Mercator and her cargo, first captured by him, and afterwards taken out of his possession by a British privateer; and because, also, some items are admitted into the account, taken for the purpose of ascertaining the sum for which he is liable, which ought to be excluded from it. Shattuck complains of the sentence because he was not allowed by the circuit court all the items contained in the report, to the whole of which he thinks himself entitled.

*In discussing the right of Shattuck [*488 to compensation for the Mercator and her cargo, the first question which presents itself is, was that vessel and cargo really his property?

Without reciting the various documents filed in the cause, it will be admitted that they demonstrate the affirmative of this question, unless the court be precluded from looking into them by the sentence in Jamaica, condemning the ship and cargo as lawful prize.

On the conclusiveness of the sentence of a foreign court of admiralty, it is not intended now to decide. For the present, therefore, such sentence will be considered as conclusive to the same extent which is allowed to it in the courts of Great Britain. But, in those courts, it has never been supposed to evidence more than its own correctness; it has, consequently, never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. If, then, in the present case, the Mercator, with her cargo, may have been condemned as prize, although in fact they were both known to be the property of a neutral, the sentence of condemnation does not negative the averment that they both belonged to Jared Shattuck.

It is well known that a vessel libelled as enemy's property is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character.

If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is in truth the vessel of a friend. Of consequence, this sentence, being only conclusive as to its own correctness, leaves the fact of real title open to investigation. This positive impediment to inquiry being removed, no doubt upon the subject can be entertained.

It being proved that the Mercator and her cargo belonged to Jared Shattuck, who, though born in the United States, had removed to the 489*] island of St. Thomas, *and had acquired all the commercial rights of his domicile before the occurrence of those circumstances which occasioned the acts of Congress under which this seizure is alleged to have been made, the case of the *Charming Betsey* determines that the vessel and cargo were not liable to forfeiture under those acts.

It remains, then, to inquire whether the Mercator appeared under such circumstances of suspicion as to justify her seizure.

On this point, too, the authority of the *Charming Betsey* appears to be decisive. In each case the vessel was built in America, and had been recently sold to a person born in the United States, who had become a Danish burgher before the rupture between this country and France; and both cases present the same circumstances of suspicion, derived from the practice of the island to cover American as Danish property. The points of dissimilitude are, that in the *Charming Betsey* the captain and crew were of a description to give greater suspicion than the captain and crew of the Mercator; and in the *Charming Betsey* was found a *proces verbal*, which stated facts unfavorable to that vessel, whereas no similar paper was found in the Mercator. The only circumstance of suspicion attending the Mercator, which did not belong to the *Charming Betsey*, is, that she was bound to Port-au-Prince, and was taken entering the port of Jacmel. This circumstance appears to be sufficiently accounted for, but if it was not, the Court can perceive in it no evidence of her being American property which can weigh against the testimony offered by the papers that she was Danish. The documents on this point which were thought decisive in the case of the *Charming Betsey*, exist in this case also. The information of the captain, uncontradicted by any of his crew, in this case, as in that, is corroborated and confirmed by the documents on board the vessel.

The only paper, the absence of which could be important, was an authenticated burgher's brief proving the captain to have been a Danish 490*] subject. How far *the absence of this paper might have justified a suspicion in a belligerent that she was enemy property, so as to excuse from damages for capture and detention, according to the usages of belligerents, the court will not undertake to determine; but it was a casualty which is not sufficient to justify a suspicion that the vessel was American. The burgher's brief is stated to have been in possession of the captain; but is supposed not to have been produced, and, consequently, it could have no influence on Lieutenant Maley. However this may be, no inquiry respecting it was made, and he does not appear to have suggested any difficulty on that ground.

Unquestionably Lieutenant Maley had a right to stop and to search the Mercator, and to exercise his judgment on the propriety of detaining her; but, in the exercise of that judgment, he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case, were not sufficiently strong to justify the seizure which was made.

But it is obvious, that Lieutenant Maley suspected the Mercator to be a French, not an American vessel.

In his answer he says, that he mistook the captain for a Frenchman; in his letter of instructions, he speaks of the vessel as a prize; and in the protest of the American prize master, she is denominated "a French prize." From these circumstances combined, it is supposed to be sufficiently apparent that the mistake committed by Lieutenant Maley was in supposing the Mercator to be a French vessel liable to capture under the laws of the United States.

The argument of the Attorney General, that Lieutenant Maley is not liable for his loss, because it was produced by a superior force, which it was not in his power to resist, would have great weight, if the circumstances under which the Mercator appeared had been such as to justify her seizure. But the court is not of that opinion, and, consequently, that argument loses its application to this case.

*Neither is it conceived that the fail- [*491
ure of Shattuck to appeal in time, destroys his claim on Lieutenant Maley. He had certainly a right to abandon if he chose to do so, and to resort to the captor for damages.

In the opinion given in the circuit court, that the libellant was entitled to compensation for the Mercator and her cargo, this court can perceive no error; but in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear.

In its circumstances, this case so strongly resembles that of the *Charming Betsey*, that the court will be governed by the rule there laid down. In pursuance of that rule, the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel, and the necessary advance to the crew is disapproved. Although the general terms used in the case of the *Charming Betsy* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principles with the premium of insurance if actually paid, which was expressly allowed. But this claim is nearly balanced by two items in the account which were admitted, as this court thinks, improperly.

One is the charge of 540 dollars for the expense of soliciting compensation from the United States. The court can perceive no reason for charging this expense to Lieutenant Maley.

The other is the charge of 326 dollars and 12 cents, the account of Ross & Hall, for expenses in England.

Had the appeal been prosecuted in time by Shattuck, it is scarcely possible to doubt, but that the sentence of the court, in Jamaica, would have been reversed, in which case it would have been reasonable, that the expense of the prosecution should have been paid by Lieutenant Maley. But as it was not prosecuted in time, in consequence of which the proceeds of 492*] the vessel and *cargo were lost, it is not conceived that Lieutenant Maley ought to be charged with the costs of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect.

What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire; but his claim against Lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator and her cargo to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel and the wages of the crew; and which admits the charges of 540 dollars, on account of the expenses attending the application to the government of the United States, and of 326 dollars and 12 cents, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects the account is to be reformea; for which purpose, so much of the sentence of the circuit court as respects this part of the subject is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

LAWRASON v. MASON.

A letter from the defendants to J. M., saying that they would be his security for 130 barrels of corn, payable in 12 months, will maintain an action of assumpsit against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn.

ERROR to the circuit court for the District of Columbia.

This was an action of assumpsit, brought by Mason against Lawrason, surviving partner of the firm of Lawrason & Smoot, upon the following note:

493*] *"Alexandria, 28th November, "1800. Mr. James M'Pherson,

"Dear Sir,

"We will become your security for one hundred and thirty barrels of corn, payable in twelve months."

(Signed) "LAWRASON & SMOOT."

The declaration contained several counts, laying the assumpsit in different forms, but the substance of each was, that the plaintiff, relying on, and placing confidence in, the promise of the defendants, and at their instance and request, sold and delivered the corn to M'Pherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendants had notice; whereby the defendants became liable, and, in consideration thereof, promised to pay. The defendants pleaded the general issue, and at the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon a demurrer to evidence, which stated, in substance, that the defendants signed and delivered the said note to M'Pherson; that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months; that the agent consulted the plaintiff, who agreed that M'Pherson should have the corn on those terms, if he would give security; that M'Pherson then offered, as his security, Lawrason & Smoot. The agent agreed to take them, ii they would give their assumption in writing. In a few days afterwards M'Pherson sent to the agent the said note of Lawrason & Smoot. Before the corn was delivered, the agent informed the plaintiff what had passed between himself and M'Pherson relative to the corn, and also showed him the note, and asked him whether it would do; to which he replied he supposed it would. But they called upon Lawrason, and asked him if he was content to be M'Pherson's security for this corn. He hesitated at first, but said he must be so, as he had promised; or, as his word was out, he would; or words to that effect; whereupon the plaintiff suffered M'Pherson to take the corn, *at the price of three dollars per barrel, [*494 which he agreed to give. That there was another debt due to the plaintiff from M'Pherson, about the 1st of January, 1801, which he was unable to pay.

That about the 1st of January, 1800, M'Pherson gave his promissory note for the amount due for the corn, payable to Lawrason & Smoot, with intent that they should indorse it, but, upon its being presented to Smoot, he refused, saying, that M'Pherson had failed to furnish them with meal, which he had agreed to deliver to them for their indorsement; he, therefore, would not become security, but, upon being shown the note of 28th of November, he acknowledged that it had been given by them.

The plaintiff also produced the certificate of discharge of M'Pherson, under the bankrupt law, dated the 15th of September, 1802, and proved by witnesses that he became insolvent in the year 1800.

Upon this demurrer the judgment of the court below was for the plaintiff.

Swann, for the plaintiff in error. The promise in this case was not made to the plaintiff; and no action can be maintained against a person who is a stranger to the consideration, and who is not a party to the agreement. Cro. Eliz. 369, *Jordan v. Jordan;* Esp. N. P. 105, 106. Perhaps an action might lay for the deceit, but not upon the assumpsit. The will of both parties must concur at the same moment. If I make an offer of goods at a certain price, and give time to the other party to consider of it, and within the time the other party agrees to the terms, I am not bound to comply. There was no consideration, and, consequently, no contract. 3 T. R. 653, *Cooke v. Oxley.*

Besides, it does not appear that the money was ever demanded of M'Pherson; and, until he had refused to pay, no right of action could accrue against the defendant.

*C. Lee, contra. There is an essential [*495 difference between common contracts and a let-

ter of credit. The latter is a mercantile instrument, bottomed upon the principle of good faith. It is a promise to him who will give credit to the third person, and the consideration is the actual delivery of the money or goods to the third person upon the faith of the letter of credit. This is, therefore, a promise to the plaintiff, and a good consideration is raised by the delivery of the corn upon the faith of the defendant's note in writing. All the forms of action upon a letter of credit are in assumpsit.

It is objected that no demand was made on M'Pherson; the answer is, that he was known to both parties to be insolvent.

MARSHALL, *Ch. J.*, delivered the opinion of the Court to the following effect:

This action is grounded upon a note in writing, which was certainly intended by the defendants to give a credit to M'Pherson. They are bound by every principle of moral rectitude and good faith to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear that the credit was given upon the faith of the letter.

Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported.

In the case cited from Espinasse, the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified.

Thus if money be delivered by A. to B., to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of assumpsit.

If it be said that in such a case the law raises the assumpsit from the facts, and if the facts 496*] do not imply *an assumpsit, no action will lay; it may be answered, that in the present case there is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise, has a right of action.

It has been suggested by the counsel for the defendants, that, although an action of assumpsit will not lay, yet possibly the plaintiff might support an action for the deceit. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lay in any form, the present seems to be at least as proper as any other.

Judgment affirmed.

KNOX AND CRAWFORD *v.* SUMMERS AND THOMAS.

An appearance of the defendant by attorney cures all antecedent irregularity of process.

Quære, whether a deputy marshal can plead in abatement, that the *capias* was not served on him by a disinterested person?

ERROR to the circuit court of the District of Columbia.

The plaintiffs in error brought an action of debt on a bond against the defendants, in the court below, to which the defendant, Summers, after oyer of the writ, pleaded in abatement, that on the day of the issuing of the original writ, as well as on the day of its service on him, he was one of the marshal's deputies, for the District of Columbia, and that the writ was not directed to a disinterested person, appointed by the court of the District of Columbia, or by any justice or judge thereof, to execute the same. To which plea the plaintiffs demurred specially; 1st. Because the plea was filed long after the appearance of the defendant, Summers; 2d. Because, after his appearance to the suit, no objection can be urged to the irregularity of the service of the process; 3d. Because, if the process was irregularly issued, directed or served, the remedy was by motion and not by plea; and, 4th. Because the process was duly issued, directed and served. But the court below adjudged the *plea to be good, and ordered the [*497 writ to be quashed as to both defendants. Whereupon, the plaintiffs sued out their writ of error.

By the 28th section of the act of Congress of the 24th of September, 1789, vol. 1, p. 66, it is enacted, "That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof, may appoint; and the person so appointed, is hereby authorized to execute and return the same."

Swann, for the plaintiffs in error. The provision of the act of Congress was not intended for the benefit of the marshal, or his deputy, but of the other party. The word "shall," in this, as in many other cases, means *may.* It shall be directed to a disinterested person, if the other party shall request it. But if the direction of the writ to the marshal was an informality, it is cured by the general appearance of the deputy marshal. Co. Litt. 325; 2 Ld. Raym. 1544. *Blenkinson v. Iles.* The record states, that there was judgment by default, at the rules against both defendants, and that at the next court, on the motion of the defendants, by Walter Jones, Jun., their attorney, it was ordered that the suit be returned to the rules for proceedings anew. At the next rules, the record states, that "the said Lewis Summers, in his proper person, comes and defends the force and injury, &c., and prays oyer of the writ," &c. So that this plea in abatement was not put in until after he had appeared by his attorney, and set aside the office judgment.

But this is not a matter pleadable in abatement. If a person is improperly arrested, his remedy formerly was by a writ of privilege, but now it is by motion to be discharged. He cannot plead it.

NOTE.—Appearance cures all defects in service of process, or to the non-service of process.
Farrar v. United States, 3 Pet. 459.
Gracie v. Palmer, 8 Wheat. 699.
Carrington v. Brents, 1 McLean 167.
Pollard v. Dwight, 4 Cranch, 421.
The Merino, 9 Wheat. 391.
McCoy v. Lemons, Hempst. 216.
Jones v. Andrews, 10 Wall. 327.
But does not cure any want of jurisdiction.
U. S. v. Yates, 6 How. 605.
Deeper v. N. Y. Belting Co., 11 Blatchf. 76.
Wheelock v. Lee, 74 N. Y. 495.
Service of summons by an improper person, as a party, is a mere irregularity, and a motion for relief on that ground must be made at earliest opportunity, and before judgment.
1 Wait's Pract. 540, 541; 2 Abb. Pr. R. 344; 4 E. D. Smith, 428; 10 Abb. Pr. R. 260; 18 How. Pr. R. 347.

C. Lee, contra. When the cause was sent back to the rules for proceedings anew, it was as if nothing had been done at the rules. Everything was to begin *de novo*. The defendant, Summers, is to be considered as then appearing for the first time; and instantly, upon his appearance, he pleaded in abatement *in propria persona*.

498*] *It does not appear upon the writ that he was a deputy marshal. It could not, therefore, be taken advantage of upon motion. Or if it could, yet that is not the most regular way. Upon a motion, the fact must appear by affidavit, and the court must decide the fact. But upon a plea, the fact is put in issue and tried by the jury, the proper tribunal to try a question of fact.

The law is express and positive; "the writ shall be directed" to a disinterested person. There is no discretion in the court.

Where it appears to the court, from the writ itself, that it ought to abate, there the court, ex officio, ought to give judgment against the plaintiff, though the defendant does not plead it in abatement; but it is otherwise where it does not appear in the writ. 4 Bac. Abr. 44. Where the fact does not appear upon the record, it must be pleaded in due time.

WASHINGTON, *J*. The defendant could not set aside the office judgment without entering his appearance.

C. Lee. If such an appearance is to cure all antecedent error, no plea in abatement could be put in, although the office judgment was irregularly obtained; nor could the defendant take advantage of irregularity at the rules; although the court is, by the express provisions of the law, authorized to set aside the proceedings at the rules.

The court were unanimously of opinion, that the appearance by attorney cured all irregularity of process. The defendant, perhaps, might have appeared *in propria persona*, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity.

The judgment reversed, the defendant ordered to answer over, and the cause remanded for further proceedings.

499*] *SANDS *v.* KNOX.

The non-intercourse act of June 13th, 1798, did not impose any disability upon vessels of the United States, sold bona fide, to foreigners residing out of the United States during the existence of that act.

ERROR to the court for the trial of impeachments, and the correction of errors, in the state of New York.

Thomas Knox, administrator, with the will annexed of Raapzat Heyleger, a subject of the King of Denmark, brought an action of trespass *vi et armis* in the supreme court of judicature of the state of New York, against Joshua Sands, collector of the customs for the port of New York, for seizing and detaining a schooner called the Jennett, with her cargo. The defendant, Sands, pleaded in justification, that he was collector, &c.; and that after the 1st day of July, 1798, viz., on the 16th of November, 1798, the said schooner, then being called The Juno, was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz., from Middletown to the island of St. Croix, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel was not, and should not be, employed during her said intended voyage, or before her return as aforesaid, in any traffic or commerce, with or for any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December, 1798, she did proceed, and was voluntarily carried from Middletown to the island of St. Croix, in the West Indies; and from thence, before her return within the United States, to Port de Paix in the island of St. Domingo, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or *want of provisions, or ac- [*500 tual force and violence; whereby, and according to the form of the statute, the said schooner and her cargo became forfeited, the one-half to the use of the United States, and the other half to the informer; by reason whereof the defendant, being collector, &c., on the 1st of July, 1799, arrested, entered and took possession of the said vessel and cargo for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, &c.; that at the time she sailed from Middletown for St. Croix, she was owned by a person then resident of the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to St. Croix, where she arrived on the 1st of February, 1799, the said island of St. Croix then and yet being under the government of the King of Denmark. That one Josiah Savage, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at St. Croix, to the said Raapzat Heyleger, who was then, and until his death continued to be, a subject of the King of Denmark, and resident at St. Croix; who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from Port de Paix to St. Croix, without that, that she was at any other time carried, &c.

To this replication there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the court for the trial of impeachments and correction of errors in the state of New York, was affirmed.

The defendant now brought his writ of error

to this court, under the 25th section of the judiciary act of the United States, vol. 1, p. 63.

The only question which could be made in this court, was upon the construction of the act of Congress, of June 13th, 1798, vol. 4, p. 129, commonly called the non-intercourse act; the 1st section of which is in these words: "That no ship or vessel, owned, hired or employed, 501*] *wholly or in part, by any person resident within the United States, and which shall depart therefrom after the 1st day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned, in any circuit or district court of the United States which shall be holden within and for the district where the seizure shall be made."

The condition of the bond stated in the plea corresponded exactly with that required by the 2d section of the act.

The 70th section of the act of 2d of March. 1799, vol. 4, p. 390, makes it the duty of the several officers of the customs to seize any vessel liable to seizure, under that or any other act of Congress respecting the revenue.

C. Lee, for the plaintiff in error.

The question is, whether the act of Congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West Indies, under the acknowledged government of France." She was also a vessel which, 502*] "in a voyage *thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act which, according to the letter of the law, rendered her liable to forfeiture, seizure and condemnation.

It is true that the decision of this court, in the case of the *Charming Betsey*, *ante*, vol. 2, p. 115, seems at first view to be against us. But the present question was not made, and could not arise, in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents were to be permitted, the whole object of the non-intercourse act would be frustrated. A vessel of the United States may, according to the judgment in the case of the *Charming Betsy*, be sold and transferred to a Dane, and he may trade with her as he pleases; but we say it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American citizens, but American vessels, from carrying on an intercourse with French ports.

The case of the *Charming Betsy* was under the act of February, 1800; but the present case arises under that of 1798, which is very different in many respects.

The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination.

Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel before her return. If, therefore, a sale is made it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better *situation than before, for [*503 she will receive her usual supplies, and we shall be weakened by the loss of the carrying trade.

Bayard, contra, was stopped by the Court.

MARSHALL, *Ch. J.* If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no bona fide sale and transfer of the vessel, the court does not wish to hear any argument on the part of the defendant in error.

It considers the point as settled by the opinion given in the case of the *Charming Betsy*, with which opinion the court is well satisfied.

The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel after a bona fide sale and transfer to a foreigner.

Judgment affirmed.

RANDOLPH *v.* WARE.

A promise by a merchant's factor that he would write to his principal to get insurance done, does not bind the principal to insure.

THIS was an appeal from a decree of the circuit court for the district of Virginia, which dismissed the complainant's bill in equity.

Ware, the executor of Jones, surviving partner of the house of Farrel & Jones, British merchants, had in the same court, at June term, 1800, obtained a decree against William Randolph, administrator *de bonis non*, with the will annexed, of Peyton Randolph, for a large sum *of money, with liberty to William Ran- [*504 dolph to file this bill against Ware, for relief in

regard to 50 hogsheads of tobacco, shipped in September, 1771, in the ship Planter, Captain Cawsey, and consigned to Farrel & Jones; a credit for which had been claimed, but was by the decree disallowed.

The tobacco never came to the hands of Farrel & Jones, having been lost at sea without being insured.

The appellant contended that he was entitled to a credit for the customary insurance price of the tobacco, viz., 10*l.* per hogshead, with interest.

1. Because, from the usage of the trade between the Virginia planter and the British merchant, it was the duty of the latter to have insured the tobacco, and that having failed so to do, he is responsible as insurer.

2. Because Thomas Evans, the appellee's agent for soliciting consignments and managing this business, having promised to get the insurance done, it is equivalent to the promise of his principals, Farrel & Jones, and they are responsible for the consequences.

3. It was contended that the claim, under all circumstances disclosed in the record, if not fit to be decreed according to the prayer of the bill, appears to be of a nature proper to be decided in a court of law, in pursuance of an order of the court of equity; and, therefore, that the decree should be reversed, and an order made directing a trial at law, to ascertain whether the appellee is not liable to the appellant for the value of the tobacco, and the interest from the month of September, 1772, as standing in the place of insurer thereof.

C. Lee, for the appellant.

1. The common course of the trade was for the British merchant to cause insurance to be made upon notice of the shipment of tobacco; and it appears by the letters exhibited in this record, that Farrel & Jones did, without any special orders, cause insurance to be made on some of the tobacco shipped by Randolph's executors.

505*] *Thus, in their letter of August 1, 1769, to Richard Randolph, they say, "We have made the following insurance on the True Patriot, for the two estates, viz., 480*l.* on 40 hogsheads, W. Randolph's estate; 816*l.* on 68 hogsheads, P. Randolph's," but say nothing of having received orders therefor. And again, August 10, 1769, "We have made 816*l.* insurance on the True Patriot, on 68 hogsheads, which Captain Cawsey informs us he is to have."

It is true, that on the 15th of August, 1771, they say, "Captain Cawsey writes us that he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance." But they have received no orders for the insurance they made in August, 1769, on the 68 hogsheads which Captain Cawsey informed them he was to have. The executors had a right to expect, that as Farrel & Jones had made insurance without orders on the 68 hogsheads, by the True Patriot, they would also have insurance made on the 50 hogsheads by the Planter.

The appellee's amended answer, put in after this point was known, does not pretend that any orders were given for the insurance, made in 1769, on the 68 hogsheads. And in the accounts of Farrel & Jones, there are many charges of premiums on insurances, for which no orders appear to have been given.

2. But the deposition of P. L. Grymes goes to establish an agreement, on the part of Evans, the agent of Farrel & Jones, to get insurance done upon the 50 hogsheads in question.

This deposition is corroborated by the fact, that in the correspondence produced there is no letter of the executors respecting the shipment of that parcel of tobacco. They relied altogether upon the promise of Evans.

No argument against the claim can arise from the length of time which elapsed before it was made. The estate of Randolph was acknowledged to be indebted; the executors, therefore, would not bring a suit. It was time enough to exhibit their claim when suit was brought *against them. Besides, from [*506 1774 to 1783, the war interposed; after that time until the suit was brought, the courts of justice were absolutely shut, or legal impediments existed to the recovery of British debts. The executors, also, might have been ignorant of their right. This suit, therefore, ought to be considered as if it had been instituted in 1775.

3. This is a claim proper to be settled in a court of law. There is a difference between a case where the chancellor will order an issue at law to be tried, to satisfy or inform his conscience, and where the whole claim is a matter properly cognizable at law.

P. B. Key, contra.

1. There is no evidence in the record of such a general usage of the trade, as is contended for by the appellant. And if there had been, the voluminous correspondence exhibited in the cause, shows most clearly that it did not exist in the negotiations between the present parties. For it proves, that in almost every instance, where the Randolphs shipped tobacco, they ordered insurance to be made at the time they gave notice of the shipment. Farrel & Jones, in their letter of August 6th, 1770, (stated in the appellee's answer,) say, "We made no insurance on the Virginian, though we were a little uneasy that so large a quantity as 66 hogsheads were ventured home without it, for it is our rule not to make any insurance, without orders, upon tobacco; which you will please to remember."

On the 15th of August, 1771, they say, "Captain Cawsey writes us that he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance."

On the 17th of September, 1771, the tobacco in question was shipped. On the 10th of December, 1771, Farrel & Jones write to the Randolphs as follows: "We wrote you the 15th of August, by the True Patriot, Captain Aselby, to which we refer. We observe by our agent Mr. Evans's letter, that you have shipped 50 hogsheads of the estate's tobacco on board Captain Cawsey, and it gives us great concern to find you ordered no *insurance on [*507 them, though we wrote you in August, 1770, that we never made any insurance on tobacco without orders; as we are much afraid some accident has happened to him. He has now been sailed from Virginia twelve weeks, and by accounts we have from captains who sailed from America about that time, he must have had dreadful weather in a few days after he came out. We think there is no other chance for him, but that he has lost his masts and liged to bear away for the West Indies."

In their letter to the Randolphs of the 4th April, 1772, they say, "You have also, enclosed, the estate's account current to the 31st December, balance in our favor l. if any error, you will please to advise us."

And in August 15, 1772, they say, "As yet we have received no orders for insurance on the Elizabeth, on account of the estate. If any tobacco is shipped in her, we hope to receive directions in time to prevent the like accident as happened last year."

On 23d of April, 1773, they say, "Having settled the account current agreeable to what Mr. Evans wrote us, we send it to you enclosed. Balance in our favor l. if any error, please to advise."

On the 10th of August, 1774, they write, "You have also, enclosed, the estate's account current to 31st December last; balance in our favor l. if any error, please to advise."

And on the 10th of March, 1773, they sent the estate's account current to 31st of December, with the same request, "if any error, please to advise."

Here the correspondence was closed by the war; after which, in 1783, the house of Farrel & Jones sent out an agent, Mr. Hanson, who was known as such to the Randolphs, and who, in that capacity, transacted business with them, and who continued in Virginia until the year 1800.

508*] *During the whole of this period, of nearly 30 years, not a syllable was said of any claim against Farrel & Jones, on account of the 50 hogsheads of tobacco lost in the Planter.

In addition to all this, it appeared, by the exhibits in this cause, that some time in June, 1772, after the loss of the tobacco was known to the Randolphs, they gave their bond, antedated on the 1st of January, 1772, for the balance then due, without any credit being given for the lost tobacco.

2. But it is contended that Farrel & Jones had, in some instances, made insurance without orders, and, therefore, they were bound to do it in this instance.

We deny the fact. Although, in one or two instances, Farrel & Jones have in their letters mentioned having made insurance, without stating it to be by order, yet it does not follow that no orders were given. And the whole general tenor of the correspondence shows that it was not their usual practice to insure without orders..

3. The appellant relies upon the affidavit of Grymes to show that Evans, the agent of Farrel and Jones, promised to have insurance done.

This affidavit appears in the transcript of the record, without date, place or circumstance. It does not appear to have been sworn before any magistrate competent to administer an oath, and no cross-examination, nor any thing to show upon what occasion it was made. It is uncertain in itself, uncorroborated by any other part of the testimony, and inconsistent with the general tenor of it. He says the conversation happened early in the year; but the tobacco was shipped in September. His words are, "He the said Evans informed the aforesaid Peyton and Richard Randolph, that he was writing to the aforesaid house of Farrel & Jones, that he would direct insurance to be made," "and that they need give themselves no further trouble in the business."

*The long time which had elapsed [*509 before this deposition was made, (probably 30 years,) renders its contents of very little weight, especially as there were a number of shipments of tobacco made at different times in the same ship, and he swears the conversation happened early in the year. It appears from the correspondence, that early in the year preceding, viz., 1770, the same ship had been loaded with tobacco at the same place; and this renders it probable that Mr. Grymes had mistaken the year.

But admitting that it proves all that is contended, yet Evans was not competent to bind his principal to insure; it was not a matter within his agency.

JOHNSON, *J.* I found my opinion in this case upon a single consideration. It was incumbent on the appellant to show that Evans's neglecting to comply with his promise to insure, made Farrel & Jones liable. I think it did not, because it appears that Farrel & Jones did not generally hold themselves bound to insure shipments of tobacco, without receiving express instructions to do so. It was, therefore, incumbent upon the executors of Randolph to communicate such instructions to Farrel & Jones. If they confided in the promise of Evans to give these instructions, it was to their own prejudice. And although the failure of Evans to do so certainly made him personally liable to them, yet it could not produce a liability in Farrel & Jones. So far as Evans was intrusted to do an act incumbent on the appellant's testator himself to do, he was the agent of the executors of Randolph, and not of Farrel & Jones.

WASHINGTON, *J.* In this case it appears that a letter was written by Farrel & Jones, in August, 1770, notifying the executors of Randolph that they would not make insurance without orders. And it is shown also, that the Randolphs were accustomed to give orders for insurance whenever they wished to have it made. Whatever, then, may be the general usage of the trade, it will not apply to the present case.

*The deposition of Grymes comes [*510 in a very questionable shape. It speaks of things 30 years ago, and in very uncertain language. But admitting for a moment that it applies to this shipment, Evans had not authority to bind his principal by a promise to insure. He did not promise for them, but promised for himself, that he would write to them to make insurance. This, it is admitted, he did not do. Are Farrel & Jones liable for his personal engagement?

But the deposition of Grymes is not only uncorroborated, but opposed, by the other evidence in the cause. If the Randolphs relied upon this supposed engagement of Evans, why did they give their bond in 1772, nine months after the loss, and long after they had notice of the loss, for the balance of the account, without demanding a credit for the lost tobacco? Three accounts current were sent them for the years 1772, 1773 and 1774, at several times, and they were requested at each time to examine them, and, if they contained any error,

to advise Ferrel & Jones of it. By not doing this, they have given strong evidence that there was no such agreement with Evans, that there was no error in the accounts, and that Mr. Grymes must have been mistaken, or that his deposition refers to some other transaction.

PATERSON, *J.* The complainants filed a cross bill to obtain credit for 50 hogsheads of tobacco, which were shipped on board the Planter, the 17th September, 1771, by Richard and Peyton Randolph, executors of William Randolph, and consigned to Farrel & Jones, merchants, at Bristol, in England. The tobacco was not insured. The Planter foundered at sea, and the tobacco was lost. The question is, who shall sustain the loss? It is contended, on the part of the representatives of the Randolphs, that Farrel & Jones ought to have insured the tobacco, and, not having done so, they have made themselves liable to the amount, as if it had been insured. To establish this position, the counsel for the complainant has taken the following grounds.

1st. From the nature and usage of the trade between the Virginia planter and the English 511*] merchant, it was *the duty of the latter to have insured the tobacco, and failing so to do, he is responsible as the insurer.

2d. That Thomas Evans, the agent of Farrel & Jones, having promised to have insurance made, it is equivalent to the promise of his principals, Farrel & Jones, and they were responsible for the consequences.

As to the first point, no usage has been proved. And if the usage did exist, this case was taken out of it; as it appears by the whole course of correspondence between the parties, that Farrel & Jones never did insure tobacco without orders and that the Randolphs gave them orders to effect insurances on tobacco, whenever they thought it expedient or necessary.

Great stress is laid on the contract which, it is stated, was entered into between the Randolphs and Thomas Evans, the agent of Farrel & Jones. The contract is founded on the deposition of Philip Grymes. This deposition is certainly open to the strictures which have been made upon it by the counsel on the part of the defendant. It does not appear when, and before whom, the deposition was taken. The deposition is *ex parte*, for neither the defendant or his attorney had an opportunity to cross-examine the witness. If it was taken at or about the time that the bill was filed, then it is liable to the objections resulting from the frailty and uncertainty of memory, and the misconception or misconstruction of words used in a general conversation, after a long period of time, exceeding twenty years. Besides, the quantity of tobacco to be insured was not mentioned in the course of the conversation, nor does it appear that it was at any time afterwards communicated to the agent; and unless the quantity was ascertained, an insurance could not be effected. How this paper, purporting to be a deposition, became annexed to the bill, I have not been able to discover from the proceedings; and if it be admitted as a piece of evidence in the cause, its credit is much impaired in consequence of the observations already made.

The acts of the agent bind the principal; and supposing Evans to have been the general agent of Farrel *& Jones, it may well [*512 be questioned, whether his undertaking to insure is obligatory upon them; as it is manifest, from the correspondence between the Randolphs and Farrel & Jones, that the latter did not insure tobacco without express orders for the purpose; that the Randolphs wrote to them to insure, when they deemed an insurance proper. The fair inference is, that if Evans engaged to have an insurance made in this instance by Farrel & Jones, it was a personal contract on his part, which bound himself and no other, and for the performance of which he was responsible in his private character. Orders for insurance were invariably transmitted by the Randolphs to Farrel & Jones, and not communicated to them through the medium of Evans, unless the present should be considered as an exception. Under such circumstances, the Randolphs, if they relied on the promise of Evans, must look to him individually, and not through him to Farrel & Jones. By this promise, Evans bound himself, and not the firm.

The house of Farrel & Jones transmitted annually their accounts to the Randolphs; they did so for the year 1771, after the loss of the tobacco, which it is admitted was not passed to the credit of the Randolphs. The bond given for the balance is dated the 1st January, 1772, though from the letter of the 4th April, 1772, it was not, probably, executed till some months after its date. It was made to bear date the 1st January, 1772, that it might correspond with the accounts rendered, and carry interest from that period. Farrel & Jones annually rendered regular and stated accounts to the Randolphs of their mutual dealings in the years 1772, 1773, and 1774; and in a letter of the former to the latter, Farrel & Jones particularly requested that errors, if any occurred, should be pointed out, that they might be rectified. But the Randolphs made no objections; they made no mention of the tobacco which was lost, nor did they ever intimate an opinion that Farrel & Jones were liable for its amount. Why this silence, this acquiescence? The period of the war we will let pass without animadversion, as no dealings or communication took place between the parties. Evans died in 1778. In 1780 Hanson was appointed the agent of Farrel & Jones. It was never suggested to Hanson that the Randolphs, *or their representa- [*513 tives, claimed an allowance for the tobacco; no intention was manifested to charge Farrel & Jones with it, until an action was commenced on the bond, in 1793, or 1794, when, for the first time, a claim was set up for the tobacco. Mr. Lee has endeavored to account for this silence and acquiescence, but not in a satisfactory manner; and it is probable that the Randolphs never thought of making any demand, because they were convinced that they had no right to do so, and that they must sustain the loss themselves, as they had neglected to order Farrel & Jones to make the insurance. It was a loss justly imputable to their own neglect or imprudence; or if not, then they intended to stand their own insurers.

Farrel & Jones expressed regret whenever they received no orders to insure; and this flowed from the nature and situation of their accounts and dealings: for as the Randolphs

were indebted to the firm, in a large amount, it became the interest of Farrel & Jones that the tobacco should be insured, as it was property intended to be appropriated towards the payment of the debt due to them. The loss rendered the Randolphs the less able to pay, and increased the risk of Farrel & Jones, by diminishing their security. An insurance, therefore, of the property of the debtor, must have been beneficial and satisfactory to the creditor. But this insurance, it seems, the house of Farrel & Jones never thought themselves authorized to make, unless they received immediately from the Randolphs explicit directions for the purpose.

The charge is stale. The claim comes too late; it is brought forward after a sleep of near 30 years, during which period the original parties and their agents have disappeared and are no more. An acquiescence for such a length of time, and under such circumstances, is too stubborn and inveterate to be surmounted. The claim was put into oblivion; and there it ought to have remained. A court of equity should not interpose in a case of this kind; and, therefore, the decree pronounced by the circuit court ought to be affirmed.

CUSHING, *J.*, concurred.

Judgment affirmed.[1]

1.—Marshall, *Ch. J.*, did not sit in the cause, having decided it in the court below.

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*FIELD *v.* MILTON. [*514

A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.

W PINCKNEY, for plaintiff in error, suggested that the citation had been served, but was not returned by the clerk below with the writ of error, and prayed a *certiorari*.

The Court said it was a new case. *Certiorari* granted.

WINCHESTER *v.* JACKSON AND OTHERS.

Costs will be allowed upon a dismission of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error.

THE writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states.

Campbell, for the defendants in error, prayed that the dismissal might be with costs, the original defendants being also defendants in error.

The clerk stated that the practice had heretofore been to dismiss without costs, where the dismission was for want of jurisdiction.

The court directed it to be dismissed with costs.

Branch 3.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and Distarct Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citations of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,
So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text-books.

EDITOR.

III CRANCH.

3 Cr. 1–73, 2 L. 347, HUIDEKOPER v. DOUGLASS.

Legislative contracts should be construed according to the ordinary rules of contractual construction, p. 70.

Cited to this point in Charles River Bridge v. Warren Bridge, 11 Pet. 611, 9 L. 849, dissenting opinion, majority holding a right could not be implied, because not expressly forbidden; dissenting opinion, The Richmond, etc., R. R. Co. v. The Louisa. R. R. Co., 13 How. 86, 14 L. 62, majority construing stipulation restraining State, strictly; in U. S. v. Arredondo, 6 Pet. 749, 8 L. 568, holding "in possession" of land satisfied by constructive possession; State v. Real Estate Bank, 5 Ark. 599, 41 Am. Dec. 112, holding charter of corporation forfeited by assignment of all its property; Jasper v. Quarles, Hardin, 477, holding right of a settler dates from commencement of services necessary to procure a certificate; Stark v. Mather, Walk. (Miss.) 193, if government gives title to another he is a trustee for first grantee; Leavitt v. Lovering, 64 N. H. 608, 15 Atl. 415, rejecting words to which no effect consistent with the statute could be given; Thompson v. People, 23 Wend. 579, in construing act giving right to build bridge; Durer v. Boyd, 1 S. & R. 207, holding a person obtaining another's patent as trustee for him; Barnes v. Irvine, 5 Watts, 503, as to settlement of land; Dodson v. Cocke, 1 Overt. 322, a subsequent grantee cannot avoid a prior grant for fraud against State. Cited in Weatherhead v. Bledsoe, 2 Overt. 374, 379, in construing statute of limitations; Pinson v. Harkins, 1 Yerg. 330, 339, treating State as an individual; as also in Neal v. E. T. College, 6 Yerg. 194. Cited incidentally, Thompson v. Phillips, Bald. 385, F. C. 13,974. Approved in Leasure v. Wilson, 3 Watts, 174, and Ross v. Barker, 5 Watts, 397.

Statutes.— Terms of a law requiring two incompatible things must be reconciled with the least possible change in meaning, and a view to the general intent, p. 66.

3 Cr. 73–92, 2 L. 370, UNITED STATES v. HOOE.

Insolvency.— There must be a general voluntary assignment to render debtor insolvent within the bankrupt act, p. 91.

The following citing cases are concerned with this holding and apply it: The United States v. The Marshal, etc., 2 Brock. 491, F. C. 15,727, if an inconsiderable part of property is retained, it is a question

for the court; United States v. Langton, 5 Mason, 284, F. C. 15,560, holding a small portion left out by mistake does not defeat priority; United States v. McLellan, 3 Sumn. 352, F. C. 15,698, holding a conveyance of all property, but in distinct parts, is good, unless especially to evade priority; Conard v. The Atlantic Ins. Co., 1 Pet. 439, 7 L. 212, holding that a bona fide general assignment defeats priority; Huntley v. Kingman, 152 U. S. 533, 38 L. 543, 14 F. C. 690. a bona fide assignment of part of a debtor's property is valid; Bush v. United States, 8 Sawy. 330, 14 Fed. Rep. 323, holding confession of judgment is not a voluntary assignment; Holt v. Bancroft, 30 Ala. 201, holding an assignment of all his property, with fraudulent intent, but by distinct deeds, a general assignment; Campbell v. The Colorado Coal, etc., 9 Colo. 66, 10 Pac. 252, holding partial assignment valid; McLean v. Rankin, 3 Johns. 374, holding plaintiff must show that the shipment constituted the whole of defendant's property; Ewing v. Runkle, 20 Ill. 462, both parties must have fraudulent intent, to invalidate a conveyance; U. S. v. Bank of U. S., 8 Rob. (La.) 416, holding priority not defeated by partial assignments of all property; as also in Marshall v. Barclay, 1 Paige Ch. 161; Willing v. Bleeker, 2 S. & R. 225, and Downing v. Kintzing, 2 S. & R. 337, two assignments held a general assignment; Mussey v. Noyes, 26 Vt. 473, holding a partial assignment valid; Stanley v. Robbins, 36 Vt. 429, holding a lease not an assignment; dissenting opinion, Winner v. Hoyt, 66 Wis. 247, 28 N. W. 390, majority holding where all property was transferred by different mortgages, it was a general assignment. Cited in United States v. Couch, 25 F. C. 674, holding assignment of property of firm and one partner, not enough to give priority to United States; United States v. Wood, 28 F. C. 753, holding partial assignment gives no preference.

Distinguished in McArthur v. Chase, 13 Gratt. 691, holding "insolvency" in that statute meant insufficient property to pay debts; Ex parte Hull, 12 Fed. Cas. 856, defining insolvency in statute; Thelusson v. Smith, 2 Wheat. 424, 4 L. 278, holding United States in cases specified in act of 1799, has preference over judgment lien.

Fraud — Mortgages.— Mortgagor's remaining in possession of property is proper and not evidence of fraud. p. 89.

Cited and applied in Almy v. Wilbur, 2 W. & M. 388. F. C. 256, holding possession by mortgagor not evidence of fraud; Bingham v. Frost, 6 Bank. Reg. 131, 3 F. C. 401, holding that word "conveyance" includes a mortgage; Malone v. Hamilton, Minor, 289, where the deed contained a power of sale, and surplus was to be paid to mortgagor; likewise in The Planters', etc., Bank of Mobile v. Willis & Co., 5 Ala. 780, where mortgagor retained possession of the chattel; Hempstead v. Johnston, 18 Ark. 134, 65 Am. Dec. 467, holding grantor's remaining in possession does not invalidate a trust

deed; Walters v. Whitlock, 9 Fla. 102, 76 Am. Dec. 613, holding whether retention of possession of a chose in action by an assignor is fraud, is a question of fact; Suiter v. Turner, 10 Iowa, 523, holding retention of possession of realty by grantor no evidence of fraud; Bank of Commerce v. Payne, 86 Ky. 464, 8 S. W. 862, holding whether the conveyance is fraudulent depends on the intent; Lunt v. Whitaker, 10 Me. 314, holding where mortgagor retained possession of horse, mortgagee had good title against a purchaser; Wilson v. Russell, 13 Md. 530, 71 Am. Dec. 648, holding that mortgagor's remaining in possession does not invalidate a deed; Dawes v. Cope, 4 Binn. 265, holding delivery of a bill of lading is a sufficient transfer of possession; dissenting opinion in Wolf v. Farrell, 3 Brev. 76, majority holding title passed, though mortgagor of chattel retained possession; Rose v. Burgess, 10 Leigh (Va.), 197, holding mortgagor's retention of possession of chattels does not make it liable to his creditors.

Distinguished in Fowler v. Merrill, 11 How. 394, 13 L. 743, where mortgage was recorded; In re Hussman, 2 Bank. Reg. 140, 12 Fed. Cas. 1076, holding sale without change of possession was void against creditors; Merrill v. Dawson, Hemp. 603, 616, F. C. 9,469, where sale was held fraudulent per se; Coburn v. Pickering, 3 N. H. 425, 14 Am. Dec. 378, holding retention of possession of chattel after absolute sale is prima facie evidence of fraud; Clow v. Woods, 5 S. & R. 284, 9 Am. Dec. 354, holding mortgagor's continuing in possession fraudulent per se.

Future advances.— Mortgage to secure future advances is valid, p. 89.

Cited to this point and rule applied in Lawrence v. Tucker, 23 How. 27, 16 L. 479, as also in United States v. Lennox, 2 Paine, 183, F. C. 15,592, and Leeds v. Cameron, 3 Sumn. 492, F. C. 8,206, sustaining mortgages for future advances; Turnbull v. Thomas, 1 Hughes, 176, F. C. 14,243, holding a deed of trust for future advances a good lien; Perkins & Elliot v. Mayfield, 5 Port. 187, where deed was given to secure one against the consequences of suretyship; Allen v. Montgomery R. R. Co., 11 Ala. 452, holding a deed of real estate for security of bonds to be issued not void per se; as also in Tully v. Harloe, 35 Cal. 309, 95 Am. Dec. 105; Peters v. Goodrich, 3 Conn. 152, holding mortgage to secure an indorser valid; Crane v. Deming, 7 Conn. 397, mortgage for future advances held good, where advancements were made after subsequent mortgages; Hubbard v. Savage, 8 Conn. 220, where a mortgage to secure against future liabilities was held good; Speer v. Skinner, 35 Ill. 293, sustaining mortgage for future advances; as also in Collins v. Carlisle, 13 Ill. 259; Stewart v. English, 6 Ind. 182, where a bona fide conveyance to pay debts was sustained; Griffith v. Bank, 6 Gill & J., 436, where a deed to indemnify indorsers was held good as against

creditors; Commercial Bank v. Cunningham, 24 Pick. 274, 35 Am. Dec. 323, holding a like mortgage good; Robins v. Embry, 1 S. & M. Ch. 267, holding assignment not vitiated, because for future advances; Boisregard v. Wall, 1 S. & M. Ch. 430, holding mortgages given to secure debts of a partnership valid; as also in James v. Morey, 2 Cow. 292, 14 Am. Dec. 485; Hendricks v. Robinson, 2 Johns. Ch. 308, holding a bona fide assignment by a debtor in insolvent circumstances for future advances good; Walker v. Snediker, 1 Hoff. Ch. 146, holding such a mortgage valid, but future liabilities not embraced by a subsequent parol agreement; Truscott v. King, 6 N. Y. 159, holding when a judgment to secure future advances has been paid, it cannot be set up for subsequent advances as against an intervening incumbrancer; Robinson v. Williams, 22 N. Y. 383. holding such a mortgage is good as against a creditor by judgment recovered before such advances became due; Young v. Wilson, 27 N. Y. 353, holding mortgage to secure liabilities, though not specifying amount, was certain enough; Sabin v. Columbia Fuel Co., 25 Or. 24, 42 Am. St. 761, 34 Pac. 695, holding mortgage valid though it may subsequently turn out that, at the time, mortgagor was unable to pay all his debts; McGavock v. Deery, 1 Cold. 270, holding assignment for future advances valid; McCarty v. Chalfant, 14 W. Va. 547, holding deed of trust for future advances valid. See also a note in 20 Am. Dec. 659, on this subject.

Distinguished in Craig v. Tappin, 2 Sandf. Ch. 84, the mortgage there not reciting its object.

Insolvency.— United States is entitled to a priority of payment, but has no lien, p. 90.

The citing cases show that this doctrine has been very extensively affirmed. They approve and apply it as follows: Beaston v. Farmers' Bank of Delaware, 12 Pet. 134, 9 L. 1029, holding an attachment of an individual not defeated by a subsequent attachment of the United States; In re Hambright, 11 Fed. Cas. 316, 2 Bank. Reg. 158, holding creditor's valid prior lien prevailed over costs of bankruptcy; United States v. The Canal Bank, 3 Story, 81, F. C. 14,715, this priority rests on statute; Postmaster-General v. Robbins, 1 Ware, 169, F. C. 11,314, holding that widow's allowance took precedence; Perry Manufacturing Co. v. Brown, 2 Wood. & M. 454, F. C. 11,015, holding that where proceedings in insolvency advanced to appointment of a messenger, this inchoate title was not defeated by a subsequent lien; United States v. Wilkinson, 5 Dill. 278, F. C. 16,695, where a purchaser under an attachment took free from preference; United States v. McLellan, 3 Sumn. 353, F. C. 15,698, holding conveyance of all his property to creditors is not a voluntary assignment within the statute; United States v. Hawkins, 4 Mart. N. S. (La.) 330, holding United States has not a preference in an insolvent estate, above the mortgage creditor;

Farmers' Bank v. Beaston, 7 Gill & J. 426, 28 Am. Dec. 229, an attachment, operating as a lien, takes priority over United States where receiver was appointed; Watkins v. Otis, 2 Pick. 102, holding a foreign attachment not such a one as to give United States priority; Anderson v. State, 23 Miss. 476, holding United States has no lien; Finney v. Steamboat Fayette, 10 Mo. 619, to the point that United States has lien on commencement of suit; United States v. Crookshank, 1 Edw. Ch. 237, holding priority does not exist in relation to real estate descended to heirs; Bank of Muskingum v. Carpenter, 7 Ohio (Pt. 1), 70, 28 Am. Dec. 620, holding an equitable mortgage to be preferred to a judgment of later date; Wilcocks v. Waln, 10 S. & R. 380, holding a mortgage prior to general assignment cuts off preference; State v. Harris, 2 Bailey L. 600, holding the State not entitled to priority at common law; Ex parte Waddell, 28 F. C. 1314, holding decree of bankruptcy creates no lien. estate vests in assignee; Savings Society v. Multnomah, 169 U. S. 428, 42 L. 805, 18 S. Ct. 395, holding that a mortgage conveys an interest in land and may be taxed; United States v. Arcola, 24 Fed. Cas. 850, holding interest of mortgagee is distinct from that of mortgagor; note to 4 Wheat. 120, 4 L. 530, on this subject; dissenting opinion, Winner v. Hoyt, 66 Wis. 247, 28 N. W. 390, 57 Am. Rep. 263, majority holding separate assignments covering all his property are a general assignment; Conard v. Atlantic Ins. Co., 1 Pet. 441, 7 L. 213, holding priority of United States will not divest a specific lien such as a mortgage; Thelluson v. Smith, 1 Pet. C. C. 196, 198, F. C. 13,878, holding priority of United States does not cut off a judgment creditor.

Costs.— Whether costs may be awarded against the United States, query, p. 92.

Cited in Hathway v. Roach, 2 Wood. & M. 68, F. C. 6,213, and Stanley v. Schwalby, 162 U. S. 272, 40 L. 966, 16 S. Ct. 761, holding United States are not liable to judgment for costs; Carlisle v. Cooper, 64 Fed. Rep. 474, 26 U. S. App. 240, holding in absence of legislation by congress, costs cannot be awarded against the United States; Curtis v. Banker, 136 Mass. 360, and Saunders v. Frost, 16 Am. Dec. 407, refusing to give costs against the United States; United States v. Davis, 54 Fed. Rep. 153, 12 U. S. App. 47, allowing costs, by statute, in proceeding to recover excessive duties.

Appeal and error.— Cause may be removed from Circuit to Supreme Court by writ of error, p. 79.

Cited to this point in Harrison v. Burgess, 1 Hawks, 392.

Distinguished in The San Pedro, 2 Wheat. 143, 4 L. 205, holding cause could not be removed by writ of error.

Miscellaneous citations.— Cited in Enders v. Swayne, 8 Dana, 111, but not in point. Cited generally in United States v. Wilkinson, 5 Dill. 277, F. C. 16,695.

3 Cr. 92-96, 2 L. 376, PEYTON v. BROOKE.

Costs.— Judgment for costs includes all costs, prior or subsequent to its rendition, p. 96.

Cited in Blake v. Hawkins, 19 Fed. 205, holding that a judgment opens to include commissions of clerk; Windrum v. Parker, 2 Leigh (Va.), 366 holding a party having taken one execution can take another at his own costs.

3 Cr. 97-139, 2 L. 377, LAMBERT v. PAINE.

Wills.— A devise of all one's estate carries the fee without words of inheritance, p. 128.

Cited and principle applied in Roberts v. Lewis, 153 U. S. 377, 38 L. 750, 14 S. Ct. 946, construing the words "all my estate, real and personal," etc., in a devise to carry a fee; Denechand v. Berry, 48 Ala. 605, construing words "all property" in a statute to mean everything capable of ownership; Robinson v. Randolph, 21 Fla. 637, 644, holding word "property" in a devise carries fee; Fogg v. Clark, 1 N. H. 167, holding "all my landed property" in a will conveyed a fee; Den v. Schenck, 8 N. J. L. 39, where words "all my real estate" were followed by qualifying clause, held devisee took fee subject to qualification; Jackson v. Robins, 16 Johns. 588, a devise of "all his estates" to B., and in case of her death without alienation to C. B., takes a fee; Bradstreet v. Clarke, 12 Wend. 661, devise to executors of my "landed estate" gives a fee; Fox v. Phelps, 20 Wend. 445, holding a devise "of my estate" carries fee; dissenting opinion, French v. M'Ilhenny, 2 Binn. 19, majority held a devise "of his plantation" carried fee; Campbell v. Carson, 12 S. & R. 55, holding a devise of "all lands to be by her fully possessed" carried fee; dissenting opinion, Steele v. Thompson, 14 S. & R. 92, majority held devise of "plantation" carried life estate; Waterman v. Greene, 12 R. I. 484, holding devise of my "mill, land," etc., took fee; Troth v. Robertson, 78 Va. 55, "estate" in statute includes real and personal property. Cited Byers v. Fowler, 12 Ark. 286, 54 Am. Dec. 288, arguendo.

Distinguished in Wright v. Denn, 10 Wheat. 235, 6 L. 311, where words "all the rest of my lands and tenements" carried only a life estate; Beal v. Holmes, 6 Har. & J. 225, holding "all that tract of land" carried only a life estate.

Wills.— Little aid can be had from adjudged cases in construing wills, p. 131.

Cited to this point in Rosenberg v. Frank, 58 Cal. 411, and Le Breton v. Cook, 107 Cal. 416, 40 Pac. 553.

Wills.— Meaning of adjudged words should be adhered to in construing a will, p. 134.

Rule applied in Kean v. Roe, 2 Harr. (Del.) 116, 29 Am. Dec. 343, giving technical words in will their technical meaning.

Wills are construed more liberally than common-law conveyances to effectuate intent, p. 138.

Miscellaneous citations.— Cited in Boone v. Chiles, 10 Pet. 212, 9 L. 400, apparently not in point.

8 Cr. 140–158, 2 L. 391, HODGSON v. BUTTS.

Chattel mortgages.— Virginia law requires that they be acknowledged before three witnesses; accordingly chattel mortgages of vessel acknowledged before but two is void as to creditors and subsequent purchasers, pp. 156–158.

Cited and doctrine applied in Bank of the United States v. Lee, 13 Pet. 122, 10 L. 89, holding a deed of slaves to wife, duly recorded, good against subsequent creditors; Killough v. Steele, 1 Stew. & P. 267, 279, where an unrecorded chattel mortgage upon a valuable consideration was held not within the statute of frauds; Baker v. Washington, 5 Stew. & P. 149, holding a mortgage upon valuable consideration need not be registered; Rushin v. Shields, 11 Ga. 640, 56 Am. Dec. 438, holding the irregular registration of a deed is not even notice; Shepherd v. Burkhalter, 13 Ga. 449, 58 Am. Dec. 526, holding a recorded instrument to be constructive notice only so far as it appears on the record; Walker v. Gilbert, 1 Freem. Ch. 93, holding a deed not duly registered not notice; Smith v. Chamberlain, 2 N. H. 441, refusing to extend statute, by requiring "competent" witnesses; Gooding v. Riley, 50 N. H. 409, restricting it to subsequent creditors without notice; Simon v. Brown, 3 Yeates, 187, 2 Am. Dec. 368, holding an unauthorized recording is no evidence of notice; Heister v. Fortner, 2 Binn. 44, 4 Am. Dec. 420, holding registry of a defectively proved deed is not constructive notice; Johnson v. Slater, 11 Gratt. 325, held a deed not duly recorded is void as to creditors. Cited in Wolf v. Farrell, 3 Brev. 78. Cited in The Bramen, Brown Adm. 162, F. C. 1,805, holding mortgagee is liable for mate's wages.

Distinguished in McGregor v. Hall, 3 Stew. & P. 404, where mortgage was left to be recorded; Hobson v. Kissam, 8 Ala. 362, holding valid a deed of trust not recorded in statutory form.

Maritime liens.— Master of vessel has right to retain freight for debts due him, p. 158.

Cited and principle applied in The Ship Packet, 3 Mason, 264, F. C. 10,654, holding master has lien on freight for advances made abroad; Snow v. Goodrich, 14 Me. 239, holding master pledging his individual credit to obtain cargo has lien on it; Ingersoll v. Van Bokkelein, 7 Cow. 679, holding master has lien on freight for liability incurred; Starr v. Knox, 2 Conn. 228, holding register of ship is prima facie evidence of ownership. Cited in Shaw v. Godkin, 7 N. H. 20.

Distinguished in Van Bokkelein v. Ingersoll, 5 Wend. 325, holding master has no lien on freight for wages.

3 Cr. 159–174, 2 L. 397, UNITED STATES v. MORE.

Federal courts.— Supreme Court has appellate power only in the cases provided for by congress, p. 173.

A number of citations affirm and apply this principle: In re Kaine, 14 How. 120, 14 L. 352, holding it has no power to review decision of Circuit Court remanding prisoner on writ of habeas corpus in absence of statute; Ex parte Bradley, 7 Wall. 384, 385, 19 L. 221, in dissenting opinion, majority holding they had right to review, by writ of mandamus, disbarment proceedings; Baker v. Biddle, 1 Bald. 403, 406, F. C. 764, holding United States courts will not sustain suits in equity where the remedy at law is adequate; Ex parte Crane, 5 Pet. 200, 204, 219, 8 L. 96, 98, 103, in dissenting opinion, majority holding they had right to issue mandamus compelling Circuit Court to sign bill of exceptions; dissenting opinion, Ex parte Lange, 18 Wall. 185, 205, 21 L. 882, 888, majority holding Supreme Court will, by writ of habeas corpus, see if Federal court had authority over prisoner; Forsyth v. United States, 9 How. 572, 13 L. 263, where right to review criminal cause had been given by law; dissenting opinion, Decatur v. Paulding, 14 Pet. 603, 607, 10 L. 612, 614, majority holding Supreme Court has right to mandamus, ministerial Federal officer; Ex parte Watkins, 3 Pet. 201, 7 L. 652, holding this court cannot revise proceeding of Circuit Court in criminal cases; Daniels v. Railroad Co., 3 Wall. 254, 18 L. 225, holding appellate jurisdiction depends on act of congress; dissenting opinion, Tennessee v. Davis, 100 U. S. 283, 290, 25 L. 657, 659, majority held provision of Constitution extending judicial power of United States "to all cases in law and equity" embraces criminal cases; United States v. Sanges, 144 U. S. 319, 36 L. 449, 12 S. Ct. 612, holding writ of error does not lie in behalf of United States in a criminal case; Cross v. United States, 145 U. S. 574, 36 L. 822, 12 S. Ct. 843, holding a statute permitting appeals from District and Circuit Courts in capital cases, does not embrace Supreme Court of District of Columbia; Cross v. Burke, 146 U. S. 87, 36 L. 898, 13 S. Ct. 23, holding this court has no jurisdiction over judgment of court of District of Columbia on habeas corpus; Chapman v. United States, 164 U. S. 447, 448, 450, 41 L. 508, 509, 17 S. Ct. 77, 78, holding they had right to review, by writ of error, judgment of Court of Appeals of District of Columbia in a criminal case; as also in United States v. Plumer, 3 Cliff. 26, F. C. 16,055, and Humphrey v. The State, Minor, 65. Cited in Warner v. Steamer Uncle Sam, 9 Cal. 736, holding failure of congress to provide for appeals from State court does not affect their original jurisdiction; Laverty v. Duplessis, 3 Mart. (O. S.) 49, holding, where Constitution limited jurisdiction of a court to civil, it cannot consider criminal cases; Commonwealth v. Cummings, 3 Cush. 218, 50 Am. Dec. 737, holding that a writ of error does not lie in a criminal case in behalf of the

State; Fleming v. Clark, 12 Allen, 195, refusing to discharge on habeas corpus, though writ of error had been issued by Supreme Court of United States; Bryan v. Bates, 12 Allen, 209, holding a writ of error issued by United States Supreme Court in criminal case operates as a stay of execution; Ex parte Marmaduke, 91 Mo. 251, 4 S. W. 99, dissenting opinion, majority holding habeas corpus ad testificandum not issuable to produce felon in custody; United States v. McElroy, 2 Mont. 496, construing act permitting appeals; Rhodes v. Phillips, 2 Tex. 161, holding jurisdiction of court depended on act of legislature; as also in Yarbrough v. The State, 2 Tex. 527; State v. Daughtery, 5 Tex, 3, 4, where act gives defendant in criminal case right to appeal, State cannot; in dissenting opinion, State v. Croteau, 23 Vt. 73, to the point, writ of error will not lie for State in a criminal case of acquittal. Cited in dissenting opinion, Sparf v. United States, 156 U. S. 176, 39 L. 387, 15 S. Ct. 321. And see note to 11 Wheat. 474, 6 L. 523, on this subject.

Distinguished in People v. Jordan, 65 Cal. 648, 4 Pac. 686, holding where court has been given appellate jurisdiction it may establish its own system of procedure; People v. Bradley, 60 Ill. 400, for there the court had jurisdiction in criminal cases.

Federal courts.— Supreme Court has no jurisdiction by appeal or error of criminal causes from the District of Columbia, p. 173.

Obiter dictum.— Court not bound by expressions in opinion on point not contested, p. 172.

Rule applied in Ex parte Bollman, 4 Cr. 104, 2 L. 564; Cross v. Burke, 146 U. S. 87, 36 L. 898, 13 S. Ct. 23; Darden v. Lines, 2 Fla. 580, courts refusing to consider themselves bound by expressions in opinion on points not contested.

Miscellaneous citations.— Note, p. 160, is cited in Turner v. Turner, 44 Ala. 451; Gimter v. Dale, 44 Ala. 644, that it is the duty of every State to protect its citizens; dissenting opinion, State v. Clinton, 26 La. Ann. 413.

3 Cr. 174-178, 2 L. 402, FAW v. ROBERDEAU.

Statute of limitation.— "Beyond the sea" and "out of State" are analogous terms, p. 177.

Cited and applied in Davie v. Briggs, 97 U. S. 637, 24 L. 1089, following State rule that "beyond seas" means without the United States; Smith v. Bond, 8 Ala. 390, "return into State" means within jurisdiction of State courts; Thomason v. Odum, 23 Ala. 486, "beyond the seas" includes a resident of another State; Hatch v. Spofford, 24 Conn. 441, if both parties reside in another State statute does not run; Galusha v. Cobleigh, 13 N. H. 87, holding "beyond sea" means without the State; Paine v. Drew, 44 N. H. 319. resident and nonresident plaintiffs on same footing; Hale v. Law-

rence, 21 N. J. L. 741, 47 Am. Dec. 205, both parties nonresidents, cause arose out of State, statute runs; Richardson v. Richardson, 6 Ohio, 126, 25 Am. Dec. 746, "beyond seas" means without State, as also in Forbes v. Foot, 2 McCord, 333, 13 Am. Dec. 733. Cited, Pruseux v. Welch, 20 Fed. Cas. 26, holding same as main case. See also 13 Am. Dec. 733, and 83 Am. Dec. 645, note.

Distinguished in Campbell v. Rankins, 11 Me. 106, holding, where statute prohibited the transportation of infants, "beyond the seas" meant without the United States.

Statute of limitations.— A creditor resident of another State, removes his disability as one "out of the commonwealth" by coming into the State, however temporarily, and the statute begins to run against his claim, p. 178.

Cited in Palmer v. Shaw, 16 Cal. 96, holding a temporary return, not clandestine, starts statute; Cole v. Jessup, 10 N. Y. 104, holding averment of "public return" sufficient; Powell v. Koehler, 52 Ohio St. 120, 49 Am. St. Rep. 709, 39 N. E. 196, holding temporary return of infant removes disability of absence.

Distinguished in Alexander v. Burnet, 5 Rich. L. 202, holding return must be open; Didier v. Davison, 2 Sandf. Ch. 66, 68, restricting rule to open return with intent to reside.

Appeal and error.— On writ of error court will take facts as found in the record, p. 177.

Cited and followed in United States v. Eliason, 16 Pet. 301, 10 L. 972, holding writ of error lies to decision of Circuit Court upon an agreed case; United States v. King, 7 How. 865, 12 L. 948, and Suydam v. Williamson, 20 How. 434, 15 L. 980, holding statement filed after writ of error is issued cannot be considered a part of the record; Insurance Co. v. Folsom, 18 Wall. 249, 21 L. 833, holding Supreme Court cannot review Circuit Court's findings of facts; Holbrook v. Allen, 4 Fla. 101, holding where court is to weigh evidence on agreed statement of facts, a writ of error does not lie; Derby v. Jacques, 1 Cliff. 433, F. C. 3,817, holding writ of error lies from Circuit Court judgment upon an agreed case.

3 Cr. 179-180, 2 L. 404, RAY v. LAW.

Appeal and error.— Decree of sale, after foreclosure, is final, from which appeal lies, p. 180.

Numerous citations show affirmance and various applications of this principle: Thomson v. Dean, 7 Wall. 346, 19 L. 95, decree directing transfer of stock, and account of amount paid and to be paid for same, is final; Marin v. Lalley, 17 Wall. 17, 21 L. 596, holding from proceeding in its nature similar to the foreclosure of mortgage, appeal lies; Whiting v. Bank, 13 Pet. 15, 10 L. 38, holding a decree

of foreclosure and sale a final decree; Bronson v. Railroad Co., 2 Black, 531, 17 L. 360, holding right to appeal cannot be suspended by cross-bills between others; The Steamboat New England, 3 Sumn. 507, F. C. 10,151, holding one party may appeal from decree of sale, or wait until definitive decree; Railroad Co. v. Swasey, 23 Wall. 409, 23 L. 137, and Grant v. Insurance Co., 106 U. S. 431, 27 L. 238, 1 S. Ct. 416, restricting appeal to case where amount due was determined; Chicago, etc., R. R. v. Fosdick, 106 U. S. 70, 27 L. 55, holding decree final, though it does not exhaust equity of redemption; Keystone Iron Co. v. Martin, 132 U. S. 93, 96, 33 L. 276, 277, 10 S. Ct. 33, 34, holding granting of perpetual injunction and ordering an account not a final decree; McGourkey v. Toledo & Ohio Ry., 146 U. S. 545, 36 L. 1083, 13 S. Ct. 172, decree final if there is a ministerial reference, not if judicial; Desvergers v. Parsons, 60 Fed. 150, 23 U. S. App. 239, decree terminating litigation on its merits, leaving nothing but its execution, is final; Weatherford v. James, 2 Ala. 176, though there be a reference to compute damages, decree is final; Crittenden, ex parte, 10 Ark. 356, 370, decree of dower, appointing commissioners to ascertain intermediate rents, not final; The Farmer's Loan, etc., v. Canada, etc., Ry. Co., 127 Ind. 256, 26 N. E. 785, decree of sale, proceeds in court, subject to lienholders, is conclusive upon the parties; Ringgold's Case, 1 Bland Ch. 17, discussing whether an appeal from ex parte proceedings lies, not decided; Benedict v. Thompson, 2 Doug. (Mich.) 303, holding order for appraisement of mortgaged premises final; Cromwell v. Craft, 47 Miss. 59, holding decree to sell specified articles unless claim is paid, is final; Baker v. Lehman, Wright, 523, holding decree for sale of mortgaged premises final; Hey v. Schooley, 7 Ohio (pt. 2), 49, holding decree to sell, not opened by appeal from decree confirming; Royall v. Johnson, 1 Rand. 430, holding decree as to one defendant final, though action is pending as to rest; Thorntons v. Fitzhugh, 4 Leigh (Va.), 216, holding decree, with reservation of further decree if unavailing, is final; Core v. Strickler, 24 W. Va. 694, holding decree ascertaining amount of debts and ordering sale, final; in note, see 60 Am. Dec. 435, note, and Suckley v. Rotchford, 12 Gratt. 70, 65, Am. Dec. 245, discussing point generally.

Distinguished in The Palmyra, 10 Wheat. 504, 6 L. 376, holding decree not final where damages were unassessed; Beebe v. Russell, 19 How. 286, 15 L. 669, holding appeal will not lie where there is a reference to state an account; Burlington, etc., Ry. v. Simmons, 123 U. S. 55, 31 L. 74, 8 S. Ct. 59, where no sale was ordered; Gray v. Palmer, 9 Cal. 635, where partnership accounts remained to be taken; Cocke v. Gilpin, 1 Rob. (Va.) 39, 40, holding decree not final where further action of court is necessary; Cent. Trust Co. v. Ry. Co., 89 Fed. Rep. 27, holding while decree of foreclosure is final, it did not prevent purchaser from filing a supplemental bill for an injunction restraining others from bringing suit in State court attacking validity of decree.

3 Cr. 180-186, 2 L. 404, LEVY v. GADSBY.

Usury.— Court has exclusive power of deciding whether written contract is usurious, p. 186.

Principle applied in Walker v. Bank, 3 How. 72, 11 L. 499, holding question of usury dependent on writing is for court; Buttrick v. Harris, 1 Biss. 445, F. C. 2,256, holding court should construe instrument indirectly involving usury; Goddard v. Foster, 17 Wall. 142, 21 L. 595, where agreement was deduced from correspondence of parties; Higgins v. McCrea, 116 U. S. 682, 29 L. 768, 6 S. Ct. 562, where facts not disputed, construction rules of a board is a question of law; Comfort v. Ballingal, 134 Mo. 288, 35 S. W. 611, but if jury construed correctly, judgment will not be reversed; Archibald v. Thomas, 3 Cow. 289, court has exclusive power to decide whether written contract is usurious; Morris v. Ward, 36 N. Y. 595, construing a grant; Dwight v. Germania Life Ins. Co., 103 N. Y. 353, 57 Am. Rep. 734, 8 N. E. 658, contract of insurance; Denison v. Wertz, 7 S. & R. 376, holding error to leave construction of written instrument to jury, also Evans v. Negley, 13 S. & R. 220, and McFarland v. Newman, 9 Watts, 59, 34 Am. Dec. 502; Reid v. Dodson, 1 Overt. 412, as to military entry; San Antonio v. Lewis, 9 Tex. 71, legal effect of written evidence a matter of law. Cited in Lloyd v. Scott, 4 Cr. C. C. 213, F. C. 8,434, and Insurance Co. v. Walsh, 18 Mo. 237, in general discussion. See also note on this subject, 69 Am. Dec. 454.

Usury is provable under general issue, p. 186.

Rule applied in Ambler v. Ruddell, 17 Ark. 140, holding defense of usury may be set up under general issue in action on oral promise, notwithstanding statute; Stockham v. Munson, 28 Ill. 53, holding it is not necessary to set up usury by plea; Fulton Bank v. Stafford, 2 Wend. 486; Solomon v. Jones, 3 Brev. 56, and Bank v. Evans, 9 W. Va. 382, holding usury may be proved under general issue. Cited in Howard v. Thompson, 21 Wend. 334, holding in action of libel defendant may rest on probable cause, after abandoning defense of justification; Irwin v. Bell, 1 Overt. 486, holding plaintiff failing to prove under special count may resort to general count.

Distinguished in Little v. Riley, 43 N. H. 112, holding in suit on writ of entry upon a mortgage, usury could not be set up under general issue; Barbour v. Tompkins, 31 W. Va. 415, 7 S. E. 4, holding defense of usury must be directly raised.

Miscellaneous citations.— Cited in Oates v. National Bank, 100 U. S. 249, 25 L. 584; Atkinson v. Allen, 71 Fed. Rep. 59, 36 U. S. App. 255; Gittell v. Riley, Hardin, 87; Polk v. Robertson, 1 Overt. 457, in general discussion.

Usury.— If borrower agrees to pay same rate of interest he receives on a reloan by himself, usury in second contract makes first illegal, p. 186.

Cited in Newman v. Williams, 29 Miss. 222, holding where one is to receive more than the legal rate for forbearance, agreement is usurious; Pfeister v. Building Assn., 19 W. Va. 718, holding if building association advances money at legal rate to one paying highest premium, loan is usurious.

Distinguished in Nichols v. Fearson, 7 Pet. 108, 8 L. 625, holding sale of note by drawee at a discount is not per se usurious; Kimball v. Athenaeum, 3 Gray, 232, holding agreement to pay rate of interest and to give creditor notes and pay him for disposing of them is not usurious.

3 Cr. 187–192, 2 L. 406, MARINE INS. CO. v. WILSON

Marine insurance, unseaworthiness.— Surveyor's reporting vessel unsound, not referring to time, will not discharge policy, p. 192.

Distinguished in Dorr v. Ins. Co., 7 Wheat. 614, 5 L. 537, this case not resembling that in evidence or pleadings; as also in Watson v. Insurance Company of North America, 2 Wash. C. C. 153, F. C. 17,284.

3 Cr. 193–210, 2 L. 408, WILSON v. CODMAN.

Practice.— Defendant not entitled to continuance upon death of plaintiff, but may insist on production of letters testamentary, p. 207,

Cited in Alexander v. Patten, 1 Cr. C. C. 339, F. C. 171, and North v. Clark, 3 Cr. C. C. 93, F. C. 10,308, holding administrator bound to give oyer of his letters, whenever demanded, before expiration of time to plead; Equitable Life, etc. v. Trimble, 83 Fed. Rep. 87, 48 U. S. App. 569, holding administrator may be substituted as plaintiff without filing supplemental pleadings; Taylor v. Western Pacific R. R. Co., 45 Cal. 337, upon plaintiff's death, his representative was substituted by ex parte order; Dale v. Roosevelt, 8 Cow. 343, defendant may call upon administrator d. b. n. to produce letters; Hobbs v. Bush, 2 Dev. & B. 512, where husband moves to be admitted as party, objections to validity of marriage must be made then.

Practice.— Immaterial averment in declaration need not be proved; such is an averment that a note is assigned for value received, p. 209.

Rule applied in Cabiness v. Brown, Minor, 42, where variance was immaterial and not misleading; Marr v. Plummer, 3 Me. 76, holding indorsee of promissory note entitled to recover against maker, without alleging it was made for valuable consideration; Ward v. Steamboat Little Red, 7 Mo. 584, where averment was alleged by way of inducement, and was descriptive of a written

instrument; Mechanics, etc., Bank v. Whinfield, 24 Wend. 418, holding immaterial averment need not be proved; in dissenting opinion, Olinger v. McChesney, 7 Leigh (Va.), 679, majority holding in tort action founded on contract, variance from contract alleged will be fatal; also concurring opinion, same case, p. 683, declaring Wilson v. Codman not applicable; Averett v. Booker, 15 Gratt. 164, 76 Am. Dec. 204, in action on bill of exchange it is not necessary to aver it was given for value.

Principal and agent.— Claims against agent cannot be offset against the principal, p. 210.

Cited in Taylor v. Kincaid, Hardin, 88, holding usury between assignor and assignee does not discharge obligor; Defrance v. Davis, Walk. (Miss.) 71, holding interest of assignee unaffected by subsequent bankruptcy of assignor; Mott v. Hicks, 1 Cow. 538, 13 Am. Dec. 557, one indorsing as "agent" not liable as indorser; Olive v. Napier, Cooke, 14, holding action of debt not maintainable by indorsee of promissory note, not under seal.

3 Cr. 210–219, 2 L. 414, HALLET v. JENKS.

Admiralty.— An American vessel entering a French port under stress of weather, and compelled by the French to load a French cargo does not violate the nonintercourse act of 1798 so as to forfeit insurance, p. 219.

Cited in Crawford v. The William Penn, 3 Wash. C. C. 493, F. C. 3,373, holding hypothecation of vessel in enemy's country to procure money to return valid; Amory v. McGregor, 15 Johns. 36, holding a citizen of one belligerent may withdraw his goods, within a reasonable time after declaration of war. Cited in general discussion in New O., etc., R. R. Co. v. Evans, 49 Miss. 788; Pelletreau v. Rathbone, 1 N. J. Eq. 333; Booth v. Cotton, 13 Tex. 362

3 Cr. 220–228, 2 L. 417, MILLIGAN v. MILLEDGE.

Equity pleading.— Want of proper parties not a good plea if bill suggests that they are out of court's jurisdiction, p. 228.

Cited and applied in Harrison v. Urann, 1 Story, 66, F. C. 6,146, holding joinder of those persons whose citizenship would oust court of jurisdiction dispensed with; Bowman v. Burnley, 2 McLean, 379, F. C. 1,740, holding necessary parties within jurisdiction must be before court; Trecothick v. Austin, 4 Mason, 32, 41, F. C. 14,164, holding administrators need not be parties if without jurisdiction; West v. Randall, 2 Mason, 196, F. C. 17,424, holding interested party without jurisdiction need not be joined; Wood v. Dummer, 3 Mason, 317, F. C. 17,944, holding parties dispensed with where they are so

numerous that it is impossible to join all; Wormley v. Wormley, 8 Wheat. 456, n., 5 L. 660, holding party without jurisdiction need not be joined; as also in Lucas v. Bank of Darien, 2 Stew. 326; Reese v. Bradford, 13 Ala. 844, where court held removal of party from State does not give jurisdiction of a legal demand; London, etc., Bank v. Smith, 101 Cal. 423, 35 Pac. 1030, holding nonresident surviving partner need not be a party; Etheridge v. Vernoy, 71 N. C. 186, holding appearance of parties out of jurisdiction dispensed with.

Equity pleading.— Matter in the plea must be a complete bar to the equity in the bill, p. 228.

Cited in Rhode Island v. Massachusetts, 14 Pet. 262, 10 L. 448, holding proper pleading to a bill containing no equity is demurrer; Piatt v. Oliver, 1 McLean, 303, F. C. 11,114, if plea is not complete bar it must be set aside; Sharp v. Reissner, 20 Blatchf, 13, 9 Fed. Rep. 447, plea denying infringement of patent, stricken out; Salmon v. Clagett, 3 Bland Ch. 135, denial of facts not proper for a plea.

Equity pleading.— Bill should not be dismissed for want of proper parties, p. 228.

Approved and applied in Berry v. Rogers, 2 B. Mon. 308, holding leave should be given to amend, not dismiss absolutely; Colt v. Lasnier, 9 Cow. 334, ordering the cause to stand over that necessary parties may be added.

Miscellaneous.— Cited in Trescott v. Trescott, 1 McCord's Ch. 433.

3 Cr. 229–235, 2 L. 420, COOKE v. GRAHAM.

Pleadings.— Upon oyer, if declaration misdescribes the date of the bond, it is bad on general demurrer, p. 235.

This holding approved and applied in Tingey v. Carroll, 3 Cr. C. C. 694, F. C. 14,056, holding variance as to "seals" fatal; Chilton v. People, 66 Ill. 503, holding where one declares on a bond and upon oyer, instrument is unsealed, variance is fatal; as also in Deming v. Bullitt, 1 Blackf. 241; Smith v. Brown, 3 Blackf. 25, proving of a different date than that alleged, does not sustain the action, note; Palmer v. McGinnis, Hardin, 515, where the variance is in form only, must demur specially; Long v. Overton, 7 Mo. 568, holding omission of month in declaration a fatal variance; Messer v. Smythe, 58 N. H. 313, holding operation of oyer is to make the writing part of the pleadings; Church v. Feterow, 2 Pen. & Watts, 303, holding variance in date fatal; Cabell v. Hardwick, 1 Call (Va.), 354, holding contract as evidenced must correspond with that declared on; Bennetts v. Lloyd, 6 Leigh (Va.), 318, holding variance in date fatal; Damarin v. Young, 27 W. Va. 437, holding variance in date between note declared on and produced is fatal.

Distinguished in Moses v. United States, 166 U. S. 578, 41 L. 1122, 17 S. Ct. 685, holding where trial is upon the merits variance in date in declaration and instrument is not fatal.

Demurrer.— Judgment upon demurrer is against party making first error, p. 235.

Rule applied in Aurora v. West, 7 Wall. 93, 19 L. 46; United States v. Bank, 10 Fed. Rep. 615; Peoria, etc., R. R. v. Neill, 16 Ill. 271; Tillotson v. Stipp, 1 Blackf. 77, n.; Conner v. Paxson, 1 Blackf. 209; Joy v. Simpson, 2 N. H. 181; Governor v. Porter, 4 Yerg. 192, and State v. Williams, 8 Tex. 265, all holding court will give judgment against the party whose pleading is first defective in substance. Cited in Henley v. Brush, 33 Ala. 641, to show that a visitation of a demurrer was within mischief intended to be guarded against by code.

Distinguished in Park v. Kelly, 49 Fed. 622, holding that a demurrer to an answer denying plaintiff's power to make the contract sued upon does not admit the facts therein alleged so as to make them part of the petition.

Bonds.— In construing bonds, the letter of the condition may be departed from to carry out the intention, p. 235.

Cited and rule applied in Whitsett v. Womack, 8 Ala. 481, holding bond varying from form prescribed by statute good; Swain v. Graves, 8 Cal. 551, holding court will transpose or reject meaningless words in construing an appeal bond; Stockton v. Turner, 7 J. J. Marsh. 192, holding a repugnant stipulation in a condition will not change the import of the contract; Giles v. Halsted, 24 N. J. L. 367, 370, 61 Am. Dec. 669, 671, holding though condition of bond be meaningless it should be construed according to the intention of the parties; Roth v. Miller, 15 S. & R. 107, holding sureties are as much bound by the true intent of the meaning of the instrument as the principals.

3 Cr. 241, 242, 2 L. 427, DOBYNES v. UNITED STATES.

No citations.

3 Cr. 242-249, 2 L. 427, HANNAY v. EVE.

Fraudulent contracts.— Agreement in fraud of law of United States is unenforceable, p. 248.

The following citing cases approve and apply this holding: Piatt v. Oliver, 1 McLean, 301, F. C. 11,114, holding agreement between persons not to bid at sheriff's sale is void against public policy; as also in Piatt v. Oliver, 2 McLean, 277, F. C. 11,115; Tufts v. Tufts, 3 Wood. & M. 505, F. C. 14,233, refusing specific performance of an illegal contract; Mitchell v. Doggett, 1 Fla. 371, holding no action can be maintained on illegal contract, after statute illegalizing is

repealed; Howell v. Fountain, 3 Ga. 184, 46 Am. Dec. 422, holding no action maintainable on contract growing out of immoral or illegal transaction; as also in Martin v. Barstow Iron Works, 35 Ga. 328; Overshiner v. Wisehart, 59 Ind. 138, if parties are in equal fault, no relief given in case of fraud; Marienthal, etc. v. Shafter, 6 Iowa, 226, holding there can be no action on contract with illegal consideration; Bank of the United States v. Norvell, 2 A. K. Marsh, 105, holding a title acquired against law not enforceable; Bank of Michigan v. Niles, 1 Doug. 412, 41 Am. Dec. 583, holding contract for purchase of land by corporation in excess of legal amount allowed, to be held void; Drexler v. Tyrrell, 15 Nev. 132, holding agreement to place property without operation of revenue law void; Chauncy v. Yeaton, 1 N. H. 157, if property is tortiously taken and put to illegal use, owner cannot recover money received for that use; Gulick v. Ward, 10 N. J. L. 92, 18 Am. Dec. 394, holding contract contravening an act of congress is void; Graves v. Delaplaine, 14 Johns. 159, holding contract for trade, during nonintercourse law, void, and that no recovery can be had on it; Alwyn v. Perkins, 3 Desaus. Eq. 307, one cannot recover commissions for holding property of a foreigner to avoid foreign law; Hunt v. Robinson, 1 Tex. 762, holding contract in violation of land laws unenforceable. See note on general doctrine of illegal contracts, 55 Am. St. Rep. 776.

Distinguished in Greffin v. Lopez, 5 Mart. (O. S.) 165, where a person making deed to defeat creditors was permitted to recover his property; Kershaw v. Kelsey, 100 Mass. 566, 97 Am. Dec. 129, 1 Am. Rep. 146, upholding lease of plantation in rebel State during war; James v. Fulcrod, 5 Tex. 522, 55 Am. Dec. 750, upholding agreement where two persons with honest intent agreed to purchase at a public sale, one to bid for both.

Miscellaneous citations.— Cited generally The M. M. Chase, 37 Fed. Rep. 711, Darrington v. Borland, 3 Port. 35, and State v. Doyle, 40 Wis. 194, 22 Am. Rep. 699.

3 Cr. 249, 250, 2 L. 429, MONTALET v. MURRAY.

Appeal and error.— Upon affirmance of judgment on writ of error, costs are awarded as of course, p. 250.

Cited in Burnham v. Rangeley, 2 Wood. & M. 422, F. C. 2,177, holding where case is dismissed for lack of jurisdiction no costs allowed. See 4 Cr. 46, 2 L. 545, for this case on further hearing.

3 Cr. 250-266, 2 L. 429, SILSBY v. YOUNG.

Wills.— In a direction that in case of insufficiency of estate to pay all legacies, one shall abate and not all ratably, sufficiency of estate is to be ascertained not as of the time of testator's death but of time of distribution, p. 265.

Cited to this point, Kirkman v. Mason, 17 Ala. 139, where legacy was given after debts were paid.

3 Cr. 267, 268, 2 L. 435, STRAWBRIDGE v. CURTISS.

Jurisdiction of Federal courts.— Each plaintiff must be capable of suing each defendant in that court, p. 267.

The number of citing cases show this to be a leading case of considerable importance. The following are the various applications of the principle which they make: New Orleans v. Winter, 1 Wheat. 95, 4 L. 45, holding citizen of a territory cannot sue a citizen of State in these courts, though joined with parties capable of so suing; Wormley v. Wormley, 8 Wheat. 457, n., 5 L. 661, holding court will not allow its jurisdiction to be ousted by joinder or nonjoinder of formal parties; Commercial, etc., Bank of Vicksburg v. Slocomb, 14 Pet. 64, 10 L. 356, holding all the corporators must be citizens of a different State from the other party; in dissenting opinion, Marshall v. Baltimore & O. R. R. Co., 16 How. 340, 14 L. 964, majority holding that averment, defendants are a corporation, created by legislature of Maryland, gives the court jurisdiction; Wood v. Davis, 18 How. 469, 15 L. 461, holding joinder of formal parties cannot oust courts of jurisdiction; Coal Co. v. Blatchford, 11 Wall. 174, 20 L. 180, holding executors not qualified because of citizenship, cannot sue, although those they represent are qualified; Case of the Sewing Machine Companies, 18 Wall. 574, 21 L. 918, holding, where one defendant is citizen of plaintiff's State, court has no jurisdiction; Peninsular Iron Co. v. Stone, 121 U. S. 632, 30 L. 1020, 7 S. Ct. 1010, 1011, holding, if necessary party on both sides is citizen of same State, court has no jurisdiction; Smith v. Lyon, 133 U. S. 318, 319, 320, 33 L. 636, 637, 10 S. Ct. 304; S. C., 38 Fed. 54, plaintiffs citizens of different States cannot unite in a suit in a State of which either is a citizen; Hanrick v. Hanrick, 153 U. S. 195, 38 L. 686, 14 S. Ct. 836, holding all plaintiffs and defendants must be citizens of different States; Hooe v. Jameson, 166 U. S. 397, 398, 41 L. 1050, 17 S. Ct. 597, holding citizen of District of Columbia cannot maintain an action, though joined with a competent person; Hubbard v. Northern R. R. Co., 3 Blatchf. 88, F. C. 6,818, holding plaintiffs cannot be citizens of different States; Hatch v. The Chicago, etc., R. R. Co., 6 Blatchf. 113, F. C. 6,204, holding no defendant can be citizen of same State as plaintiff; Brigham v. Luddington, 12 Blatchf. 241, F. C. 1,874, if suit is not maintainable without proper parties, and bringing them in would oust court of jurisdiction, action must be dismissed; Petterson v. Chapman, 13 Blatchf. 399, F. C. 11,042, holding no plaintiff and defendant can be of same State; Sawyer v. Switzerland Marine Ins. Co., 14 Blatchf. 452, F. C. 12,408, holding requisite jurisdictional citizenship must exist as to each plaintiff; Case v. Douglas, 1 Dill. 300, F. C. 2,491, holding all the plaintiffs must be shown to be citizens of another State; Barney v. Baltimore, 1 Hughes, 121, F. C. 1,029, holding citizenship of one of the suitors in District of Columbia does not give jurisdiction; Ward v. Arredondo, 1 Paine, 412, F. C. 17,148,

holding joining of nominal parties, without requisite citizenship, does not oust court; Moffat v. Saley, 2 Paine, 105, F. C. 9,688, holding plaintiffs must be citizens of same State; Smith v. Rines, 2 Sumn. 345, 347, F. C. 13,100, Circuit Court has jurisdiction where there are joint defendants, if all petition for removal; Bank of Cumberland v. Willis, 3 Sumn. 473, F. C. 885, all of the incorporators must be citizens of another State; New Jersey v. Babcock, 4 Wash. 346, F. C. 10,163, holding, if State be a party, the Circuit Court is without jurisdiction and will remand cause, even after it has been docketed; Kirkpatrick v. White, 4 Wash. 598, F. C. 7,850, holding all of the corporators must be citizens of another State; Nesmith v. Calvert, 1 Wood. & M. 38, F. C. 10,123, where suit could be maintained alone against one defendant, that others were citizens of same State as plaintiff, was not fatal to jurisdiction; Saginaw Gas Light Co. v. Saginaw, 28 Fed. 531, holding no plaintiff or defendant can be of same State; Kane v. Indianapolis, 82 Fed. Rep. 772, holding one joint defendant cannot have cause removed, unless other defendant has capacity; Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 324, holding Circuit Court has no jurisdiction, where plaintiffs are nonresidents, but only one defendant is a resident; Calderwood v. Braly, 28 Col. 99, holding all the defendants must be citizens of another State to authorize a removal; Howland Coal, etc., Works v. Brown, 13 Bush (Ky.), 687, holding court had no jurisdiction where corporation, one of defendants, was of same State as plaintiff; Bryant v. Rich, 106 Mass. 192, 8 Am. Rep. 315, if a defendant or plaintiff, real party in interest, is of same State, court has no jurisdiction; North River Co. v. Hoffman, 5 Johns. Ch. 303, holding, each incorporator must have jurisdictional citizenship; Schuyler v. Pelisser, 3 Edw. Ch. 192, holding though Federal court has no jurisdiction, it cannot be enjoined by State court; James v. Thurston, 6 R. I. 431, holding presence of co-plaintiff of different State, entitled to decree, fatal to jurisdiction; Robb v. Parker, 3 S. C. 70, holding court has no jurisdiction where plaintiffs are citizens of different States, as also in Belknap v. Northern R. R. Co., 25 Vt. 719; Beery v. Irick, 22 Gratt. 487, 12 Am. Rep. 541, if any plaintiff and defendant are of same State, case is not removable; Tuckerman v. Bigelow, 24 F. C. 282, holding where interests are joint each plaintiff must be competent to sue each defendant. Cited in West v. Randall, 2 Mason, 197, F. C. 17,424, approvingly in Eames v. Carlisle, 3 N. H. 131. See also note in 33 Am. Dec. 400, and 12 Am. Rep. 545.

Distinguished in Louisville R. R. v. Letson, 2 How. 554, 11 L. 376, declaring main case was carried too far, and that a corporation is a citizen of the State under whose laws it is organized, though corporators be citizens of other States; Northern R. R. Co. v. Mich. C. R. R., 15 How. 248, 14 L. 681, where it is declared to have been overruled; Ober v. Gallagher, 93 U. S. 205, 23 L. 831, where it is

declared to have been obviated by statute; Sands v. Smith, 1 Abb. (U. S.) 371, 376, 1 Dill. 293, 297, F. C. 12,305, holding that an action brought against a citizen of that State, and citizen of another State, latter voluntarily appearing, cognizable in United States courts; Pond v. Railroad Co., 12 Blatchf. 290, F. C. 11,265, holding defendant who is citizen of State where action is brought cannot object to jurisdiction because other defendant resides in a different State; Pegram v. United States, 1 Brock. 262, F. C. 10,906, holding that in an action against defendants, some of whom are nonresidents, judgment may be taken against the residents. Denied in Wiggins v. The Railway, 1 Hask. (Fox's Dec.) 126, 128, 129, 130, F. C. 17,626, holding Circuit Court has jurisdiction, though respondent is a nonresident, served in this State, and remaining respondents are residents. Distinguished in Florence, etc., Co. v. Grover, etc., Co., Holmes, 242, F. C. 4,883, holding under later act, one defendant may remove cause though others be citizens of same State as plaintiff; Doremas v. Bennet, 4 McLean, 225, F. C. 4,001, holding defendant cannot plead to jurisdiction because other defendants and plaintiff are citizens of same State; Wildes v. Parker, 3 Sumn. 596, F. C. 17,652, court doubting whether American citizen domiciled in foreign country is an alien. Denied in Heriot v. Davis, 2 Wood. & M. 231, 232, F. C. 6,404, holding that if respondent appears court has jurisdiction, though other respondents be citizens of same State as plaintiff. Distinguished in Froment v. Duclos, 30 Fed. 385, a case concerning a consul, and hence one where Federal courts have exclusive jurisdiction. Denied in Zambrino v. Galveston Ry., 38 Fed. Rep. 451, holding that a corporation is presumed to be a citizen of the State where created; as also in Ysleta v. Canda, 67 Fed. 7, holding same of municipal corporation; Ex parte Andrew, 40 Ala. 646, 649, 651, holding where interests of parties are distinct, requisite citizenship need not be common; Home Ins. Co. v. Council, 50 Ga. 541, holding a foreign corporation to be an "inhabitant," and liable to same taxes as individuals; Renard v. Hargous, 13 N. Y. 265, holding an attachment authorized, though one partner was a nonresident; Cooke v. Bank, 52 N. Y. 110, 11 Am. Rep. 676, holding a corporation a citizen of State creating, irrespective of citizenship, incorporators; Cromwell v. Insurance Co., 2 Rich. L. 516, holding a corporation's residence is wherever its corporate business is; Hall v. Bank of Virginia, 14 W. Va. 619, holding a corporation is a citizen of State where created; State v. Railroad, 45 Wis. 593, holding a corporation to be a citizen of the State where its principal place of business is. Distinguished in Valarino v. Thompson, 7 N. Y. 582, where defendant was a consul, and Federal court had exclusive jurisdiction; Babcock v. Millard, 2 Fed. Cas. 299, where it was not an original suit; Taylor v. Rockefeller, 23 Fed. Cas. 795, holding cause may be removed under later act, though nominal plaintiffs and defendants be of same State.

3 Cr. 268-270, 2 L. 436, GORDON v. CALDCLEUGH.

Jurisdiction of Supreme Court.— If State court decrees in favor of right claimed under an act of congress, Supreme Court has no jurisdiction on writ of error, p. 269.

Rule applied in Scott v. Jones, 5 How. 375, 12 L. 196; Roosevelt v. Meyer, 1 Wall. 517, 17 L. 502; Missouri v. Andriano, 138 U. S. 501, 34 L. 1014, 11 S. Ct. 387, holding court was without jurisdiction. Cited in Whitten v. Tomlinson, 160 U. S. 238, 40 L. 411, 16 S. Ct. 300, and Fleming v. Clark, 12 Allen, 196, in general discussion.

3 Cr. 270-282, 2 L. 436, McFERRAN v. TAYLOR.

Vendor and vendee.—Vendor is bound in equity by description of property sold, given by himself, even though error therein be by innocent mistake, and is liable for the error, p. 281.

This holding is affirmed and applied in the following citing cases: Smith v. Richards, 13 Pet. 38, 10 L. 48, holding false affirmation of material fact, though innocently made, is good ground for rescission; Barnes v. Union Pac. Ry. Co., 54 Fed. 90, 12 U. S. App. 1, permitting recovery on misrepresentation, without alleging knowledge or fraud; Moline Plow Co. v. Carson, 72 Fed. 392, 36 U. S. App. 448, holding vendor liable for misrepresentation when he ought to have known its truth; Ricks v. Dillahunty, 8 Port. 138, holding an express warranty extends to all defects, known or unknown; Pitts v. Cottingham, 9 Port. 677, holding false representation gives vendee right to rescind; as also in Read v. Walker, 18 Ala. 333; Sears v. Hicklin, 13 Colo. 152, 21 Pac. 1024, holding material misrepresentation made by mistake, ground for relief, though vendee might have learned its falsity; Smith v. Mitchell, 6 Ga. 480, holding knowledge of maker of material misrepresentation immaterial; as also in Hammons v. Espy, 1 Wilson (Ind.), 538, and Borders v. Kattleman, 142 Ill. 104, 31 N. E. 21. Cited and applied in Cowger v. Gordon, 4 Blackf. 113, even if vendor believes misrepresentation to be true, he is liable; Frenzel v. Miller, 37 Ind. 13, 10 Am. Rep. 67, holding knowledge of maker of misrepresentation immaterial; as also in Wilcox v. Iowa Wesleyan University, 32 Iowa, 374, but purchaser must have relied on them; Waters v. Mattingly, 1 Bibb, 244, holding knowledge of maker of misrepresentation is immaterial; Bean v. Herrick, 12 Me. 269, 28 Am. Dec. 180, holding, though party making misrepresentation has no interest, he is liable; Taymon v. Mitchell, 1 Md. Ch. 499, if misrepresentation is material, knowledge of maker is immaterial; Parham v. Randolph, 4 How. (Miss.) 451, 35 Am. Dec. 405, holding any misrepresentation by vendor as to title is fraudulent; Rimer v. Dugan, 39 Miss. 483, 77 Am. Dec. 688, holding material misrepresentation, though innocently made, is binding; Owens v. Rector, 44 Mo. 393, holding knowledge of seller as to mis-

representation, a material question of fact; Phillips v. Jones, 12 Neb. 215, 10 N. W. 709, holding vendor liable for misrepresentation, though made through mistake; Leavitt v. Sizer, 35 Neb. 85, 52 N. W. 833, holding party liable, though not knowing statement untrue; Hoock v. Bowman, 42 Neb. 84, 47 Am. St. Rep. 694, 60 N. W. 390, holding false description of property grounds for rescission of contract. Rule applied in Walsh v. Hall, 66 N. C. 241, holding defendant had right of rescission of contract induced by fraudulent misrepresentation; McCall v. Davis, 56 Pa. St. 435, 94 Am. Dec. 96, holding absence of wilful fraud in vendor will not relieve him from mistake; Donelson v. Weakley, 3 Yerg. 197, holding material misrepresentation authorizes rescission; Lewis v. McLemore, 10 Yerg. 209, holding party liable for misrepresentation of material fact, innocently made, upon similar facts as original case; also McMullin v. Sanders, 79 Va. 365, and Miner v. Medbury, 6 Wis. 309. Cited in note to 45 Am. Dec. 632.

Distinguished in Buford v. Guthrie, 14 Bush (Ky.), 694, where misrepresentation was as to title and title was made good; Brooks v. Hamilton, 15 Minn. 34, where party had opportunity to examine the goods; Erie, etc., Works v. Barber, 106 Pa. St. 141, 51 Am. Rep. 515, holding that to recover in action of deceit, defendant must have been guilty of some moral wrong; Smith v. Mariner, 5 Wis. 577, 68 Am. Dec. 78, where there was no contract, but representation was as to date of public sale.

Trial.— Finding of jury, contradicting fact admitted by pleadings is to be disregarded, p. 280.

Rule applied in Grady v. Robinson, 28 Ala. 303, holding defendant cannot prove a fact which he failed to put in issue in his answer; Roth v. Miller, 15 S. & R. 105, holding verdict, contradicting a fact admitted in pleading, is to be disregarded.

Distinguished in Bright v. Haggin, Hardin, 538, holding that defendant denying contract in bill, but setting up one under different circumstances, does not have to prove the circumstances.

Miscellaneous citations.— Cited in Keatts v. Rector, 1 Ark. 425; Hollingshead v. McKenzie, 8 Ga. 459; Woodman v. Freeman, 25 Me. 554, 560, but not in point.

3 Cr. 283-293, 2 L. 441, WILSON v. SPEED.

Evidence.— Assignee of pre-emption warrant is competent to prove facts as to nature of the assignment, where these facts do not tend to support title of party producing him, pp. 290, 291.

Caveat.— Caveat in Kentucky, in part supported by proof, ought not to be dismissed, but on the merits, p. 292.

Miscellaneous citations.— Cited in Sarchet v. The Sloop Davis, Crabbe, 191, F. C. 12,357, but not in point.

3 Cr. 293-298, 2 L. 444, BUDDICUM v. KIRK.

Deposition.— Formal errors in taking deposition held to have been waived, p. 297.

Cited and applied in Shutte v. Thompson, 15 Wall. 160, 21 L. 156, holding that refraining from objecting until after possibility of removal is a waiver; to same effect, Doane v. Glenn, 21 Wall. 35, 22 L. 476, and Howard v. Stillwell & Bierce, 139 U. S. 205, 35 L. 150, 11 S. Ct. 503, holding failure to object to formal irregularity in taking deposition amounts to a waiver; Murray v. Larabie, 8 Mont. 213, 19 Pac. 576, delay in objecting to defect waives it; Town of Alton v. Town of Gilmanton, 2 N. H. 521, 522, holding attorney may waive any objection to notice; Perkins v. Hawkins, 9 Gratt. 655, overruling objection made after reading of deposition, and after death of witness.

Deposition.— If notice be given that deposition will be taken on a certain date, and commission will adjourn from day to day, if they adjourn for more than one day, commission is not taken agreeably to notice, p. 297.

Rule applied in Harding v. Merrick, 3 Ala. 60, holding commission could not adjourn to a day more remote than that succeeding.

Distinguished in Glover v. Mullings, 2 Stew. & P. 39, where there was no direction to adjourn from day to day.

Deposition.— Notice of time and place of taking deposition given to attorney-at-law, is not sufficient under Virginia statute, p. 297.

Distinguished in Irving v. Lutton, 1 Cr. C. C. 575, F. C. 7,078, holding notice of a motion to take depositions may be given to attorney.

Pleading.— Under plea of payment to a bond, evidence of wheat delivered and of debts assigned will support the issue, p. 298.

Rule applied in Howe v. Mackay, 5 Pick. 46, and Richbaugh v. Dugan, 7 Pa. St. 396, holding under plea of payment, defendant may show a chattel or land was received as satisfaction.

Miscellaneous citations.— Cited in United States v. Parrott, McAll. 456, 457, F. C. 15,999; United States v. Cameron, 15 Fed. Rep. 796, 5 McCrary, 97, but not in point.

3 Cr. 298-300, 2 L. 245, DOUGLASS v. McALLISTER.

Damages for breach of contract.— Value of article sold on day cause of action arose is the measure of damages for breach, p. 300.

Cited and principle applied in Willis v. Dudley, 10 Ala. 938, holding purchaser entitled to value of article if warranty had been true; Leach v. Smith, 25 Ark. 253, allowing the value of the article at time

it was due; McAlpin v. Lee, 12 Conn. 133, holding measure of damages is difference between price agreed upon and real value of property; Davenport v. Wells, 1 Iowa, 599, holding value of goods on day they were due the measure of damages; Thompson v. Howes, 14 La. Ann. 45, allowing market price of article at time of breach; Clark v. Pinney, 7 Cow. 687, allowing difference between contract price and value of goods at time of delivery; Wilson v. Robertson, 1 Overt. 465, holding value of land at time of rendering judgment the damages; Hendrick v. Stewart, 1 Overt. 477, holding party is entitled to what he actually lost. Cited approvingly, Ferris v. Barlow, 2 Aikens, 107; dissenting opinion, Christian v. Miller, 3 Leigh (Va.), 83, 23 Am. Dec. 254.

Trial.— In jury trial court is bound to give an opinion upon any relevant point, p. 300.

Approved and applied in Emerson v. Hogg, 2 Blatchf. 7, F. C. 4,440, holding exceptions will lie for refusal to give instructions; Colquitt v. Thomas, 8 Ga. 272, giving improper, charge, amounts to a refusal to charge; State v. Brette, 6 La. Ann. 662, holding where judge refuses to charge a certain way, but jury find in accordance with charge requested, no error; State v. Donnelly, 9 Mo. App. 525, holding court may refuse instructions based upon hypothetical facts, where there is no competent evidence tending to prove them; State v. Hascall, 6 N. H. 359, court may refuse to instruct as to a point not raised at trial; Linn v. Ross, 16 N. J. L. 57, holding refusal to charge is error; Dunlop v. Patterson, 5 Cow. 246, holding it is not error to refuse to charge upon matter to which attention was not drawn; Halliday v. McDougall, 22 Wend. 273, holding that a refusal to charge that general reputation is not alone sufficient to establish a co-partnership, is not error.

3 Cr. 300–311, 2 L. 446, SIMMS v. SLOCUM.

Judgments.— Fraudulent judgments are not absolutely void, and all acts performed under them are valid as respects third persons. Accordingly the obligor on a prison-bounds bond is protected by a discharge from prison rules fraudulently obtained by the insolvent, pp. 306–311.

Subsequent cases have many times reaffirmed this doctrine and applied it as follows: Ammidon v. Smith, 1 Wheat. 460, 4 L. 135, 136, a similar case, holding discharge of a prisoner, obtained by fraud, is a lawful discharge, and no action lies on the bond; Noble v. Railroad, 147 U. S. 174, 37 L. 127, 13 S. Ct. 274, holding judgment cannot be impeached collaterally, even if court was imposed upon; Ex parte Freedley, Crabbe, 550, F. C. 5,079, court cannot compel purchaser at sheriff's sale to relinquish property, though judgment be reversed; Derby v. Jacques, 1 Cliff. 437, F. C. 3,817, holding a

judgment cannot be questioned collaterally; Bank of the United States v. Voorhees, 1 McLean, 224, F. C. 939, holding purchaser under judgment, however erroneous, is protected; Farmers' L. & T. Co. v. McKinney, 6 McLean, 10, F. C. 4,667, holding judgment cannot be treated as a nullity for error in proceedings; Woodhull v. Wagner, 1 Bald. 299, F. C. 17,975, holding discharge by bankrupt laws of foreign country no bar to action here; Hancock v. Jenks, 21 Fed. 914, recital "that patentee had made oath," cannot be inquired into; Davis v. Cathey, 1 Stew. 404, holding fraudulent discharge of debtor, without collusion of surety, exempts latter; Mabry v. Herndon, 8 Ala. 868, query whether discharge of bankrupt can be impeached for fraud; Burnham v. Stone, 101 Cal. 174, 35 Pac. 630, holding sheriff taking possession under fraudulent judgment is not a trespasser; Camp v. Moseley, 2 Fla. 195, holding an officer protected under process, showing court has jurisdiction of subject-matter; Ponder v. Moseley, 2 Fla. 268, 48 Am. Dec. 202, holding judgments import absolute verity until reversed; as also in Wiley v. Kelsey, 9 Ga. 120; Jamison v. Beaubien, 3 Scam. 115, 36 Am. Dec. 535, holding pre-emption may be shown to have been obtained by fraud; Wadhams v. Gay, 73 Ill. 422, holding innocent purchaser at judicial sale not affected by reversal of judgment; Gilman v. Hamilton, 16 Ill. 232, holding decree of specific performance is not a judicial sale, purchaser is not protected under erroneous judgment; Granger v. Clark, 22 Me. 130, holding judgment, where want of jurisdiction is not on record, not impeachable; Wilton Manuf. Co. v. Butler, 34 Me. 411, holding officer is protected under irregular writ, though judgment afterwards reversed; Way v. Howe, 108 Mass. 507, 11 Am. Rep. 390, holding discharge in bankruptcy cannot be impeached for fraud; Milburn v. Gilman, 11 Mo. 67, holding sheriff levying execution under fraudulent judgment not a trespasser; Johnson v. Jones, 2 Neb. 133, holding judgment cannot be attacked collaterally for falsity of return of summons; Lincoln v. Williams, 12 S. & R. 106, where debtor performs bond, surety cannot be held, though there was fraud in its inception; Farmers' Bank v. Boyer, 16 S. & R. 50, holding the surety does not stand on more advantageous terms than principal; Fetterman v. Murphy, 4 Watts, 426, 28 Am. Dec. 730, holding title of innocent purchaser at judicial sale unaffected by fraud in judgment; Eldridge v. Bush, Smith, 297, holding as in main case upon similar facts; Hoffman v. Coster, 2 Whart. 472, holding judgment, though fraudulent, cannot be impeached by a party or privy; Cochran v. Eldridge, 49 Pa. St. 369, holding court has power to relieve against inequitable award of arbitrators; Gregg v. Bigham, 1 Hill (S. C.), 303, 26 Am. Dec. 183, holding purchase under fraudulent judgment good; Hunter v. Ruff, 47 S. C. 554, 58 Am. St. Rep. 930, 25 S. E. 75, holding judgment voidable where defendant was not properly summoned; to same effect as original case, Hibber v. Hammond, 2

Strob. L. 107, holding discharge of prisoner releases bondsmen; Turner v. Malone, 24 S. C. 406, holding judgment will not be avoided collaterally, for lack of jurisdiction not appearing on record; Raymond v. Southerland, 3 Vt. 506, holding certificate of board of commissioners as to notice conclusive; Jackson v. Astor, 1 Pinn. 159, 39 Am. Dec. 292, holding judgment cannot be impeached collaterally. See also note to 21 Am. Dec. 198, respecting levy by officer under fraudulent judgment.

Distinguished in Pratt v. Northam, 5 Mason, 103, F. C. 11,376, holding judgment in Court of Probate, obtained by fraud, not conclusive; Murchison v. White, 54 Tex. 85, holding fraudulent judgment is open to collateral attack by strangers.

3 Cr. 311-319, 2 L. 450, HARRIS v. JOHNSTON.

Bills and notes.— Indorsee, in Virginia, cannot sue a remote indorser at law, p. 317.

Cited in Walker v. Brooks, 125 Mass. 245, holding assignee cannot sue in equity, because he cannot sue at law in his own name; Hunter v. Hempstead, 1 Mo. 70, holding indorsee can sue immediate indorser; McGee v. Lynch, 3 Hayw. 106, holding assignee cannot sue remote assignor.

Distinguished in Clifford v. Keating, 3 Scam. 252, where statute provided that all indorsers should be liable to last assignee.

Evidence.— Bill of parcels delivered by A. and stating goods as bought of A. & B., may be explained by extraneous evidence to show A. & B. not joint owners, p. 318.

Rule applied in Grant v. Frost, 80 Me. 205, 13 Atl. 882, holding a bill of parcels is always open to parol evidence, to show the real terms; Hazard v. Loring, 10 Cush. 268, and Jones v. Rahilly, 16 Minn. 324, holding that a transfer of personal property may be shown orally to have been a pledge; Wallace v. Rogers, 2 N. H. 507, admitting parol evidence to change terms in a bill of parcels; Perrine v. Cooley, 39 N. J. L. 452, admitting parol evidence of representations as to soundness of a horse; Crosby v. Canal Co., 141 N. Y. 592, 36 N. E. 334, admitting parol evidence of a transaction to show whether it was a sale or a bailment.

Payment.— Action cannot be maintained on original contract by a person who has received a note as conditional payment and indorsed it to third persons, p. 318.

Principle applied in Looney v. District of Columbia, 113 U. S. 261, 28 L. 975, 5 S. Ct. 464, to facts similar to those in principal case; Russell v. Hester, 10 Ala. 536, holding failure of creditor to preserve liability of indorser of promissory note, received for debt, renders him liable; Cocke v. Chaney, 14 Ala. 66, by transferring note,

creditor accepts it as payment; Ware v. Russell, 57 Ala. 45, 29 Am. Rep. 711, holding if creditor transfers collateral note first it operates pro tanto as payment of original note; Ringgold v. Newkirk, 3 Ark. 109, holding guarantor cannot be held unless creditor uses reasonable diligence; Costar v. Davies, 8 Ark. 217, 46 Am. Dec. 312, holding note received in discharge of an open account is a bar to an action on that account; Salomon v. Pioneer Co-operative Co., 21 Fla. 382, allegation in plea, that defendant gave draft on third person which was accepted as payment constitutes a good defense; Wylly v. Collins, 9 Ga. 240, holding note of debtor or third person not payment, unless accepted as such; Stevens v. Bradley, 22 Ill. 248, holding where vendor took notes without indorsement, he cannot recover of purchaser; Patapsco Ins. Co. v. Smith, 6 Harr. & J. 170, 14 Am. Dec. 270, holding one accepting note of agent for debt, cannot sue principal; Hoffman v. Johnson, 1 Bland Ch. 107, holding that where note is given, creditor must use due diligence in collecting; Watkins v. Worthington, 2 Bland Ch. 527, holding where a decedent and creditor are jointly liable, creditor must show how decedent was bound. Cited in Wright v. First Crockery Ware Co., 1 N. H. 282, 283, 8 Am. Dec. 69, 70, holding that vendor taking agent's note cannot sue principal; Hill v. Marcy, 49 N. H. 269, holding that a creditor selling a negotiable note is presumed to have taken it as payment; Hutchins v. Olcutt, 4 Vt. 555, 24 Am. Dec. 639, holding promissory note received as payment a bar to action on account; Torrey v. Baxter, 13 Vt. 457, holding note of third person proving unavailable is not payment; Dickinson v. King, 28 Vt. 381, holding note not payment, though negotiated, if indorsee has unsatisfied judgment.

Distinguished in Roach v. Hullings, 16 Pet. 326, 10 L. 981, where there was no evidence to show a note had been given; Stebbins v. Kellopp, 5 Conn. 269, where note was not received as conditional payment and was not passed away; Penny v. Crane, 80 Ill. 247, holding where note is taken as collateral, party is an absolute guarantor; Daniels v. Burnham, 2 La. 247, where bills given were protested; Wade v. Staunton, 5 How. (Miss.) 635, where note was not taken as payment; Steamboat Charlotte v. Kingland, 9 Mo. 67, 68, where note was not transferred.

3 Cr. 319–324, 2 L. 453, DIXON v. RAMSAY.

Executors and administrators.— Foreign executor cannot maintain suit in domestic court upon his foreign letters, pp. 323, 324.

The following citing cases affirm this principle and apply it in numerous ways: Vaughn v. Northup, 15 Pet. 6, 10 L. 641, holding that an administrator in a State is not liable to be sued in District of Columbia; Noonan v. Bradley, 9 Wall. 400, 19 L. 759, holding that an administrator appointed in one State cannot sue in another; Mellus v. Thompson, 1 Cliff. 128, 131, 132, F. C. 9,405, holding ad-

ministrator could not be sued in foreign State; Swatzel v. Arnold, Woolw. 388, F. C. 13,682, holding administrator may maintain suit in foreign State, if, after obtaining letters there, he avers it by amendment; Eells v. Holder, 2 McCrary, 622, 12 Fed. 669, holding administrator cannot sue out of the State where appointed; Kropff v. Poth, 19 Fed. Rep. 200, holding administrator cannot continue suit brought in another State, unless he has taken out letters there; Lusk v. Kimball, 87 Fed. 547, holding suit commenced by foreign administrator without first taking out letters here is a nullity; Leavens v. Butler, 8 Port. 401, holding court could not direct the division of lands situate in other States; Harrison v. Mahorner, 14 Ala. 835. holding administrator may sue in another State, under statute, on recording letters; Equitable Life Assurance Society v. Vogel, 76 Ala. 447, 52 Am. Rep. 345, holding administrator can sue a foreign corporation, in his own State; Greer v. Ferguson, 56 Ark. 330, 19 S. W. 967, holding suit cannot be revived against executor appointed in another State; Hobart v. Turnpike Co., 15 Conn. 147, holding executor cannot sue in another State; Davis v. Smith, 5 Ga. 296, 48 Am. Dec. 295, holding administrator is not liable for failing to appear in action brought in another State; Naylor v. Moody, 2 Blackf. (Ind.) 248, n., that executor cannot bring suit in another State; Lucas v. Tucker, 17 Ind. 44, holding executor, by complying with law where realty is, acquires power over it; Embry v. Millar, 1 A. K. Marsh. 302, 10 Am. Dec. 735, holding personalty cannot be recovered in another State, unless administrator is appointed there; Moore v. Tanner, 5 T. B. Mon. 46, 17 Am. Dec. 39, holding that administrator in State cannot sue in District of Columbia; Sneed v. Ewing, 5 J. J. Marsh. 467, 22 Am. Dec. 48, holding a probate to be a judgment in rem; Louisville & Nashville R. R. Co. v. Brantley, 96 Ky. 304, 49 Am. St. Rep. 295, 28 S. W. 478, holding administrator cannot sue in another State; Haven v. Foster, 9 Pick. 134, 19 Am. Dec. 362, holding administratrix had no power to make tender in another State; Sabin v. Gilman, 1 N. H. 194, holding that an administrator cannot sue in another State; as also Taylor v. Barron, 35 N. H. 495; Leonard v. Putnam, 51 N. H. 250, 12 Am. Rep. 108, holding powers of guardians do not extend to other States; Haight v. Bergh, 15 N. J. L. 185, holding that attachment cannot be issued against executors; Patterson v. Pagan, 18 S. C. 588, holding administrator cannot sue in this State, unless letters are issued here; Caldwell v. Maxwell, 2 Overt. 107, holding, where executrix moved to another State with the effects, courts in latter State could specifically enforce will; Vaughn v. Barret, 5 Vt. 336, 26 Am. Dec. 307, holding administrator has no power to discharge debt due from citizens of another State; Hooper v. Hooper, 29 W. Va. 294, 1 S. E. 298, holding sureties liable for assets brought by executor from another State and wasted; Crumlish v. Railroad Co., 40 W. Va. 650, 22 S. E. 99, in dissenting opinion agreeing with majority in this, that administrator cannot be sued out of his State.

Distinguished in Pedan v. Robb, 8 Ohio, 227, holding that ward could maintain suit against her guardian's representatives.

Executors and administrators.— Power of executor is derived from testator's will which invests him with the whole personal estate, p. 323.

Cited in Wall v. Bissell, 125 U. S. 387, 31 L. 775, 3 S. Ct. 982, holding. under a statute, executor has no right to dispose of property, until after letters; Gayle v. Blackburn, 1 Stew. 433, holding executor has right to property in another State, if he can get it without suit; Johnes v. Jackson, 67 Conn. 89, 34 Atl. 711, deciding that service of attachment, before will probated, holds property.

Executors and administrators.— Executor does not derive power to maintain suit from the will appointing him, but from his letters, pp. 323, 324.

Conflict of laws.— Right to personalty is governed by law of testator's domicile, p. 324.

Rule applied in Union Bank of Georgetown v. Smith, 4 Cr. C. C. 36, F. C. 14,362, holding lex domicilii governs order of payment of debts; as also in Harvey v. Richards, 1 Mason, 408, F. C. 6,184, as to distribution of estate of intestate; Irving v. McLean, 4 Blackf. 53, and Barnes v. Brashear, 2 B. Mon. 382, as to testamentary disposition; as also in Penny v. Christmas, 7 Rob. La. 497. Cited in Binney's Case, 2 Bland Ch. 146, holding, though a canal is declared personalty, it must be governed by lex situs; Rue v. High, 2 Doug. (Mich.) 522, holding will made according to lex domicilii, passes personalty wherever situated; Garland v. Rowan, 2 S. & M. 635, holding lex domicilii governs distribution of personalty; Fishburne v. Kunhardt, 2 Spears L. 562, holding registry of mortgage of personalty governed by lex domicilii. Cited arguendo in Latine v. Clements, 3 Ga. 432.

Distinguished in Varnum v. Camp, 13 N. J. L. 336, 25 Am. Dec. 485, holding that instrument legal at maker's domicile will not pass personalty elsewhere, if prohibited by local law; dissenting opinion, Bonati v. Welsch, 24 N. Y. 164, majority holding that rights of wife under laws of France will attach to property of husband dying domiciled here; Hyman v. Gaskins, 5 Ired. (N. C.) 269, holding that it is not absolutely necessary that will should first be submitted to forum of domicile.

Conflict of laws.— Suit for property of testator is governed by lex fori, p. 324.

Cited and principle applied in Willard v. Wood, 135 U. S. 313, 34 L. 213, 10 S. Ct. 832, where mortgagee sued on mortgage debt; Hinkley v. Marean, 3 Mason, 90, F. C. 6,523, as to insolvency

laws; Thomas v. American Freehold, etc., 47 Fed. 554, holding proceedings on note regulated by lex fori; Munos v. Southern Pac. Co., 51 Fed. 190, 2 U. S. App. 222, holding that lex fori governs as to statute of limitations; Jordan v. Thornton, 7 Ark. 231, 44 Am. Dec. 548, holding assignor may bring suit against previous indorser, lex fori governing; Embry v. Millar, 1 A. K. Marsh. 302, 10 Am. Dec. 735, holding action to recover personalty governed by lex fori; De Sobry v. De Laistre, 2 Harr. & J. 228, 3 Am. Dec. 544, holding remedy on contract should be governed by lex fori; Whittemore v. Adams, 2 Cow. 632, holding an insolvent law, not exempting future acquisitions, being a remedy, lex fori governs; Edmondson v. Ferguson, 11 Mo. 345, holding remedy and contract are distinct, act affecting remedy is constitutional.

Miscellaneous citations.— Cited, but not in point in Holland v. Jones, 9 Ind. 496, and Winfried v. Yates, Dall. (Tex.) 364.

3 Cr. 324-331, 2 L. 455, SCOTT v. NEGRO LOUDON.

Slaves.— Under statute providing, if owner of slave removing into Virginia takes required oath, slave shall not be free, removal of master and importation of slave need not be contemporaneous, p. 330.

Distinguished, Murray v. McCarty, 2 Munf. (Va.) 401, 406, holding statute does not authorize importation by a citizen residing away temporarily.

3 Cr. 331-337, 2 L. 457, WISE v. WITHERS.

Jurisdiction of courts-martial.— A decision of a court-martial without its jurisdiction cannot protect the officer who executed it, p. 337.

An examination of the citations shows a variety of applications of the principle underlying the rule above laid down. The doctrine is applied in the following citing cases: Luther v. Borden, 7 How. 61, 12 L. 607, holding person liable for excessive force in enforcing martial law; Dynes v. Hoover, 20 How. 80, 82, 15 L. 844, where authorities are examined, court holding it was not false imprisonment, where court-martial had jurisdiction; dessenting opinion, Dow v. Johnson, 100 U. S. 189, 25 L. 643, majority holding army officer not liable for seizing goods in enemy's country; Smith v. Whitney, 116 U. S. 177, 29 L. 604, 6 S. Ct. 575, holding writ of prohibition does not lie to court-martial having jurisdiction; Runkle v. United States, 122 U. S. 556, 30 L. 1170, 7 S. Ct. 1146, where jurisdiction depended on approval of president, sentence without it was inoperative; Tolmie v. Thompson, 3 Cr. C. C. 137, F. C. 14,080, holding sale by commissioners without jurisdiction is void; Greene v. Briggs, 1 Curt. 333, F. C. 5,764, holding order of justice of peace, upon matter without

his jurisdiction, is void; United States v. Stowell, 2 Curt. 156, F. C. 16,409, holding every fact necessary to existence of authority must appear on face of indictment or process; Smith v. Miles, Hemp. 34, F. C. 13,079a, if court has jurisdiction, officer is not liable as trespasser on execution; The J. W. French, 5 Hughes, 433, 13 Fed. Rep. 919, 920, holding that a court may examine collaterally into jurisdiction of another court to pass upon title of property, and an act coram non judice may be disregarded; Thurston v. Martin, 5 Mason, 503, F. C. 14,018, tax collector, in excess of jurisdiction, imprisoning one, is liable for trespass; Barrett v. Hopkins, 2 McCrary, 131, 7 Fed. Rep. 313, holding jurisdiction of court-martial may be inquired into; Clarke & Co. v. Clarke, 3 Woods, 412, F. C. 2,846, holding collectors collecting on property exempt are trespassers; Justices, etc., of Morgan Co. v. Selman, 6 Ga. 442, holding where court of ordinary, without jurisdiction, granted letters, act is void; Hall v. Rogers, 2 Blackf. 430, holding one arresting under warrant from justice of peace exceeding jurisdiction, is liable; Nooe v. Bradley, 3 Blackf. 160, holding county board exceeding its authority liable; Barkeloo v. Randall, 4 Blackf. 478, 32 Am. Dec. 47, holding one acting under attachment issued without a bond is a trespasser; Steel v. Williams, 18 Ind. 164, holding one procuring arrest by void process, liable for trespass; dissenting opinion, Ex parte Holman, 28 Iowa, 178, majority holding State court has no right to interfere with jurisdiction of Federal courts; White v. McBride, 4 Bibb (Ky.), 62, holding court-martial being without jurisdiction could not punish the parties; Campbell v. Webb, 11 Md. 481, holding officer, acting under process, void on its face, is liable; Brooks v. Adams, 11 Pick. 442, holding proceedings of court-martial without legally appointed judge-advocate are void; Brooks v. Daniels, 22 Pick. 501, holding same as to judges irregularly chosen; Fisher v. McGirr, 1 Gray, 45, 61 Am. Dec. 404, discharging prisoner committed by magistrate whose want of jurisdiction appeared on the face of the proceedings; Tyler v. Pomeroy, 8 Allen, 485, holding one seized and taken into camp without authority has a cause of action; Clark v. Holmes, 1 Doug. (Mich.) 394, holding actions of inferior courts in excess of jurisdiction are void; dissenting opinion, Wall v. Trumbull, 16 Mich. 252, majority holding board of supervisors not liable for errors in judgment, provided they had jurisdiction; Morrill v. Taylor, 6 Neb. 246, holding board has no jurisdiction without taking required oath; Webber v. Aldrich, 2 N. H. 462, holding action for goods illegally taken in trespass not assumpsit; Cloutman v. Pike, 7 N. H. 211, holding collector, defendant for distress, must show a tax legally granted; Smith v. Shaw, 12 Johns. 267, 272, holding commanding officer of court-martial also liable; Mills v. Martin, 19 Johns. 31, 35, both opinions, holding one justifying under judgment of court-martial must affirmatively show jurisdiction; Bell v. Tooley, 11 Ired. 607, holding acts of court-martial

not regularly organized, void; School Directors v. Carlisle Bank, 8 Watts, 294, holding act of board in levying tax void; Porter v. Webb, 4 Yerg. 162, holding, in action against sheriff for nonreturn, all necessary facts must appear, to give court jurisdiction; Bates v. Hazeltine, 1 Vt. 84, holding one justifying as tax collector must show authorizing facts; Warner v. Stockwell, 9 Vt. 17, holding imposition of fines, by military officers, acting within their jurisdiction, are conclusive; Barrett v. Crane, 16 Vt. 251, 254, 257, holding proceedings of court of limited jurisdiction exceeding its jurisdiction are void; Driscoll v. Place, 44 Vt. 258, holding process gives no protection, court being without jurisdiction; Ex parte Henderson, 11 Fed. Cas. 1068, discharging prisoner on habeas corpus where court-martial was without jurisdiction; In re Reynolds, 20 F. C. 605, holding State court may, under habeas corpus, discharge a prisoner illegally held. Cited generally in Lampert v. Gas Light Co., 14 Mo. App. 387. And see note in 42 Am. Dec. 55, on subject of liability of military officers.

Distinguished in Ex parte Watkins, 3 Pet. 209, 7 L. 655, involving a court of general jurisdiction; Noble v. Railroad, 147 U. S. 173, 37 L. 126, 13 S. Ct. 273, holding that quasi-jurisdictional facts, once established, cannot be collaterally attacked; Pullan v. Kinsinger, 2 Abb. (U. S.) 101, 104, F. C. 11,463, where statute provides that no suit to restrain the collection of taxes may be maintained, applies where an officer has the power, however erroneous his decision may be; Borden v. State, 11 Ark. 549, 54 Am. Dec. 239, holding judgment of Superior Court not void, though party had no notice; McCraw v. Welch, 2 Colo. 290, holding where attachment is issued upon a defective bond, and subsequently a good bond is filed, attachment becomes valid from the beginning; Milburn v. Gilman, 11 Mo. 69, holding person acting under erroneous judgment not liable if court had jurisdiction; Savacool v. Boughton, 5 Wend. 179, 180, 21 Am. Dec. 188, 189, holding ministerial officer is protected, if process on its face shows jurisdiction of subject-matter; as also in Parker v. Walrod, 16 Wend. 518, 519, 30 Am. Dec. 128; Chegary v. Jenkins, 5 N. Y. 382, holding warrant in due form, to collect taxes, is a protection, whether tax was legally issued or not; Commonwealth v. Cornman, 4 S. & R. 100, holding court-martial has jurisdiction over one on list of exempts, who did not appear to claim his privilege; Miller v. Grice, 1 Rich. L. 153, holding one acting under warrant, lack of jurisdiction not appearing on its face, is not liable (cited dissenting opinion of same case, p. 156); Delaware R. R. Co. v. Prettyman, 7 F. C. 410, holding collector acting under assessor who acts within his jurisdiction is not a trespasser.

Militia.— Justice of peace of District of Columbia is an officer of the government of the United States and exempt from militia duty, p. 336.

3 Cr. 337–356, 2 L. 459, UNITED STATES v. GRUNDY.

Admiralty.— The statute providing that a false oath made in registering a vessel is ground for forfeiture of vessel or its value, does not vest title to the vessel in the United States upon the making of the oath, but only after condemnation, and the government may elect either remedy. Suit for money had and received can, therefore, be maintained by the United States against the assignee in bankruptcy of the owner swearing falsely, the vessel having been sold by the assignee, pp. 350–356.

The following citing cases have found this holding a helpful precedent and applied the principle upon which it rests: Caldwell v. United States, 8 How. 382, 12 L. 1122, holding title is consummated after condemnation, but intermediate sales are avoided; The Distilled Spirits, 11 Wall. 368, 20 L. 171, declaring that forfeiture to United States defeats innocent purchaser; Henderson's Distilled Spirits, 14 Wall. 56, 58, 20 L. 817, holding, where forfeiture is absolute, decree of condemnation relates back to time of commission; Burbank v. Conrad, 96 U. S. 300, 24 L. 726, holding title vested from judgment in confiscation proceedings; United States v. Fifty-six Barrels of Whisky, 1 Abb. (U. S.) 105, F. C. 15,095, holding where forfeiture is in direct terms, it occurs from time of offense; United States v. One Hundred Barrels of Spirits, 2 Abb. (U. S.) 314, F. C. 15,948, holding, unless words of statute are absolute, forfeiture will not defeat bona fide purchaser; United States v. York Street Flax, etc., 17 Blatchf. 139, F. C. 16,781, holding, in action for value of goods forfeited, recovery not limited to price received by defendant; The Florenzo, Blatchf. & H. 60, 61, F. C. 4,886, holding judgment of forfeiture relates back to time of sale to alien; United States v. One Hundred Barrels Spirits, 1 Dill. 57, F. C. 15,948, holding, unless statute is absolute, title of bona fide purchasers not defeated; The Brig Mars, 1 Gall. 195, F. C. 9,106, holding that innocent purchaser is protected from United States in all cases; The Mary Celeste, 2 Low. 357, F. C. 9,202, holding if forfeiture is not absolute innocent purchaser is protected; The Steamboat Laurel, Newb. 273, F. C. 15,569, holding, where no forfeiture was declared by statute, government took subject to lien of materialmen; The Kate Heron, 6 Sawy. 110, F. C. 7,619, holding time forfeiture takes effect depends on intention of congress; Six Hundred Tons of Iron Ore, 9 Fed. 600, holding freight earned before government elects has first right; Trustees of University v. Winston, 5 Stew. & P. 27, holding forfeiture being absolute, it takes place at once; Gills v. Taylor, 3 Port. 185, holding failure to pay final payment extinguished his interest in land; Selma, etc., R. R. Co. v. Tipton, 5 Ala. 802, 39 Am. Dec. 350, holding right of corporation to forfeiture is cumulative to right to sue for subscriptions; The Oakland R. R. Co. v. The Oakland, etc., Co., 45 Cal. 374, 13 Am. Rep. 185, holding under statute title vests in State at once; Arcata v. Arcata, etc., R. R. Co.. 92 Cal.

647, 28 Pac. 678, holding, in absence of statute, right terminates on judgment of forfeiture; The State v. Emmert, 19 Kan. 549, holding failure to pay, by purchaser of school land, ipso facto forfeits; Summers v. Clark, 29 La. Ann. 102, holding where statute is absolute, goods vest immediately in government; Mitchell v. Cunningham, 29 Me. 382, holding that government title to vessel fishing without license vests upon condemnation; Ingersoll v. Jackson, 13 Mass. 185, holding where statute was alternative, no forfeiture until seizure; Hamilton v. O'Neil, 9 Mo. 18, holding widow's right to dower is absolute until divested by election; Welch v. Anderson, 28 Mo. 299, holding widow has no right until election is made; as also in Matney v. Graham, 50 Mo. 564, and Brawford v. Wolfe, 103 Mo. 399, 15 S. W. 428. Cited in Scott v. Wilson, 3 N. H. 323, holding entire title of owner divested by forfeiture; Fontaine v. Phœnix Ins. Co., 11 Johns. 300, holding where statute is absolute, forfeiture occurs at once; Tracey v. Corse, 58 N. Y. 149, holding title to property seized for revenue is divested only on judgment; Hollman v. Peebles, 1 Tex. 703, holding abandonment of public land ipso facto restores it to government; U. S. v. Haun, 26 F. C. 230, holding property smuggled into United States under Federal court's jurisdiction; U. S. v. Hamilton, 26 F. C. 91, holding forfeiture of vessel does not vest until after election; Schenck v. Peay, 21 F. C. 683, holding, unless intention is apparent, courts will not construe a forfeiture to be ipso facto. Cited generally in The Neptune, 3 Wheat. 607, 4 L. 471; Pitcher v. Patrick, Minor, 322. See also extended note in 5 Am. St. Rep. 806.

Distinguished in United States v. Coffee, 8 Cr. 408, 3 L. 606, holding that where statute is absolute forfeiture occurs on commission of offense; United States v. Maillard, 4 Ben. 467, F. C. 15,709, where the commission of the offense was a question of fact; United States v. Bark Reindeer, 2 Cliff. 68, F. C. 16.144, and United States v. Distilled Spirits, 3 Cliff. 315, 317, F. C. 16,306, holding where words in statute are absolute, title vests from time of wrong; Parker v. United States, 2 Wash. C. C. 363, F. C. 10,751, holding under statute providing if vessel "shall" be seized, government may sue, forfeiture takes place from time of wrong; Hornbrook v. Elm Grove, 40 W. Va. 548, 21 S. E. 852, holding State alone can enforce forfeiture of charter of a municipality.

Evidence.—Witness is not bound to answer if pecuniary interest will be affected, pp. 343, 344.

Denied in Brooks v. McKinney, 4 Scam. 315, holding party though not to record compelled to testify against his own interest; Bull v. Loveland, 10 Pick. 12, holding witness bound to answer, though his interest is affected.

Miscellaneous citations.—Cited in United States v. Willetts, 5 Ben. 223, F. C. 16,699, but not in point.

3 Cr. 357–398, 2 L. 466, MARINE INS. CO. v. TUCKER.

Marine insurance.— Intended deviation is not sufficient to defeat insurance, p. 384.

Cited in dissenting opinion, Thames, etc., Ins. Co. v. O'Connell, 86 Fed. Rep. 154, 56 U. S. App. 682, majority holding intent to use a forbidden port exonerated company; Lawrence v. Ocean Ins. Co., 11 Johns. 261, 263, 265, holding an intended deviation will not discharge the policy. As also in Snow v. Ins. Co., 48 N. Y. 630, holding similarly.

Distinguished in Merrill v. Ins. Co., 3 Allen, 249, 252, holding policy defeated by substitution of new port of discharge, though at time of loss vessel is on regular course.

Marine insurance.— Where vessel is captured, recaptured and sold, insured may abandon for a total loss, p. 391.

Cited in Peele v. Merchants' Ins. Co., 3 Mason, 55, F. C. 10,905, holding owner had right to abandon vessel in desperate situation, though injury was less than half the value; Thompson v. Marine Ins. Co., 2 La. 240, 22 Am. Dec. 136, holding if prospect of getting possession of vessel be feeble, may abandon; Greene v. Ins. Co., 9 Allen, 226, holding inability to procure means to refit vessel, amounts to constructive total loss; Post v. Ins. Co., 10 Johns. 84, holding owners entitled to recover for total loss, where ship, when recovered, could not prosecute her voyage.

Miscellaneous citations.— Cited in Kimbal v. Jenkins, 11 Fla. 125, 89 Am. Dec. 241; May v. Wright, 1 Overt. 389, and Dunn v. Waggoner, 3 Yerg. 59, to points not decided in the principal case.

3 Cr. 399–414, 2 L. 479, UNITED STATES v. HETH.

Statutes.— Retroactive construction is to be avoided when possible. Act changing compensation of revenue officers construed and held not to retrospect so as to decrease amount of commissions on previously executed bonds, pp. 408–414.

The following citing cases affirm and apply this principle: Solm v. Waterson, 17 Wall. 599, 21 L. 738, construing statute of limitation; Twenty Per Cent. Cases, 20 Wall. 187, 22 L. 341, as to act reducing salaries; Chew Heong v. United States, 112 U. S. 559, 28 L. 778, 5 S. Ct. 266, construing Chinese restriction act; United States v. Burr, 159 U. S. 82, 40 L. 83, 15 S. Ct. 1004, construing tariff act not to apply to transactions completed before its enactment; The Circassian, 11 Blatchf. 481, F. C. 2,726, holding rule of admiralty cannot revive claim almost barred; Fuller v. United States, 48 Fed. 655, holding amendment decreasing interval between sums paid soldiers, not retrospective; United States v. National Exch. Bank, 53 Fed. 10, 9 U. S. App. 145, holding court has no jurisdiction to review judgment rendered before court was created; Central Trust

Co. v. Sheffield, etc., Co., 60 Fed. 16, holding act regulating sale of property not applicable to judgments rendered prior to act: McClellan v. Pyeatt, 66 Fed. 846, 32 U. S. App. 104, holding statute of frauds to have no retrospective effect; Anglo-California Bank v. Secretary of Treasury, 76 Fed. 755, 48 U. S. App. 51, holding goods in bonded warehouse are not included in reduction of tariff act passed subsequently; Lawrence v. Louisville, 96 Ky. 599, 49 Am. St. Rep. 311, 29 S. W. 451, applying rule in statute of limitation; appeal of Lambard, 88 Me. 591, 34 Atl. 531, holding property of one dying before, but whose will was probated after act, not subject to tax; Gillette v. Hibbard, 3 Mont. 417, giving statute of limitation no retrospective effect; Fitzgerald v. Fitzgerald, etc., Co., 41 Neb. 462, 59 N. W. 862, holding interstate commerce act abrogated existing special rates based upon contract; dissenting opinion, Rich v. Flanders, 39 N. H. 367, majority holding statute removing disqualification of interest in witness, to apply to existing cases; Berdan v. Van Riper, 16 N. J. L. 15, giving act relating to joint tenants prospective operation only; McGovern v. Connell, 43 N. J. L. 109, holding act providing for execution applies only to judgments obtained after its passage; Williamson v. N. J. S. R. R. Co., 29 N. J. Eq. 334, refusing to give statute retroactive effect, especially where a different construction would render statute unconstitutional; Boylan v. Kelly, 36 N. J. Eq. 334, giving chattel mortgage act prospective operation only; Potter v. Rio Arriba, etc., Co., 4 N. Mex. 326, 327, 17 Pac. 613, 614, holding statute for forfeiture of lands of aliens no defense to specific performance of contract made before statute; American Inv. Co. v. Thayer, 7 S. Dak. 74, 63 N. W. 234, holding unless intent is clear, statute will not be given retroactive effect; Ex parte Graham, 12 Rich. Eq. 283, as to repealing act, exempting from military service; Stewart v. Vandervort, 34 W. Va. 530, 12 S. E. 739, refusing to give retroactive effect to marriage laws; The Circassian, 5 Fed. Cas. 692, holding same as to amendment of rule in admiralty; Nor. M. L. Ins. Co. v. Seaman, 80 Fed. Rep. 359, holding statute that no federal judge shall "hereafter" appoint a relative a court officer, does not invalidate appointment previously made. Affirmed in 11 Blatchf. 481, F. C. 2,726; In re Montgomery, 12 N. B. R. 321, 17 F. C. 625, construing amendment to bankruptcy act.

Distinguished in Cook v. United States, 138 U. S. 181, 34 L. 912, 11 S. Ct. 274, where intent of congress that act should operate retroactively was clear and positive; as also in In re Perkins, 6 Biss. 187, F. C. 10,983, as to repealing law; Southern Wire Co. v. R. R. Co., 38 Mo. App. 198, giving interstate commerce act retrospective effect.

Statutes.— Dubious words are to be taken most strongly against lawmakers, p. 409.

Cited United States v. Huggett, 40 Fed. 643, refusing to enlarge criminal statute.

Miscellaneous citations.— Cited in Swaim v. Buck, 40 Miss. 302, holding contract of employment of government official not within the obligation clause of the Constitution.

3 Cr. 415–448, 2 L. 484, MANELLA v. BARRY.

Principal and agent.— Agent must follow instructions. A factor following a specific instruction from a general agent at variance with general instructions from the principal, held not to have deviated from his instructions, pp. 439, 440.

Cited in The Joseph Grant, 1 Biss. 197, F. C. 7,538, holding owner not bound by bill of lading signed in blank by master; Ferguson v. Porter, 3 Fla. 38, holding factor bound to follow instructions, unless inconsistent with special agreement with principal; Hays v. Stone, 7 Hill, 135, holding agent must follow instructions.

3 Cr. 448–453, 2 L. 495, EX PARTE BURFORD.

Habeas corpus.— Supreme Court has power to issue writ of habeas corpus to examine cause of commitment by Circuit Court, p. 449.

Cited in Ex parte Watkins, 7 Pet. 573, 581, 8 L. 788, 791, holding court has power to issue writ, where it was revising effect of process of Circuit Court; Decatur v. Paulding, 14 Pet. 620, 10 L. 622, holding the issue of writ to be an exercise of appellate jurisdiction; Ex parte McCardle, 6 Wall. 324, 18 L. 817, holding, under statute, appeal lies to this court from judgments on writs in Circuit Court; Ex parte Yerger, 8 Wall. 98, 19 L. 336, holding court may issue writ in the exercise of its appellate jurisdiction; Ex parte Lange, 18 Wall. 166, 21 L. 875, holding court will issue writ to examine authority of court in committing defendant; dissenting opinion in same case, p. 205, 21 L. 888; Ex parte Virginia, 100 U. S. 343, 25 L. 678; Ex parte Siebold, 100 U. S. 374, 25 L. 718, issuing writ to inquire into imprisonment under unconstitutional act; In re Barry, 136 U. S. 613, 34 L. 509, 42 Fed. Rep. 124, holding writ will not issue to release child unlawfully detained by grandparents; In re Martin, 5 Blatchf. 306, F. C. 9,151, holding, under statute, Supreme Court may issue certiorari, as ancillary to habeas corpus; Ex parte Perkins, 29 Fed. Cas. 908, releasing on writ, person imprisoned for contempt by court without jurisdiction; King v. Asylum, 64 Fed. 343, 21 U. S. App. 481, holding Circuit Court had no jurisdiction to determine the custody of an insane person, by habeas corpus; State v. Neel, 48 Ark. 288, 3 S. W. 633, holding Supreme Court has jurisdiction to review proceedings of courts and judges upon application for habeas corpus; State v. Gleason, 12 Fla. 203, holding, under statute, Supreme Court could issue writs; The People v. Turner, 1 Cal. 147, 52 Am. Dec. 298, holding Supreme Court could exercise its

appellate jurisdiction by mandamus, habeas corpus, etc.; In re Snell, 31 Minn. 111, 16 N. W. 692, holding Supreme Court has original jurisdiction of habeas corpus; Peltier v. Pennington, 14 N. J. L. 318, refusing to release prisoner on civil process, for irregularity in process; In re Kaine, 14 Fed. Cas. 83, refusing to grant writ, unless all the proceedings are laid before the judge; In re Kaine, 14 Fed. Cas. 88, holding Federal court can examine into legality of an imprisonment.

Distinguished in Ex parte Watkins, 3 Pet. 208, 7 L. 655, holding this court cannot by habeas corpus revise conviction of prisoner by Circuit Court; In re Kaine, 14 How. 124, 125, 126, 130, 134, 14 L. 353, 354, 356, 358, holding Supreme Court could not issue writ, Circuit Court having dismissed one; In re Metzger, 5 How. 189, 12 L. 110, holding court cannot issue writ, where judge in chambers surrendered prisoner, this not being appellate jurisdiction. Denied in dissenting opinion, Ex parte Bollman, 4 Cr. 103, 107, 2 L. 564, 565, majority holding Supreme Court may issue writ to examine commitment by Circuit Court.

Warrant of commitment by justice of peace must be under oath and state a good cause, p. 453.

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3 Cr. 454–458, 2 L. 497, HOPKIRK v. BELL.

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Cited in dissenting opinion, McNutt v. Bland, 2 How. 22, 11 L. 164, majority holding if real plaintiff had right to sue, incapacity of nominal plaintiff will not oust court of jurisdiction; Speigle v. Meredith, 4 Biss. 126, F. C. 13,227, dismissing bill because it did not allege jurisdictional facts. As also in Donaldson v. Hazen, Hemp. 424, F. C. 3,984.

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Miscellaneous citations.— Cited in Merril v. Jones, 8 Port. 557, but not in point, and Montalet v. Murray, 4 Cr. 47, 2 L. 546.

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4. If a vessel be insured at and from K. to A., and take a cargo for B. and A., and sail with intent to go first to B. and then to A., and is captured before she arrives at the dividing point between A. and B., this is a case of intended deviation only, and not of non-inception of the voyage insured.
Marine Ins. Co. v. Tucker, 357
5. It depends upon the particular circumstances of the case, whether, if the vessel be captured and recaptured, the loss shall be deemed total or partial. *Id.* *Ib.*
6. A promise by a factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. Ware, 503

JUDGMENT.

See Collector, 2. Caveat, 1.

JUDGE.

See Court, 2.

JURISDICTION.

1. The want of proper parties is not a good plea to a bill in chancery which suggests that such parties are out of the jurisdiction of the court.
Milligan v. Milledge, 220

2. If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction.
Strawbridge v. Curtiss, 267
3. This court has not jurisdiction upon a writ of error to a state court, if the decision of the state court be in favor of the privilege claimed under an act of Congress.
Gordon v. Caldcleugh, 268
4. All the rights to a testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.
Dixon v. Ramsay, 319
5. If the court has not jurisdiction, the officer executing its process is a trespasser.
Wise v. Withers, 331

JURY.

See Damages, 1.

JUSTICES OF PEACE.

1. *Quære,* whether the act of Congress abolishing the fees of the justices of peace of the District of Columbia, can affect those justices who were in commission when the act was passed?
United States v. More, 159
2. A justice of peace of the District of Columbia is an officer of the government of the United States, and exempt from militia duty.
Wise v. Withers, 331
3. See Habeas Corpus, 1. Warrant, 1.

KENTUCKY.

See Caveat, 1.

LANDS.

1. Under the act of Pennsylvania of 3d April, 1792, for the sale of the vacant lands, &c., the grantee, by a warrant, of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who by force of arms of the enemies of the United States was prevented from settling and improving the said land for the space of two years from the date of his warrant, but during that time persisted in his endeavors to make such settlement and improvement, is excused from making such settlement as is described in the 9th section of the act, and the warrant vests in such grantee a fee-simple.
Huidekoper v. Douglass, 1
2. *Quære,* whether a British subject, born in England in 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia by descent or devise?
Lambert v. Paine, 97
3. See Lien, 1.

LEGACY.

If a testator declares that a certain legacy shall abate, of the personal and real estate of which he shall die seized and possessed shall not be sufficient to pay all his debts and legacies, and if the estate be more than sufficient at the time of the testator's death, but afterwards become insufficient by means of the bankruptcy of the executor, such legacy shall abate for the benefit of the other legacies. *Bilsby v. Young,* 249

LETTER OF CREDIT.

See Assumpsit, 2.

LETTERS TESTAMENTARY.

See Executors, 1 & 3.

LEX LOCI.

See Jurisdiction, 4.

LIEN.

The United States have no lien on the real estate of their debtor until suit brought, or a notorious insolvency, or bankruptcy; or being unable to pay all his debts, he has made a voluntary assignment of all his property, or having absconded, &c., his property has been attached by process of law.
United States v. Hooe, 73

LIMITATIONS.

1. The act of limitations of Virginia begins to run against a creditor residing out of the state, if he comes into the state for temporary purposes, provided the debtor be in the state at that time.
Faw v. Roberdeau, 174
2. The treaty of peace prevents the operation of the act of limitations of Virginia upon British debts contracted before the treaty.
Hopkirk v. Bell, 454
3. An agent for collecting debts merely, is not a factor within the 13th section of the act of limitations of Virginia. *Id.* *Ib.*

MILITIA.

See Justices of Peace, 2. Court Martial, 1, 2.

MISTAKE.

1. He who sells property on a description given by himself, by mistake, is bound, in equity, to make good that description.
M'Ferran v. Taylor, 270
2. *Quære,* if the mistake be of a matter deemed perfectly immaterial by both parties at the time of the contract, and which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?
M'Ferran v. Taylor, 270

MORTGAGE.

1. A mortgage of part of the property, of a collector of the revenue to his surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgageor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew, at the time of taking the mortgage, that the mortgageor was largely indebted to the United States.
United States v. Hooe, 73
2. A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged, or proved, and recorded.
Hodgson v. Butts, 140
3. *Quære,* whether the mortgagee of a ship is entitled to the freight? *Id.* *Ib.*
4. A decree for the sale of mortgaged property, on a bill to foreclose is a final decree, and may be appealed from. *Ray v. Law,* 179

NAVY.

The commander of a United States ship of war, if he seizes a vessel on the high seas, without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss. *Maley v. Shattuck,* 458

NON-INTERCOURSE.

1. A vessel belonging to citizens of the United States in the year 1799, driven by distress into a French port and obliged to land her cargo in order to make repairs, and prevented by the officers of the French government from reloading her original cargo, and from taking away, in exchange, anything but produce or bills, might lawfully purchase and take away such produce, and such voyage was not illegal, so as to avoid the insurance.
Hallett v. Jenks, 210
2. The act of June 13th, 1798, did not impose any disability upon vessels of the United States

bona fide sold to foreigners residing out of the United States during the existence of that act.
Sands v. Knox, 499

NOTICE.

1. Notice of the time and place of taking a deposition given to the attorney at law, is not sufficient under the law of Virginia.
Buddicum v. Kirk, 293
2. An attorney at law may agree to receive, or to waive notice, and shall not afterwards be permitted to allege want of it. *Id.* *Ib.*
3. If notice be given that a deposition will be taken on a certain day, and if not finished on that day, that the commissioners will adjourn from day to day until it be finished, and the commissioners adjourn over several intermediate days, such deposition is not taken agreeably to notice. *Id.* *Ib.*

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See Justice of Peace, 2. Navy, 1. Court Martial, 2. Trespass, 1.

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PAYMENT.

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PENNSYLVANIA.

See Lands, 1.

PERSONAL GOODS.

All rights to the testator's personal property are to be regulated by the laws of the country where the testator lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed. *Dixon v. Ramsay,* 319

PETERSBURGH.

By the act of Congress of 10th of May, 1800, the collector of the district of Petersburgh was not restricted to a commission of 2½ per cent. on the moneys by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States. *United States v. Heth,* 399

PLEADING.

1. See Evidence, 1.
2. In a declaration, the averment that the assignment of a promissory note was for value received, is an immaterial averment, and need not be proved.
Wilson v. Codman, 193
3. If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration which avers the note to have been given for value received.
Id. *Ib.*
4. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.
Milligan v. Milledge, 220
5. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Id.* *Ib.*
6. A variance in date between the bond declared upon, and that produced on oyer, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.
Cooke v. Graham. 229
7. A finding by a jury which contradicts a fact admitted by the pleadings, is to be disregarded.
M'Ferran v. Taylor, 270
8. Upon the plea of payment to debt on bond, the defendant may give in evidence wheat delivered, on account of the bond, at a certain price; and also an assignment of debts to the plaintiff; part of which he collected, and part was lost by his negligence or indulgence. *Buddicum v. Kirk,* 293
Cranch 3.
9. An assignment of debts cannot be pleaded as an accord and satisfaction to debt on bond.
Id. *Ib.*
10. *Quære,* whether a deputy marshal can plead in abatement that the *capias* was not served on him by a disinterested person?
Knox v. Summers, 496

PRACTICE.

1. See Appeal, 1, 2, 3. Costs, 1, 2, 3, 4, 5.
2. If statements of the case are not furnished according to the rule of the court on that subject, the cause will be dismissed or continued.
Peyton v. Brooke, 93
3. A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.
Field v. Milton, 514
4. If usury be specially pleaded, and the court reject the evidence offered upon such a special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea. *Levy v. Gadsby,* 180
5. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved. *Wilson v. Codman,* 193
6. Upon the death of the plaintiff and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute. *Id.* *Ib.*
7. See Pleading, 4, 5.
8. The want of proper parties is not a proper ground for dismissing the bill. *Id.* *Ib.*
9. If the executor has no assets, you may proceed in equity against the devisees and legatees.
Id. *Ib.*
10. See Pleading, 6. Variance, 1.
11. See General Rule:
12. To support a judgment on a collector's bond at the return term, it must appear by the record that the writ was executed 14 days before the return day. *Dobynes v. United States,* 241
13. If the plaintiff in error does not appear, the defendant may either have the plaintiff called and dismiss the writ of error with costs, or he may open the record and go for an affirmance.
Montalet v. Murray, 249
14. See Jurisdiction, 2, 3.
15. A general dismissal of the plaintiff's caveat, in Kentucky, does not purport to be a judgment upon the merits. *Wilson v. Speed,* 283
16. See Notice, 1, 2, 3.
17. The court upon a trial by jury is bound to give an opinion, if required, upon any point relavant to the issue. *Douglass v. M'Allister,* 298
18. An appearance of the defendant, by attorney, cures all irregularity of process.
Knox v. Summers, 496

PROMISSORY NOTE.

1. An indorser may avail himself of usury between the maker and the indorsee.
Levy v. Gadsby, 180
2. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved. *Wilson v. Codman,* 193
3. If the defendant plead the bankruptcy of the indorser in bar, a replication that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration which avers the note to have been given for value received.
Wilson v. Codman, 193
4. If a promissory note be received as conditional payment for goods sold and delivered, and be passed away, the vendor of the goods cannot maintain an action for the goods sold and delivered.
Harris v. Johnston, 311
5. An indorsee of a promissory note payable to order, cannot in Virginia, maintain an action at law, against a remote indorser; but he may in equity. *Id.* *Ib.*
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REGISTER.

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See Forfeiture, 1. Navy, 1.

SHIP.

See Forfeiture, 1. Navy, 1.

SLAVE.

If the owner of a slave, removing into Virginia, shall take the oath required by the act of the Assembly, within 60 days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought into Virginia by a person claiming and exercising the right of ownership over him, eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than one year; and although the true owner never brought him in. *Scott v. Negro London,* 324

STATUTE.

The words of a statute, if dubious, ought to be taken most strongly against the law makers. *United States v. Heth,* 413

TRESPASS.

Trespass lies against the officer who executes the process of a court not having jurisdiction. *Wise v. Withers,* 331

TRUST.

If the payee of a note hold it in trust, his bankruptcy will not take away his power to indorse it over to *cestui que trust.* *Wilson v. Codman,* 193

USURY.

If A. lend money to B., who puts it out at usurious interest, and agrees to pay A, the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B., and an indorser of B.'s note to A. may avail himself of the plea of usury. *Levy v. Gadsby,* 180

VARIANCE.

A variance between the date of the bond as stated in the declaration, and as it appears on oyer, is a matter of substance, and fatal on the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke v. Graham,* 229

VERDICT.

A finding by the jury which contradicts a fact admitted by the pleadings is to be disregarded. *M'Ferran v. Taylor,* 270

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WARRANT.

A warrant of commission by justices of the peace must state a good cause certain, supported by oath. *Ex parte Burford,* 448

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No appeal or writ of error lies in a criminal case from a judgment of the circuit courts of the United States. *United States v. More,* 159

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN THE YEARS 1807 AND 1808.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. 1.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

SECOND EDITION,

REVISED AND CORRECTED BY THE AUTHOR.

VOL IV.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 1807.

The following Judges attended at this Term, viz.:

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.

The honorable SAMUEL CHASE,
The honorable BUSHROD WASHINGTON,
The honorable WILLIAM JOHNSON, AND
The honorable BROCKHOLST LIVINGSTON.
Who was appointed during the recess, in the place of the honorable WILLIAM PATERSON, deceased.
} ASSOCIATE JUSTICES.

Judge Cushing was prevented from attending by a severe illness.

Cæsar Augustus Rodney, Esquire, Attorney General in the place of John Breckenridge, Esq., deceased.

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Supreme Court of the United States.

1*] *FEBRUARY TERM, 1807.

THE UNITED STATES
v.
KID and WATSON.

Round copper bars, round copper plates, and round copper plates turned up at the edges, are not subject to duty upon importation.

THIS case was certified from the circuit court of the district of Pennsylvania, upon a division of opinion between the judges of that court, upon the question whether certain articles of copper, viz., round copper bars, round copper plates, and round copper plates turned up at the edges, imported by the defendants, were subject to duty, within the meaning of the acts of Congress, viz., 20th July, 1789, and 10th of August, 1790, vol. 1, p. 251, s. 1, by which "copper in plates" is exempt from duty; and the act of the 2d of May, 1792, vol. 2, p. 71, s. 2, by which "copper in pigs and bars" is also exempt from duty.

The jury found a special verdict, the substance of which was, that such articles as those in question are of no use in the form in which they are imported, but are worked up as a raw material. That the round, the square and the flat bars are, by the manufacturers and artists, known by the denomination of "bars." That all the articles are sold by weight, and the same price is paid for round as for square or flat bars; and for round plates, and round plates turned up at the edges, as for square or oblong 2*] plates. "And that all the aforesaid *articles come under the description of bars and plates."

Rodney, Attorney General,

Admitted that the case was not to be supported, on the part of the United States, and that judgment must be given for the defendants.

JENNINGS *v.* CARSON.

The owner of a privateer capturing neutral property is not liable to a decree of restitution, unless the property or its proceeds came to his hands.

The district courts of the United States are courts of prize, and have power to carry into effect the sentences of the old continental courts of appeals in prize causes.

In all proceedings *in rem*, the court has a right to order the thing to be taken into custody of the law; and it is to be presumed to be in custody of the law, unless the contrary appears.

The thing does not follow the appeal into the superior court, but remains in the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal.

THIS was an appeal from the sentence of the circuit court for the district of Pennsylvania, in a cause civil and maritime, in which Jennings was the libellant, and Carson the respondent; the former claiming to be owner of the sloop George and cargo, captured, in the year 1778, by the American privateer Additon, commanded by Moses Griffin, of which the respondent, Carson, was part owner, and which was libelled and condemned, on the 31st of October, 1778, as lawful prize, by the court of admiralty for the state of New Jersey; from which sentence of condemnation there was an appeal to the continental court of appeals, established under authority of the old Congress, where the sentence of condemnation was, on the 23d of December, 1780, reversed, and restitution ordered, but never obtained. In the mean time, however, the vessel and cargo had been sold by the marshal of the state court of admiralty, for paper money, under an order of the court contained in the sentence of condemnation, and it did not appear what had been done with that money. No measures were taken to enforce the decree of restitution during the old confederation.

On the 19th of May, 1790, after the adoption of the present constitution of the United States, Jennings filed his libel in the district court for the district of Pennsylvania, alleging that he was a subject of the States *General of the [*3 United Provinces, an inhabitant, and domiciled, at the island of St. Eustatius, and owner of the sloop George and her cargo; at the time of capture bound to the port of Egg Harbor in the United States, and consigned to A. and G. Caldwell; in the prosecution of which voyage she was illegally captured by the privateer Addition, owned in part by the respondent, Carson, and praying process for arresting Carson, to answer, &c. A supplemental libel was filed, setting forth the proceedings against the vessel in the court of admiralty of New Jersey; the sentence of condemnation; the appeal; the reversal of that sentence, and the order of restitution.

Neither the original nor supplemental libel prayed any specific or general relief, other than process for arresting Carson, so that he should appear to answer the libellant "in his said complaint, of the wrongs and injuries aforesaid, according to the resolutions of the continental Congress, the laws of the United States, and of the commonwealth of Pennsylvania, and the laws and usages of nations in this behalf practiced, used and established."

Carson, being taken upon the writ of arrest, appeared and filed his plea and answer, averring the sloop George to have been the property of a subject of the King of Great Britain, at the time of capture, and employed in carrying goods to the British army and navy; that the goods were imported directly or indirectly from Great Britain or Ireland, contrary to the regulations of Congress and the law of nations; the

King of Great Britain then being at war with the United States.

It admits that Carson was the owner of one-third of the privateer. It admits the capture, the condemnation and sale, the appeal and reversal, and the order of restitution, but denies that any part of the proceeds of the sale ever came to the hands of the owners of the privateer, or either of them, but remained in the hands of the marshal of the court of admiralty of New Jersey, who alone is answerable for the same. It avers that Griffin, the commander of the privateer, had probable 4*] cause for *making the capture, and, therefore, the owners are not liable.

It denies the jurisdiction of the district court of Pennsylvania to take cognizance of the question, the same belonging exclusively to the court of admiralty of the state of New Jersey, and to the court of appeals established by the continental Congress. It denies the jurisdiction of the court as a prize court in any case, and especially in cases of capture made during the British war, and avers that it has no authority to carry into effect a decree of either of those courts established under the old government.

After filing his plea and answer, Carson died, and Jennings filed a petition, suggesting the death of Carson, and charging his executors with assets, and praying that the suit may stand revived against them; upon which a citation issued, and the executors appeared and answered generally by a reference to the answer and plea of their testator, and further pleaded that by the law maritime, the law of the land, and the laws and ordinances of the United States, they, as executors, are not liable to be proceeded against in that court for the several matters set forth in the libel, for that they are not answerable for the wrongs and offenses, or the pretended wrongs and offenses, of their testator; and also, for that courts maritime have not authority to intermeddle with the estates and effects, real or personal, of deceased persons, or to give relief against the same, or to seize or take the same effects or estates in execution, or to imprison the bodies of executors for the default of the testator.

To these pleas and answers there were general replications.

On the 30th of March, 1792, the judge of the district court gave an opinion in favor of its jurisdiction in general cases as a prize court; but on the 21st of September, 1793, he dismissed the libel, on the ground that the district court was not competent to compel the execution of a decree of the late continental court of *appeals.[1] This sentence was affirmed in [*5

1.—The following learned opinion of the Hon. Judge Peters, upon the prize jurisdiction of the district courts of the United States, is too important to be omitted:

"This is a case in which the general principles are stated in the proceedings and exhibits, and, therefore, will appear clear enough by the perusal of them. There are some circumstances, however, not clearly ascertained by those exhibits, which I shall have occasion to mention, in the course of the observations which I shall make on the merits hereafter. The libel complains of the illegal capture of the sloop George, whereof Robert Smith was master, and her cargo, the property of the libelant, then and now a subject of Holland, during the late war, viz., in July, 1778, by the schooner privateer Addition, Moses Griffin, commander, belonging to the testator, Joseph Carson, and others, who are named in the answer of Joseph Carson, in his lifetime.

"It is alleged on the part of the respondents, that the vessel captured was employed in carrying goods belonging to the subjects of Great Britain, contrary to the regulations and laws of the then Congress. They rely on the libel and condemnation in the state court of admiralty of New Jersey, the verdict of the jury ascertaining the facts, and the condemnation by the court and order of sale, and for payment of the net proceeds to the captors.

"The sale of the vessel and cargo at vendue, and the moneys being received by the marshal of the court, in whose hands it is said they now remain in depreciated paper, not having been distributed to and among the captors, and of course the respondents, or their testator, received no part thereof, and therefore they allege that the marshal only is chargeable to the libellant, and not the respondents, or the testator. They insist that there was probable cause of seizure, and therefore the captors are not answerable in damages. They also plead in abatement to the jurisdiction of the court, because they assert that the subject of prize or no prize belongs to the admiralty of New Jersey, and not to this court, which has no cognizance of the question; nor has it power to effectuate its judgment against executors. On the part of the executors particularly, an answer was put in denying their being chargeable for the *torts* of the testator, which, as well as their consequences, die with his person. But on an explanation on the behalf of the libellant, that he claimed no damages for the *tort*, merely as a *tort*, but sought for restitution of his property only, the point was abandoned by the advocates for the respondents.

"The libellant, to repel this defense, and denying, in the usual form, the facts as stated, sets forth the reversal of the judgment of the court of New Jersey, by the decree of the court of appeals of the United States, the 23d of December, 1780, which contains a direction to the latter court to make restitution of the property with costs, but not damages. They also join issue on the point of jurisdiction, and distinguish between a suit commenced in the lifetime of the testator, and one brought in the first instance against the executors.

"Five points were made by the advocates of the respondents: 1st. The *tort* dying with the person; 2d. The jurisdiction of this court is not competent, as it is not a prize court; 3d, and 4th. If a prize court, yet, as the cause originally attached in the court of New Jersey, that was the only court in which the consequences were cognizable, and alone competent to effectuate the decree of the court of appeals; 5th. A capture with probable cause is not a subject of action for damages.

"The first point being waived, brings the question to the competency of jurisdiction, which in order as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to inquire into the merits of the cause. On this point, as it first struck me, I confess I had doubts. The account given by Lord Mansfield of the arrangement of the court of admiralty in England, as detailed in the case of *Lindo & Rodney*, produced hesitation, and my respect for the opinion of that great character, as well as the arguments of the advocates in the present cause, induced a deliberate consideration of the subject. The division of the court of admiralty into two sides, prize and instance, was new to me, and it is allowed not to have geen generally known, if at all, by the common lawyers in England, before that case was determined. In this country it never was known, nor does it appear that any new commission was ever transmitted to the colonial judge of the admiralty from Great Britain before the revolution, in cases of wars between that Kingdom and its enemies. I have traced, from records and other authentic information, the proceedings of the admiralty court of Pennsylvania, for a period exceeding fifty years, and I have the best reason for believing that the practice in other colonies was similar. In all the proceedings, the prize suits are called suits civil and maritime. During the late war, when we assumed and effected our independence, the proceedings were unaltered in this point. I do not find that there is any such distinction in any other nation, except it should be found in Holland, and of this I much doubt. The authority out of Bynkershoek, (177,) produced by one of the advocates for the respondents, founded on an ordinance of the Earl of Leicester, shows that there is

the circuit court on the 11th of April, 1798, but was reversed by this court at February term, 6*] 1799, so far as the same *decreed that the district court had no jurisdiction to carry into effect the decree of the court of appeals, and the cause was remanded to the district court for 7*] further *proceedings; the respondent being at liberty to contend before that court, as matter of defense to the merits, or to the form of proceedings, that the libel should first 8*] *have been filed in the district court of New Jersey, but not to make the decision of the judge on that point a ground of excepting to the jurisdiction of the district court of Pennsylvania, and that costs should await the event of the cause.

9*] *Upon the second hearing of the cause, on the 2d of April, 1802, the judge decreed in favor of the libellant, for the amount of sales of the sloop and cargo, reduced by the scale of depreciation, with interest, until two months after the order of restitution by the court of appeals; and from the time of the institution of the present suit until the day of final decree; which decree was, on the 10th of May, 1804, reversed by the circuit court, and the libel dismissed with costs. From which sentence the libellant appealed to this court.

E. Tilghman, for the appellant.

No delay can be imputed to the appellant. There was no limitation by law. The federal court of appeals was unpopular in those states who were attached to the trial by jury, and its jurisdiction was opposed with great warmth. He cited the case of the sloop *Active*, and *Mr. Olmstead's Case*, and an act of the legislature of Pennsylvania in support of that assertion. The jurisdiction of that court was not finally settled until the case of *Doane & Penhallow*, 3 Dallas, 54, 85, 86.

He considered the case under six heads.

1. That if the appellant was entitled to redress, he was right in applying to the district court of Pennsylvania, and was not obliged to resort to that of New Jersey.

2. That if his suit was rightly commenced in the district court of Pennsylvania, that court had authority to decide finally on the case.

3. That the district court has jurisdiction of the question of prize.

4. That, if the appellant is entitled to redress, his remedy survives against the executors of Carson.

5. That it is immaterial whether there was or was not probable cause for the capture.

*6. That the owners of the privateer [*10

a court there whose authority is entirely confined to captures as prize, and it has no jurisdiction even of other maritime cases. This, therefore, is not applicable to a question concerning the powers of a court of admiralty, which is allowed, even in the case of *Lindo & Rodney*, to possess jurisdiction in all maritime causes, though in England it is said to act under a peculiar (and therefore not generally known) organization. I take it, therefore, for granted, because the contrary has not been shown, that in England alone are these distinct branches of the same court to be found. In all the books of reports in which cases of prohibitions to the admiralty are mentioned, precedent to the case of *Lindo & Rodney*, these prohibitions are moved for and granted generally to the court of admiralty; and though in a case in *Term Reports*, (long after the case of *Lindo & Rodney*), the distinction is taken, and the prohibitions moved for to the prize court, this very instance shows it to be a novelty in the common law books there, for if it had been known as an old practice, the particular designation of the prize court would have been unnecessary, and the prohibition would have been required to the admiralty generally, as it ever had been in former cases.

"Acting, as we now do, in a national and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England more than that of our own or any other nation. Customs purely colonial were parts of our laws, even in the time of our connection with Britain. I need instance only one, viz., that of the mode of conveyance of feme coverts' estates, contrary to the laws of England. This is a case at common law, in which we then were, and now are, particularly called to follow their rule and practice in general. The admiralty proceeds from a law which considers all nations as one community, and should not be tied down to the precedent of one nation, though it were more clearly ascertained. I shall, therefore, conclude, that if the powers of an admiralty and maritime court are delegated by Congress to this court, those of a prize court are mixed in the mass of authority with which it is invested, and require no particular specification. They are called forth (if generally delegated) by the occasion, and not by repeated and new interferences of government. Nor do I believe that even in England, any new authority is vested, though a kind of legal and solemn notice is given of a war, in which subjects for the prize authority of the admiralty may occur. It does not begin with their wars, but was pre-existent. It does not end with the commencement of peace, for their books show it to be exercised at any time afterwards. Government never interferes to put an end to it; how then can its power be repeatedly necessary to begin it? The fact is, it is inherent in a court of admiralty, and not lost, but torpid, like other authorities of the court, when there are no occasions for their exercise.

"But here the question arises, have Congress, by their judiciary laws, vested this court with general or special admiralty powers? Congress have authority (delegated by the people in the constitution) in 'all cases of admiralty and maritime jurisdiction.' The words of that part of the judiciary law affecting this subject, in which the authorities of the court are described, will be seen in the 9th section of that law. 'It shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including seizures under laws of impost, navigation, or trade, of the United States.' It is said prize or no prize is a question of military, not of a civil nature. But I find no such distinction in the books. Blackstone, in his division of courts, does not class that of the admiralty as a military, but a maritime court, and it will appear that the jurisdiction of prize is within its powers, though he points out, in cases of prizes in the then colonies, that appeals were to members of the privy counsel, and others, in consequence of treaties and domestic arrangements. But, he says 'the original court to which this question is permitted in England, is the court of admiralty,' without any distinction as to the nature of its powers, whether instance or prize, military or civil. In book 3, p. 108, he mentions the exclusive and undisturbed jurisdiction of the courts of admiralty, in cases of prize; and that court determines, not according to British laws or practice, but 'according to the law of nations.' Should I confine my attention merely to the inquiry whether this could be classed under the description of a 'civil cause,' I should think there were grounds to support the idea of its being comprehended. In the case of *Acheson & Everett*, (*Cowp.* 382,) some light is thrown on this view of the subject, because it appears that a civil suit may, in substance, but not in form, partake of criminal ingredients. So, by parity of reason, may a civil cause of admiralty and maritime jurisdiction, be mixed with, or grounded on, transactions of a military nature. But I do not think it necessary merely to fix this point. What is, perhaps, of most consequence, is to ascertain the intention of Congress in distributing a power, clearly in them, to their judiciary departments. And what was said by one of the advocates for the libellant, strikes me as being just and proper, viz., that the construction should be made, from a consideration of all the laws on the subject, *in pari materia*. 'The court shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including,' &c.; that is, being invested with criminal powers in certain cases, it shall also have civil

13*] 2. *That the case of the libellant was void of merit.

1. If the proceeding is not against the prize itself, nor the proceeds of the sale of the prize, nor against the persons of the captors, a prize court has no jurisdiction. No case can be produced, where a prize court has taken jurisdiction merely against the persons of the owners of the capturing vessel. It is even doubted whether a court of admiralty could entertain a suit against the proceeds in the hands of the agent of the captors. "Proceedings upon prize are proceedings *in rem;* and it is presumed that the body and substance of the thing is in the country which has to exercise the jurisdiction." 1 Rob. Amer. ed. 119, *The Flad Oyen.*

The jurisdiction of a court of vice-admiralty extends only to things brought within its authority. 3 Rob. 53, *The Carel and Magdalena.*

The sentence of the court of appeals required the court of admiralty of New Jersey to cause restitution to be made. If the former sentence in New Jersey is complete, it is a bar to a subsequent suit. If it is not complete, but is still pending, it is equally a bar. 3 Bac. Abr. 653; Prec. in Chan. 579.

2. As to the question of merits. Upon this subject the case of *The Mentor,* 1 Rob. 151–153, is in point. This also is an antiquated claim, and not prosecuted against the actual wrongdoer, but against persons who were not present at the act complained of. Besides, there was probable cause, and, therefore, no damages can be given. 1 Rob. 82, *The Betsey.* The sloop had sailed under a British convoy; this was a strong ground of suspicion, and, added to the false account of her destination, her want of papers, and the destruction of papers, was sufficient ground to excuse from damages and costs. 3 T. R. 332, *Smart v. Wolf;* 1 N. Y. Term Rep. 64, *Jonks v. Hallet;* Doug. 581, *Bernardi v. Motteux;* 1 Marshall, 317. The sentence of the court of admiralty of New Jersey is of itself conclusive evidence of probable cause. 1 Wills. 232, *Reynolds v. Kennedy.*

14*] *The sale was the act of the court, and not of the party.

The case of sale under a distress is not analogous; it is the act of the party alone. It is not under the judgment of a court. The sale produced a fund to which alone the libellant can resort. If a collateral security be given, and if that be lost by the laches of the party, he shall never recover.

From the date of the reversal of the decree, the marshal held the money to the use of the present libellant.

The rule of the civil law as to *torts* is the same with the rule of the common law, *actio personalis moritur cum persona.*

The court stopped Ingersoll, on the same side, and said, that the point which it would be difficult to establish on the part of the libellant is, that he would have been entitled to any remedy against the present appellees, even on the very day after the sentence of the court of appeals.

Lewis, in reply.

The sentence of the court of appeals is conclusive evidence of the falsity of the original libel, and that the capture was *tortious.*

That the present libellant is entitled to relief, in some form and in some court, cannot be questioned. It is not a case of common law jurisdiction, and there is no state court of admiralty in New Jersey. If any court has jurisdiction, it must be a district court of the United States.

Two questions arise in the cause.

1. Is the libel filed in the proper court? and,

2. To what extent is the libellant entitled to relief?

*1. A neutral is entitled to restitution; [*15 and if the captor will not proceed against the property in a reasonable time, the owner may libel the captors, and pray that they may proceed to adjudication, or restore the property.

The captured property must be considered as in the power and possession of the captors. The sale makes no difference, unless made by consent, or becaue the property was perishable, or under some act of Congress or other statute law.

The British statutes require that the captured property should be taken into the custody of certain officers of the government, or of the court, and thereby might be considered as in the custody of the law; but Congress had no such officers; the custody remained with the captors until trial and acquittal or condemnation. Resolve of Congress of 27th of November, 1774. If it had been a sentence of acquittal, a writ of restitution would have issued. A mandate would have been vain, unless the court had power to execute the sentence.

JOHNSON, *J.,* inquired of Mr. Lewis whether in his practice he had known any instance in which, upon filing a libel, a warrant has not issued to take the captured property into the custody of the marshal.

MARSHALL, *Ch. J.* It is certainly important to ascertain in whose custody the property was. I had all along considered it as in the custody of the law.

Lewis. I have had an opportunity of knowing a great deal of the admiralty practice during our revolutionary war, being concerned in all the cases in Pennsylvania, and in all the appeals from the state courts. I do not know an instance in which such a warrant has issued. But the records of the court of appeals are in the office of the clerk of this court. In this very case there was no such warrant.

LIVINGSTON, *J.* It appears that the sale was made by the marshal under the order of the court. Must we not presume that the court knew and did its duty; and that the goods were in a perishing condition?

*Lewis. If the general practice was not [*16 to issue such a warrant, but to suffer the property to remain in the hands of the captors, and no warrant appears in this record, which ought to be presumed to contain all the proceedings in the case, the presumption is, that no such warrant ever was issued; especially if such warrant was not rendered necessary by the law.

There was no writ or warrant of sale from the court to the marshal. The order of sale is embodied in the final decree itself. It was made before the appeal, and while the court had the power to make such an order.

But the appeal suspended both the power to condemn and the power to sell. The appeal suspends the sentence as to every purpose whatsoever, unless the power of sale after appeal be

given by express law, or unless the goods are in a perishing condition.

The law of New Jersey which constituted the court, does not relate to the case of appeal, and the act of 16th December, 1781, was made to remedy this defect, but that was made three years after the sale. In 2 Roll. Abr. 233, I, it is said, that if "after sentence, the party appeal, the sentence is altogether suspended during the appeal." And Wood, in his Institutes, p. 525, says, "All acts done after the appeal, in prejudice of the appellant, are to be reversed." In 2 Browne's Civil Law, 437, it is said that an appeal *apud acta* may be necessary to prevent the instant intermeddling of the adversary.

The same law is laid down by Coke, 4 Inst. 340. Sir Thomas Parker's Rep. 70, *Foster v. Cockburn*, where, upon argument and great deliberation, the court of exchequer decided, that their power to order a sale of the goods seized was suspended by a writ of error, it not being sufficiently proved that they were perishable.

Before trial and condemnation, perishable articles may be sold, but in no other case, unless the power be given by statute law. 2 Browne's Civil Law, 227, 229, 446, 450. A special power to sell, notwithstanding an appeal, is given by the British prize acts; but no such power was given to the admiralty court of New Jersey, 17*] *either by the law of that state or the act of Congress. 2 Browne's Civil Law, 231, 454. If the property was in the custody of Carson, he was bound by the sentence of restitution.

As to the question whether the libellant has any remedy against the executors of the owners of the privateer, we say that we claim merely restitution in specie, or of the value; we claim no damages for the *tort*.

CHASE, *J*. This is a libel grounded upon the original wrong. The proceedings of the court of admiralty of New Jersey, and of the continental court of appeals, are brought in only as an exhibit. There is no new relief prayed for.

Lewis. There is a supplemental libel, and the first libel prays for general relief. It is the same prayer as in the case of *Penhallow v. Doane*. The case in Cowper, 74, shows that the remedy extends to executors, where the estate of the testator has been benefited by the *tort*. The case of *Penhallow v. Doane* is against the executors of the owner. The libel in the present case was drawn from that precedent.

MARSHALL, *Ch. J*. The objection is, that the libel does not charge that the property has not been restored; nor that it has not been proceeded against; nor that the sentence of the court of appeals has not been carried into effect.

If these allegations had been made in the bill, and there had been a prayer for general relief, your argument would be pertinent. But the libel complains only of the original tortious capture, and claims damages.

There is no allegation that the property was destroyed, or that a wrongful sale had been made.

LIVINGSTON, *J*. It is strange that the case of *Penhallow v. Doane* should be cited by the appellant. The decision in that case is directly against him. The court there gave relief only for the property which actually came to the hands of the respondents.

18*] *MARSHALL, *Ch. J*., observed, that in the case cited from Cowper, the property had come to the hands of the executor. The law of that case is not denied by this court.

Lewis. This court is sitting as a court of admiralty proceeding according to the law of nations. No irregularity of form ought to prevent us from obtaining relief according to the case we make out.

As to the question whether the district court of Pennsylvania had cognizance, he observed,

That if the property had been carried first to New Jersey and then to Pennsylvania, the libel would have been proper in Pennsylvania. So where the libel is against the person, and he is found in Pennsylvania, the libel must be filed there. The only remedy of the libellant is in the courts of the United States, and the federal district court of New Jersey is as foreign to the state court of New Jersey, as the federal district court of Pennsylvania.

Carson was bound by the decree of the court of appeals; and courts of admiralty proceeding according to the law of nations will aid each other in the execution of their sentences. Carson died bound by the decree, and his executors are therefore bound. As they lived in Pennsylvania, we could only sue them there.

As to the extent of the relief, he observed, that the sentence was for restitution; and as that sentence was passed with the knowledge that a sale had been made, he inferred that the court of appeals did not intend that the proceeds of the sale only should be paid over, but that there should be an actual restitution of the thing itself, or of its actual value. It is no answer to say that such is the usual form of decree in cases where a sale has been made, because those are precedents where the sale has been lawfully made; but here it was unlawful.

Dallas, on the same side.

*The real question is, who shall bear [*19 the loss of the depreciation of the money; and this depends upon the question in whose possession was the property at the time of the decree of restitution.

The claimant did no act, and was guilty of no omission, which could make that loss fall upon him; but it was a loss produced by the tortious act of the captors, and they are in law answerable for all the consequences.

In England, formerly, all captures were considered as made for the crown. It was only in consequence of the prize acts and proclamations, that the property was adjudged to the captors. But it is now settled that the property vests in the captors immediately upon the capture; 5 Rob.;[1] and the resolves of the old Congress take for granted the same principle. By the law of nations the property is changed by the capture, and the owner has no further power over it. The claimant is really and substantially a defendant through all the forms of proceeding, as well in the original suit as in the present. There was no assent, on his part, to the sale; no acquiescence in any act of the court or of the marshal. The decree of restitution supposes and implies that the property remained in the hands of the captors. The order for sale was made to carry into effect the decree of condemnation, and for the purpose of

1.—The case of the Elsebe, 5 Rob. 173, seems contra.

distribution, not for the preservation of the property, nor to hold it in custody of the law. No security was given by the captors or by the marshal. No public notice was given of the sale; as no such notice was required by the order of sale. The sale was made thirteen days after the order was suspended by the appeal, and the captor was the purchaser.

The case was before the court of appeals upon its particular circumstances as well as upon its general merits; and the fact of the sale after the appeal must have been known to the court. Two years had elapsed since the original sentence. A restitution of the thing itself was impossible; and the form of the decree of reversal must have been a matter in question. If the sale had been regularly and lawfully 20*] made, the court of appeals would *have taken notice of it, and have decreed restoration of the proceeds of the sale. 3 Dall. 102, 115, 119, *Penhallow v. Doane*. It was a fact of which the captor might have availed himself before that court.

But the marshal is to be considered merely as the agent of the captor.

The claimant had no remedy but against the person of the captor. There is no evidence that the proceeds of the sale are anywhere to be found.

The original libel did not ask for process to arrest the vessel, but merely prayed for condemnation. The possession, and the right of possession, were in the captor. There was no process to attach the vessel. The first process was a monition and venire for the jury. The marshal could have no right to possession, unless by virtue of process of attachment. There is no order in the whole proceedings which takes the possession from the captor. After the appeal the order of sale was a nullity, and the sale by the marshal was as the agent of the captor, who was a trustee for the claimant, and had no right to sell; and is, therefore, liable for all the consequences.

February 11. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The privateer Addition, cruising under a commission granted by the Congress of these United States during the war between this country and Great Britain, captured the sloop George, brought her into port and libelled her in the court of admiralty for the state of New Jersey, where she was condemned as lawful prize by a sentence rendered on the 31st of October, 1778, and ordered to be sold by the marshal. From this sentence Richard D. Jennings, the owner, prayed an appeal, which, on the 23d of December, 1780, came on to be heard before the court of appeals constituted by Congress, when the sentence of the court of Jersey was reversed, and restitution of the vessel and cargo was awarded. Pending the appeal, on the 13th of November, 1778, the order of sale 21*] *was executed, and the proceeds of sale remained in possession of the marshal. It does not appear that any application was ever made to the court of New Jersey to have execution of the decree of the court of appeals, and this suit is brought to carry it into execution, or on some other principle to recover from the estate of Joseph Carson, who was part owner of the privateer Addition, the value of the George and her cargo.

So far as this bill seeks to carry into effect the decree of the 23d of December, 1780, there is no doubt of the jurisdiction of the court; but the relief granted can only be commensurate with that decree. It is, therefore, all essential to the merits of this cause to inquire how far Joseph Carson, the testator of the defendants, was bound by the sentence which this court is asked to carry into effect.

The words under which the plaintiffs claim are those which direct the restoration of the George and her cargo. As the captors are not ordered by name to effect this restoration, and as the order bound those in possession of the subject on which it must be construed to operate, it must be considered as affecting those who could obey it, not those who were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it. Had Richard D. Jennings appeared before the court of New Jersey with his decree in his hand, and demanded its execution, the process of that court would have been directed to those who possessed the thing to be restored, not to those who held no power over it, either in point of fact or law.

This position appears too plain to require the aid of precedent, but if such aid should be looked for, the case of *Doane v. Penhallow* unquestionably affords it. In that case a decree of reversal and restitution was satisfied by directing the proceeds of the sales to be paid; and even the judge who tried the cause at the circuit concurred with his brethren in reversing his own judgment, so far as it had decreed joint damages, and had thereby rendered the defendant liable for more than he had received. The case of *Doane v. Penhallow*, therefore, which must be considered as expounding the decree *of the court of appeals now under con- [*22 sideration, has decided that Joseph Carson was bound to effect restitution by that decree so far only as he was, either in law or in fact, possessed of the George and her cargo, or of the proceeds.

To this point, therefore, the inquiries of the court will be directed.

In prosecuting them it will be necessary to ascertain whether,

1st. The George and her cargo were, previous to the sentence, in the custody of the law, or of the captors.

2d. Whether the court of admiralty, after an appeal from their sentence, possessed the power to sell the vessel and cargo, and to hold the proceeds for the benefit of those having the right.

It appears that the court of New Jersey, which condemned the George and her cargo as prize, was established in pursuance of the recommendation of Congress, and that no legislative act had prescribed its practice, or defined its powers. The act produced in court was passed at a subsequent period, and, consequently, cannot govern the case. But the Court cannot admit the correctness of the argument drawn from this act by the counsel for the plaintiffs in error. It cannot be admitted that an act defining the powers and regulating the practice of a pre-existing court, contains provisions altogether new. The reverse of this proposition is generally true. Such an act may rather be expected to be confirmatory of the practice and of the powers really exercised.

Since we find a court instituted and proceeding to act as a court, without a law defining its practice or its powers, we must suppose it to have exercised its powers in such mode as is employed by other courts instituted for the object, and as is consonant to the general principles on which it must act.

That by the practice of courts of admiralty a vessel when libelled is placed under the absolute 23*] control of the *court, is not controverted; but the plaintiffs contend that this power over the subject is not inherent in a court of admiralty, but is given by statute, and in support of this opinion the prize acts of Great Britain have been referred to, which unquestionably contain regulations on this point. But the Court is not of opinion that those acts confer entirely new powers on the courts whose practice they regulate. In Browne's Civil and Admiralty Law, in his chapter on the jurisdiction of the prize courts, it is expressly stated that those courts exercised their jurisdiction anterior to the prize acts, and the same opinion is expressed by Lord Mansfield, in the case of *Lindo v. Rodney*, which is cited by Browne. The prize acts, therefore, most probably regulated pre-existing powers in the manner best adapted to the actual circumstances of the time.

It is conceived that the constitution and character of a court of admiralty, and the object it is to effect, will throw much light on this subject.

The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice that security should be demanded of the libellant to have it forthcoming to answer the order of the court.

If the captor should fail to libel the captured vessel, it has been truly stated in argument that the owner may claim her in the court of admiralty. How excessively defective would be the practice of that court, if, on receiving such a claim, it neither took possession of the vessel, nor required security that its sentence should be performed. Between the rights of a claimant where a libel is filed and where it is not filed, 24*] no distinction is perceived, *and the court conceives the necessary result of proceedings *in rem* to be, that the thing in litigation must be placed in the custody of the law, and cannot be delivered to either party but on sufficient security.

In conformity with this opinion is the practice of the court of admiralty, not only when sitting for the trial of prizes, and acting in conformity with the directions of positive law, but when sitting as an instance court, and conforming to the original principles of a court of admiralty. In his chapter "on the practice of the instance court," under the title of "proceedings *in rem*," p. 397, Browne states explicitly, that when the proceeding is against a ship, the process commences with a warrant directing the arrest of the ship. In Browne, 405, the course of proceedings against a ship, not for a debt, but to obtain possession, is stated at length, and in that case, too, the court takes possession of the ship.

It must be supposed that a court of admiralty, having prize jurisdiction, and, consequently, proceeding *in rem*, and not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions. If in proceeding against a ship to subject her to the payment of a debt, or to acquire the possession of her on account of title, the regular course is, that the court takes the vessel into custody and holds her for the party having right, the conclusion seems irresistible, that in proceeding against a ship to condemn her as prize to the captor, or to restore her to the owner who has been ousted of his possession, the court will also take the vessel into custody, and hold her for the party having the right.

This reasoning is illustrated, and its correctness in a great measure confirmed, by the legislation of the United States, and the judicial proceedings of our own country. By the judicial act the district courts are also courts of admiralty, and no law has regulated their practice. Yet they proceed according to the general rules of the admiralty, and a vessel libelled is always in possession of the law.

*An objection, however, to the applica- [*25 tion of this reasoning to the case before the court is drawn from the defectiveness of the record in the original cause, which does not exhibit a warrant to the officer to arrest the George. The first step which appears to have been taken by the court is an order to the marshal to summon a jury for the trial of the case.

The carelessness with which the papers of a court created for the purposes of the war, and which ceased to exist before the institution of this suit, have been kept, may perhaps account for this circumstance. At any rate, the court of admiralty must be presumed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. The proceedings furnish reasons for considering this as the fact.

The libel does not state the George to have remained in possession of the captors, that the sale was made for them, or by their means, nor that the proceeds came to their hands. The answer of the defendants avers that on bringing the George into port, she was delivered up with all her papers to the court of admiralty, and, although the answer is not testimony in this respect, yet the nature of the transaction furnishes ample reason to believe that this was the fact; and it is the duty of the plaintiff to show that the defendants are in a situation to be liable to his claim. If the process of the court of admiralty does not appear regular, this court, not sitting to reverse or affirm their judgment, but to carry a decree of reversal and restoration into effect, must suppose the property to be in the hands of those in whom the law places it, unless the contrary appears. The George and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears.

If this conclusion be right, it follows that the

regularity of the sale is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority.

26*] *If the reasoning be incorrect, it then becomes necessary to inquire,

2. Whether the court of New Jersey, after an appeal from its sentence, possessed the power of selling the George and her cargo, and holding the proceeds for the party having the right.

That the British courts possess this power is admitted, but the plaintiffs contend that it is conferred by statute, and is not incident to a prize court.

That the power exists while the cause is depending in court seems not to be denied, and indeed may be proved by the same authority, and the same train of reasoning, which has already been used to show the right to take possession of the thing whenever proceedings are *in rem*. Browne, in his chapter on the practice of the instance court, shows its regular course to be to decree a sale where the goods are in a perishable condition.

The plaintiffs allege that this power to decree a sale is founded on the possession of the cause, but the court can perceive no ground for such an opinion. It is supported by no principle of analogy, and is repugnant to the reason and nature of the thing.

In cases only where the subject itself is in possession of the court, is the order of sale made. If it be delivered on security to either party, an order of sale pending the cause is unheard of in admiralty proceedings. The motive assigned for the order never is that the court is in possession of the cause, but that the property in possession of the court is in a perishable state. A right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use.

If, then, the principle on which the power of the court to order a sale depends, is not that the cause is depending in court, but that perishable property is in its possession, this principle exists in as much force after as before an appeal. The property does not follow the appeal into 27*] the superior *court. It still remains in custody of the officer of that court in which it was libelled. The case of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained.

On the principles of reason, therefore, the court is satisfied that the tribunal whose officer retains possession of the thing retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court. This opinion is not unsupported by authority.

In his chapter on the practice of the instance court, page 405, Browne says, "If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of a suit, or sometimes after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the registrar of the court, *in usum jus habentis*."

This practice does not appear to be established by statute, but to be incident to the jurisdiction of the court, and to grow out of the principles which form its law. A prize court, not regulated by particular statute, would proceed on the same principles; at least there is the same reason for it.

But there is in this case no distinct order of sale. The order is a part of the sentence from which an appeal was prayed, and is, therefore, said to be suspended with the residue of that sentence.

The proceedings of the court of admiralty, if they are all before this court, were certainly very irregular, and much of the difficulty of this case arises from that cause; but as this case stands, it would seem entirely unjust to decree the defendant to pay a heavy sum of money, because the court of admiralty has done irregularly that which it had an unquestionable right to do.

Since the court of admiralty possessed the power of making a distinct order of sale immediately after the appeal was entered, and this, but for the depreciation, would *have [*28 been desirable by all, it is not unreasonable to suppose the practice to have been to consider the appeal as made from the condemnation, and not from the order of sale. The manner in which this appeal was entered affords some countenance to this opinion. In the recital of the matter appealed from, the condemnation alone, not the order of sale, is stated.

The court will not consider this irregularity of the admiralty, in ordering what was within its power, as charging the owners of the privateer, under the decree of the 23d of December, 1780, with the amount of the sales of the George and her cargo, which in point of fact never came to their hands, and over which they never possessed a legal control, for the marshal states himself to hold the net proceeds to the credit of the former owners.

It is, therefore, the unanimous opinion of this court, that the decree of the 23d of December, 1780, does not require that the restoration and redelivery which it orders should be effected by the captors, but by those who in point of law and fact were in possession either of the George and her cargo, or of the money for which they were sold. As the officer of the court of New Jersey, not the captors, held this possession, the decree operates upon him, not upon them.

On that part of the libel in this case which may be considered as supplemental, and as asking relief in addition to that which was given by the decree of the 23d of December, 1780, the court deems it necessary to make but a very few observations.

The whole argument in favor of this part of the claim is founded on the idea that the captors were wrongdoers and are responsible for all the loss which has been produced by their tortious act. The sentence of reversal and restoration is considered by the plaintiffs as conclusive evidence that they were wrongdoers.

But the court can by no means assent to this principle. A belligerent cruiser who, with probable cause seizes a neutral and takes her into port for adjudication, *and proceeds [*29 regularly, is not a wrongdoer. The act is not tortious. The order of restoration proves that the property was neutral, not that it was taken without probable cause. Indeed, the decree

of the court of appeals is in this respect in favor of the captors, since it does not award damages for the capture and detention, nor give costs in the suit below.

If we pass by the decree, and examine the testimony on which it was founded, we cannot hesitate to admit that there was justifiable cause to seize and libel the vessel.

Upon the whole case, then, the court is unanimously of opinion, that the decree of the circuit court ought to be affirmed.

Sentence affirmed.

RHINELANDER
v.
THE INSURANCE COMPANY OF PENNSYLVANIA.

A capture of a neutral as prize by a belligerent is a total loss, and entitles the insured to abandon. The state of the loss at the time of the offer to abandon, fixes the rights of the parties.

THIS was a case certified from the circuit court for the district of Pennsylvania, in which the opinion of the judges of that court were opposed to each other upon the question, whether the plaintiff was entitled to recover upon a case stated, the material facts of which were as follows:

The defendants insured 12,500 dollars, on the freight of the plaintiff's American ship The Manhattan, which had been chartered by Minturn & Champlin, for a voyage from New York to Batavia, and back to New York. The freight was valued in the policy at 50,000 dollars. The charter party contained a covenant that if any dispute should arise between the plaintiff and Minturn & Champlin respecting the freight, the cargo should not be detained by the plaintiff, 30*] provided they *should give good security to abide by the award of arbitrators, who were to be appointed to settle such dispute. On her homeward voyage, on the 10th of February, 1805, the ship was taken and detained on the high seas by a British armed vessel, and the second mate and 21 of the seamen taken out, and two British officers and 15 seamen put on board, with orders to take her into a British port. The second mate was put on board another vessel, and arrived in New York on the 26th of February, when he gave the above information to the plaintiff, who, on the 28th of February, communicated it by his letter of abandonment of that date, to the defendants.

The Manhattan, with her cargo, was carried into Bermuda on the 12th of February, and libeled as prize of war. On the 20th of April, 1805, both vessel and cargo were acquitted. From this sentence, so far as it respected the cargo only, an appeal was prayed, which does not appear to have been decided; but on the 8th of May the cargo was delivered to its owners, on their giving security; and on the 8th of July the vessel and cargo arrived in New York; but before their arrival, the defendants having refused to give counter security, so as to relieve the owners of the cargo from the effect of the security which they had given upon getting possession of their goods, the plaintiff, on the 6th of June, 1805, after the vessel was liberated, brought the present suit. Upon the arrival of the vessel and cargo, Minturn & Champlin gave security to abide the award of the arbitrators concerning the freight, according to the covenant in the charter party, and obtained possession of the cargo.

Hopkinson, for the plaintiff, contended,

1. That there had been a total loss of the property insured, occasioned by a peril within the terms of the policy.

2. That the abandonment was made in due time.

*Whenever a vessel is captured by a [*31 belligerent as prize, whether the belligerent be a friend or an enemy, the loss is total, so long as the detention exists; and vests a complete right of abandonment. It is not the state of the information received, but the actual state of the fact, which justifies the abandonment, and gives the right to recover as for a total loss. The vessel was actually libeled as prize at the time of the abandonment, although no information of such libel had been received by the plaintiff; and, therefore, the case is clearly within the doctrine established by the supreme court of Pennsylvania, in the case of *Dutilgh v. Gatliff*, decided a few days ago;[1] that if the vessel be

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1.—Decided January 17th, 1807. The opinion of Ch. J. Tilghman, as published in the United States Gazette, of the 20th of the same month, is as follows:

On the 24th of September, 1799, the defendant, Samuel Gatliff, underwrote seven hundred and fifty dollars upon a policy of insurance on the schooner Little Will, belonging to John Dutilgh and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havanna.

On the 25th of September, 1799, the Little Will sailed on her voyage from Philadelphia for Havanna, and on the 8th day of October following she was captured by three British privateers, and carried into the port of Nassau, New Providence, where she arrived on the 13th of the same month.

Upon her arrival in Nassau, the said schooner was libeled in the admiralty court, and on the 9th day of November following was regularly acquitted; and in the whole she remained thirty-seven days at Nassau, during thirty-five of which she was in custody of the captors; but the fact of her acquittal was not known to the plaintiff until after the abandonment hereafter mentioned; although it was known to John Dutilgh, one of the owners and supercargo, who was with her at Nassau.

On the 13th day of November, the plaintiff wrote the letter of abandonment, enclosing the papers therein referred to, which was received by the defendant the same day.

On the 20th of November the said schooner sailed from Nassau for Havanna, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at New Providence. Afterwards, the said schooner sailed from Havanna for Philadelphia, where she arrived on the 26th or 27th of February, in the year 1800, with a cargo of sugars, on which freight became due, and was received by Stephen Dutilgh for the benefit of those who were entitled to it; each party refusing to accept her, she was sold for wharfage, and the whole proceeds of sale applied to the payment thereof.

The schooner Little Will was American property, as warranted.

The question for the court is, whether the plaintiff is entitled to recover as for a total loss?

Opinion of the Court delivered by W. Tilghman, *Ch. J.* On the case thus stated, the question sub-

32*] libeled by the *captors as prize, it is such a capture as gives the insured a complete right to abandon; and to recover as for a total loss. Although the Manhattan and cargo 33*] *were acquitted by the vice-admiralty court before the return of the writ in the present case, yet the acquittal, as to the cargo, was 34*] suspended by the appeal; and the *property was not, in fact, put into the possession of the freighters, until they had given security to its full value, to return it to the captors in case 35*] the sentence of acquittal *should be reversed. As to them, therefore, the property was not restored. It never arrived in safety. Its trial was still pending, and if it should finally be condemned, the freighters would never be liable to the plaintiff for the freight. As to the plaintiff, therefore, it still continues a total loss of the freight. He cannot, in any event, recover it from the freighters until the appeal is decided, and if that decision should be against the latter, his only chance would be in the hope of justice from the courts of the captors, who, upon condemnation of the cargo, sometimes order the freight to be paid to the owner of the ship, if he is a fair neutral, and has no interest in the cargo. Nothing but relieving the freighters from the security they had given for the cargo could entitle the plaintiff to recover against *hem. The underwriters, therefore, were bound either to pay to the plaintiff the amount they had insured, or, by giving such counter security as should indemnify the freighters, give the plaintiff a right of action against them. The latter part of the alternative the defendants have refused. The case of *Da Costa v. Newnham*, 2 T. R. 407, shows that the underwriters were bound to give such counter security, or to pay the amount insured. The property never came free into the hands of the freighters. The right of action depends upon the facts existing at the time of abandonment. In the case of *Mumford v. Church*, decided by the supreme court of New York, at July term, 1799, the assured recovered notwithstanding a restoration before abandonment. But the assured cannot retract his abandonment, and it is not just that one party should be bound, and the other at liberty. If the plaintiff had a right to abandon, the defendants were bound to accept.

For the defendants, Rawle and Lewis contended,

1. That there never was a total loss; and, consequently, the plaintiff never had a right to abandon.

*2. That before the action was brought, [*36 the vessel was acquitted, and therefore no right of action existed.

3. That before the return of the writ, the vessel and cargo had arrived in safety at the port of destination, and the freight was earned, and that the plaintiff might recover it from the freighters.

4. That the plaintiff had voluntarily suffered the cargo to be delivered without payment of the freight, and had lost his lien on the goods by his own folly, and, therefore, had no right to recover from the underwriters.

They admitted that the defendants were liable for a partial loss to the amount of the charges, expenses, &c., in consequence of the capture; but denied that the plaintiff could claim for a total loss. The information received at the time of the offer to abandon was only of an arrest and detention; which, as the Manhattan was a neutral vessel, must be presumed to be only for the purpose of exercising the belligerent right of search; and such a detention has never been holden to give a right to abandon. But a capture by a friend differs from a capture by an enemy. Park, 66. It is presumed that the courts of our friend will do us justice, and restore our property without delay. Hence no salvage is allowed for the recapture of a neutral from the power of one of the belligerents, unless under very particular circumstances. If the capture of a neutral be not followed by condemnation, it is not a total loss, unless the voyage be wholly broken up. Park, 79, *Saloucci v. Johnson*. The right of search (admitted by our treaty) gives a right to send the neutral into port for examination, and for that purpose the belligerent may put a force on board, and take out part of the original crew. The mere capture, ordering her into port, taking out part of the crew and putting other men on board, gave no right to abandon, and yet the abandonment is founded upon those facts only. The defendants were not obliged to accept the abandonment. It ought to have been accompanied by a cession. No subsequent event can make it valid. It was not accepted, and, therefore, *did not bind either party. The in- [*37 formation ought to be such at the time of abandonment, that the underwriter may know wheth-

mitted to the court is, whether the plaintiff is entitled to recover for a total loss?

In resolving this question, I shall divide it into two points.

1. Did there ever exist a total loss?

2. Supposing that there once existed a total loss, has any circumstance occurred which excludes the plaintiff from recovering for more than a partial loss?

1. The case before us includes one of the risks expressly mentioned in the policy, a taking at sea. But it has been objected that this taking was not by an enemy, and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of searching for the property of his enemy, or goods contraband of war, and that in the end, justice will be done to the neutral. To a certain extent there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made, the United States acknowledged the right of the British to detain their vessels for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if under suspicious circumstances she should be carried into port, to afford an opportunity for a complete investigation, perhaps even that ought not of itself to be considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is less strong, because there the confiscation of the property is not intended, and a temporary interruption of the voyage is all that in general is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where principles are strong, it is sufficient that there have been no decisions to the contrary. It appears, however, that in the state of New York, the precise point has been determined. In the case of *Mumford v. Church*, decided in the supreme court of New York, July term, 1799, the assured recovered

er he ought to accept it or not. He should be able to decide whether he ought to undertake the defense of the property. The insured cannot abandon, unless upon information of facts which show a total loss. Subsequent events cannot be coupled with a prior offer to abandon. Suppose the insured should say, I heard of a gale of wind; I offer to abandon, although I have heard of no loss; could that avail him? In the case of *Suydam & Wyckoff v. The Marine Insurance Company*, 1 Johns. 181, the supreme court of the state of New York decided that the insured cannot avail himself of a subsequent event, without a new abandonment. It is admitted that the facts, and not the information, decide the right to abandon, but there must be information of sufficient facts at the time of abandonment. A detention for examination does not necessarily destroy the voyage, or even render it probable that the voyage will be broken up. Whenever the fact appears that the voyage is destroyed, and the jury finds the fact to be so, (for it is not a matter of law,) it is a total loss. There is no printed report of the case of *Mumford v. Church*, and, therefore, we cannot examine its principles.[1]

But the restitution of the cargo, although on security, is a legal restitution. The freight never was in danger. If it has been, it was in consequence of facts which would have discharged the underwriters. If the voyage was lawful, freight would have been allowed, even

1.—LIVINGSTON, *J*. That case was reversed, in principle, by the court of errors, in *Timberly v. Church*. And the law now established by that case in New York is, that if, at the time of abandonment, the property has been actually restored, the abandonment is invalid.

for a total loss where there was a capture, carrying into port, and libeling by a British captor, although after the abandonment the property was restored. It is necessary that some general rule should be established; some line drawn by which the assured may know at what time he has a right to abandon. In most cases the voyage is extremely injured by proceedings in the court of admiralty, and the event is doubtful. For it cannot be denied, that of late such strange occurrences have taken place, in war and politics, as have very much affected the principles and practice of foreign courts of admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am, therefore, of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon when he receives intelligence of the libelling of his vessel.

2. This brings me to the consideration of the second point. Has any circumstance occurred "which limits the plaintiff to a recovery for only a partial loss?"

It is contended that such an event has occurred; that the vessel was acquitted by decree of the court of admiralty: that after acquittal she proceeded on her voyage, and that one of the owners was on the spot, and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot, because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, and conducted all the business with the underwriters, and the owner who was in New Providence gave him intelligence of what occurred from time to time, and by no means intended, from anything that appears, to restrain him from making an abandonment. It is true that the vessel proceeded on her voyage after she was restored; but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court arises from this circumstance; that before the action was brought the vessel was restored, and even at the time of the abandonment there was a decree of acquittal, although restitution does not appear to have been actually made till some days after. The counsel for the defendant have relied much on the opinion of Lord Mansfield in the case of *Hamilton v. Mendez*, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss at the commencement of the action. There is no doubt of the soundness of the principle: I mean that a policy is a contract of indemnity. The only question is, at what period the rights of the parties are to be tested by this principle; whether at the time of abandonment or of the commencement of the action. I have considered attentively the case of *Hamilton v. Mendez*. It must be obvious to every one, that the decision in that case was perfectly right. It was simply this; that a man shall not be permitted to abandon and recover for a total loss, when he knew at the time of his offer to abandon, that his property which had been lost was restored, and the voyage very little injured. But in reading the opinion of Lord Mansfield, we find a want of accuracy, with which that great man was seldom chargeable. Sometimes it appears as if he thought the period for fixing the rights of the insurers and the insured was the commencement of the suit; sometimes the time of abandonment and sometimes he even seems to have extended his ideas so far as the time of the verdict. But finally he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore at the improper application of some general expressions used by him in the case of *Goss v. Withers*. Anxious to cut off all pretense for doing the same in *Hamilton v. Mendez*, he has taken too much pains to avoid the possibility of misrepresentation. Hence his argument, considered in the whole, is not altogether clear and consistent. Upon the whole of this case of *Hamilton v. Mendez*, I think it most safe to confine its authority to the point actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action would be of little service to the insurers; for the law being once so established, an action would be brought in every instance on the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short time after he hears of the loss, and the property being transferred by the abandonment, can never afterwards be claimed by the assured. Want of mutuality is want of justice. There is no reason why the assured should be bound, but the assurer left free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel that the right to abandon would not have been affected, even if the property had been restored at the time of the abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated that the vessel remained in the custody of the captors, at the time of the abandonment. The defendants' counsel have urged that this was the fault of the captain, or of one of the owners, who was then at New Providence, because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated that there was any fault or negligence in the captain or owner, I do not think that the court can infer it; it being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what purpose it was the restitution was delayed, we are at a loss to determine. But as restitution was not actually made, and as the plaintiff was ignorant even of the decree of acquittal, his right to abandon remained unimpaired.

Upon the whole I am of opinion that the plaintiff is entitled to recover for a total loss.

upon enemies' goods, and although the voyage was not ended. Whether the cargo be condemned or not, the shipowner is entitled to his freight. The only ground upon which a British court of admiralty will refuse to allow freight, is a ground which would also discharge the underwriters, viz., that the shipowner was not a fair neutral. 1 Rob. 245 (Amer. ed.,) *The Copenhagen;* 2 Rob. 84, *The Rebecca;* 3 Rob. 88, 38*] *The *Race-horse;* 3 Rob. 245, *The Atlas;* 4 Rob. 279, 282, *The Vrow Henrica;* 3 Bos. & Pull. 291, *Touteng v. Hubbard.* It is only a delay in receiving the freight. If the plaintiff is to be considered as a fair neutral shipowner, he must eventually recover the freight, either from the owners of the cargo, or the captors; and if he is not such a fair neutral shipowner, the warranty in the policy is falsified, and the defendants are not liable. Suppose the delay had been caused by any of the other perils insured against, such as a violent storm driving the ship off from the coast, or a long course of contrary winds, &c., the inconvenience to the plaintiff would have been the same, and yet he would have no right to abandon. The defendants did not undertake that the voyage should be performed in any given time, nor to be liable for the wear and tear of the ship, tackle, &c., in consequence of such protracted voyage. The defendants have a right to avail themselves, in their defense, of the very evidence produced on the trial of the libel, and even of the sentence of condemnation, if it proceed upon grounds inconsistent with the warranty. The defendants were not bound to give the counter security; because the plaintiff's vessel had been restored to him without security; and it cannot be right that the defendants, who are not underwriters upon the cargo, should give security to its whole amount, in order to enable the plaintiff to recover the freight from the freighters.

But the freight was earned, and the freighters were liable to the plaintiff before the defendants were bound to plead. The vessel and cargo had arrived, and the defendants may now set up that fact as a defense.

If a vessel, supposed to be lost, be abandoned to the underwriters, and a suit brought upon the policy, but before plea pleaded the vessel arrive in safety, the underwriters may plead this fact, or give it in evidence, and it will be a good defense. In *Hamilton v. Mendez,* 2 Burr. 1214, Lord Mansfield says, "We give no opinion how it would be in case the ship or goods be restored in safety," "between the commencement of the action and the verdict." And in *Sullivan v. Montague,* Doug. 112, he says, "*actio non* goes, 39*] in every case, to *the time of pleading, not to the commencement of the action." The declaration is the beginning of the action. Co. Litt. 126, a. And even after plea pleaded, if any matter of defense arise, the defendant may, and indeed if he would not forever lose the benefit of it, he must, plead it as a plea *puis darrein continuance.* Yelv. 141, *Ewer v. Moile.*

But the plaintiff has never made a cession to the underwriters of his right to the freight, and of the means of obtaining it. He had, by a covenant in the charter party, given up his lien upon the cargo; a fact unknown to the defendants, and which ought to have been disclosed. He had also, without the defendants' consent, left the question of freight to arbitrators, who have not yet decided.

Ingersoll, in reply.

The question whether the cargo shall be restored to its owners is still pending in the court of admiralty, and if the plaintiff had, at any time, a right to recover the freight from the underwriters, that right still continues. On the first intelligence of the capture, the plaintiff offered to abandon; and, according to the true state of the facts, he had then a complete right to abandon. Although the property was neutral, yet it was captured as prize. It was treated by the captors as enemy property. It was, in fact, taken *jure belli,* and, therefore, it can make no difference, in principle, whether the nation of the captors be at peace or at war with the nation of the captured vessel and cargo. It was seized as prize of war, and the question of neutrality is still to be decided. The delivery of possession, upon security, is no more a restitution of the cargo, than if the owners had purchased it under a decree of condemnation. It has not arrived safe; it is burdened with an encumbrance to its full value. The circumstances detailed by the second mate, in his first information to the plaintiff, clearly showed that the seizure was made of the property as prize of war. It is said the abandonment was made too soon. In *Fuller v. M'Call,* 2 Dall. 219, the plaintiff was holden to be too late, because he did not abandon upon receipt of the first intelligence, although the information came from a *stranger. But here the information was [*40 given by an officer of the ship, an eye witness, and the vessel was, in fact, libeled as prize of war. The insured is bound to abandon in a reasonable time after receiving the intelligence, so that the underwriter may take measures to save what he can to indemnify himself; and no objection can be made that the insured abandoned too soon, if subsequent information prove that he had then a right to abandon.

Whether this be strictly a capture or not, is immaterial, as one of the risks insured against is taking at sea; and as this taking was with the view of seizure as prize, on suspicion of its being enemy property, it is within the principle of belligerent capture. The right of search gives no right to dispossess the owner of his vessel, either according to the law of nations, or to our treaty with Great Britain. But if such right did exist, an unreasonable detention gives a right to abandon; and whenever a vessel is libeled, if the insured means to claim for a total loss, he ought to abandon, in order to give the underwriters a right to defend the property in the court of admiralty. The insured, after an offer to abandon, is not bound to defend the property. The libel was filed eight days before the abandonment, but that fact was not necessary to give the right to abandon.

It has been said that the books furnish no case in which the capture by a friend has been decided to be a total loss. But Marshall, in p. 422 and 435, considers the law as settled, that a capture by a friend under pretense of enemy's goods, must be considered as a capture, because it is done as an act of hostility. The uncertainty of the duration of the detention puts it upon the same principle as the case of an embargo. A capture is a total loss,

although a condemnation never takes place. 2 Burr. 694, 697, *Goss v. Withers.*

An actual deed of cession was not necessary, because the offer to abandon was not absolutely accepted. The offer to cede the plaintiff's right was sufficient. The covenant in the charter party to relinquish the lien on the cargo for freight, upon other security being given, did not effect the interests of the underwriters. The security stood in the place of the cargo, and was abundantly sufficient.

41*] *MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows:

The Manhattan, a neutral ship, while prosecuting the voyage insured, was captured by a belligerent cruiser, the second mate and twenty-one of the hands were taken out, and two British officers and fifteen seamen put on board, and she was ordered into a British port. The mate soon afterwards arrived in the United States in another vessel. On the 26th of February, 1805, he gave information of these facts to the owner of the Manhattan, who, on the 28th of the same month, communicated it to the insurers, and offered to abandon to them. On the 2d of April payment of the freight was demanded and refused. The Manhattan was carried into Bermuda, and libeled as prize of war. On the 20th of April in the same year, both vessel and cargo were acquitted. From this sentence, so far as respected the cargo only, an appeal was prayed, which does not appear to have been decided. The cargo was delivered to the owners on their giving security, and on the 8th of July the vessel and cargo arrived at the port of destination. The underwriters having refused to give counter security, this action was brought on the 6th of June, after the vessel was liberated, and before her arrival at the port of destination. The policy is on the freight.

The question referred to this court is, whether the facts stated entitle the insured to recover against the underwriters for a total loss.

In examining this question, the material points to be determined are,

1st. Had the insured a right to abandon when the offer was made?

2d. Have any circumstances since occurred which affect this right?

These are important questions to the commercial interest of the United States, and ought to be settled with as much clearness as the case admits.

42*] *It is universally agreed, that to constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against; but this total loss may be real, or legal. Where the loss is real, a controversy can only respect the fact; but the circumstances which constitute a legal, or technical loss, yet remain, in many cases, open for consideration.

It has been decided that a capture, by one belligerant from another, constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may afterwards be recaptured and restored.

It has also been decided that an embargo or detention by a foreign friendly power, constitutes a total loss, and warrants an immediate abandonment. But the capture, or taking at sea of a neutral vessel by a belligerent, is a case on which the courts of England do not appear to have expressly decided, and which must depend on general principles, on analogy, and on a reasonable construction of the contract between the parties.

A capture by an enemy is a total loss, although the property be not changed, because the taking is with an intent to deprive the owner of it, and because the hope of recovery is too small, and too remote to suspend the right of the insured, in expectation of that event.

If a neutral ship be captured as enemy property, the taking is unquestionably with a design to deprive the owner of it; and the hope of recovery is in many cases remote, since it may often depend on an appellate court; and though not equally improbable as in the case of capture by an enemy, is not so certain as is stated in argument by the counsel for the defendants.

The distinction between a capture by an enemy and by a belligerent not an enemy, has not been taken in the cases adjudged in England, so far as those cases have been laid before the court, and the best general writers seem to arrange them in the same class. 2 Marshall, 422, 435.

*It has been also determined, that a to- [*43
tal loss existed in the case of an embargo, or the detention of a foreign prince.

In one case cited at the bar, (*Saloucci v. Johnson,*) the court of king's bench determined that an illegal arrest at sea amounted to a detention by a foreign prince, and although that case has since been overruled in England, so far as it decided that to resist a search did not justify a seizure, yet the principle that an arrest at sea was to be resolved into a detention by a foreign power, has not been denied. Marshall, (435) after noticing the contrary decisions respecting the right of a neutral to resist a search, adds "yet the above case of *Saloucci v. Johnson* may nevertheless, I conceive, be considered as an authority to prove, that if a neutral ship be unlawfully arrested and detained by a belligerent cruiser, for any pretended offense against the law of nations, this would be a detention of princes."

That a detention of a foreign power by embargo, or otherwise, warrants an abandonment, is well settled. 2 Marshall, 483.

The opinion given by the court of king's bench in the case of *Saloucci v. Johnson*, goes no further than to establish that an unlawful arrest at sea is to be considered as the detention of a foreign prince. Whether the arrest can only be considered as unlawful when the cause alleged, if true, is not in itself sufficient to justify a seizure, or when, if true, it would be sufficient, but is in reality contrary to the fact, is not stated. In point of reason, however, it would seem that when an arrest is made at sea by a person acting under the authority of a prince, the detention is as much the detention of princes in the one case as in the other.

In the case of an embargo, the detention is lawful. The right of any power to lay an embargo has not been questioned. Yet it is universally admitted, that an embargo constitutes a detention which amounts, at the time, to a total loss, and warrants an abandonment.

*In what consists the difference be- [*44
tween a detention occasioned by an embargo,

and a detention occasioned by an arrest at sea of a neutral by a belligerent power?

An embargo is not laid with a view to deprive the owner of his property, but the arrest is made with that view. In the first case, therefore, the property detained is not a hazard; in the last, it always is in hazard. So far the claim to abandon on an arrest is supported by stronger reason that the claim to abandon when detained by an embargo.

But it is argued that the duration of an embargo has no definite limitation, while a neutral vessel may count on being instantly discharged. Such is the rapidity of proceeding in a court of admiralty, that its mandate of restoration is figuratively said to be "borne on the wings of the wind."

Commercial contracts have but little connection with figurative language, and are seldom rightly expounded by a course of artificial reasoning. Merchants generally regard the fact itself; and if the fact be attended to, an embargo seldom continues as long as the trial of a prize cause, where an appeal is interposed. The history of modern Europe, it is believed, does not furnish an instance of an embargo of equal duration with the question whether the cargo of the Manhattan be or be not lawful prize. The reasoning of the books in the case of a capture by an enemy, and of an embargo, applies in terms, but certainly in reason, to an arrest by a belligerent, not an enemy. 2 Marshall, 483.

The reasoning of the English judges in all the cases which have been read at bar, and their decisions on the question of abandonment, have received the attention of the court. To go through those cases would protect this opinion to a length unnecessarily tedious. With respect to them, therefore, it will only be observed, that the principles laid down appear to be applicable to an arrest as well as to a capture, or detention of foreign powers; and that a distinction between an arrest and such capture or detention has never been taken.

45*] *The contract of insurance is said to be a contract of indemnity, and, therefore, (it is urged by the underwriters, and has been repeatedly urged by them,) the assured can only recover according to the damage he has sustained. This is true, and has uniformly been admitted. But if full compensation could only be demanded where there was an actual total loss, an abandonment could only take place where there was nothing to abandon.

There are situations in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the insured, for the calculation of which the law affords, and can afford, no standard. In such cases there is, for the time, a total loss: and in this state of things the insured may abandon to the underwriter, who stands in his place, and to whom justice is done, by enabling him to receive all that the insured might receive. A capture by an enemy, and an embargo by a foreign power, are admitted to be within this rule, and a complete arrest by a belligerent not an enemy, seems, in reason, to be equally within it.

It is, therefore, the unanimous opinion of the court, that where, as in this case, there is a complete taking at sea by a belligerent, who has taken full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss, and the act of abandonment vests the right to the thing abandoned in the underwriters, and the amount of insurance in the assured.

2. Have any circumstances occurred since the abandonment, which have converted this total into a partial loss?

Without reviewing the conduct of the assured subsequent to that period, it will be sufficient to observe that he has performed no act which can be construed into a relinquishment of the right which was vested in him by the offer to abandon.

It only remains, then, to inquire whether the release and return of the Manhattan deprives the assured of *the right to resort to the [*46 underwriters for a total loss, which was given by the abandonment.

This point has never been decided in the courts of England.

In the case of *Hamilton v. Mendez*, Lord Mansfield leaves it completely undertermined, whether the state of loss at the time the abandonment is made, or at the time of action brought, or at the time of the verdict rendered, shall fix the right to recover for a partial or a total loss.

A majority of the judges are of opinion that the state of loss at the time of the abandonment must fix the rights of the parties to recover on an action afterwards brought; and the judge who doubts respecting it, is of opinion that, in this case, counter security having been refused by the underwriters, the question of freight is yet suspended.

It is to be certified to the circuit court of Pennsylvania, that in the case stated for the opinion of this court, the plaintiff is entitled to recover for a total loss.

MONTALET *v.* MURRAY.[1]

When both parties are aliens, the courts of the United States have not jurisdiction.

If it does not appear upon the record that a suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder.

Costs are not given upon reversal of judgment.

ERROR to the circuit court for the district of Georgia.

The action was brought in the court below by Murray, a citizen of the state of New York, against Montalet, an alien, and citizen of the French republic, upon sundry promissory notes, made by the defendant at *St. Domingo, [*47 payable to the order of Monsieur Caradeaux de la Caye, whose residence, or citizenship, or national character, does not appear in the declaration.

It was suggested that it did not appear by the record that a suit could have been prosecuted in that court to recover the contents of those notes if no assignment had been made, and therefore the court could not take cogni-

1.—Present, Marshall, Chief Justice; Washington, Johnson and Livingston, Justices.

zance of the present case, being prohibited by the act of Congress, vol. 1, p. 55, s. 11.

P. B. Key, for the defendant in error, stated that it appeared in the plea that the payee of the note was also an alien, and subject of France. 4 Dall. 8, *Turner v. The Bank of North America.*

The court was unanimously of opinion that the courts of the United States have no jurisdiction of cases between aliens.

Key then suggested that perhaps it did not sufficiently appear upon the record that the original parties to the notes were aliens.

But MARSHALL, *Ch. J.*, said, that if it did not appear upon the record that the character of the original parties would support the jurisdiction, that objection was equally fatal, under the uniform decisions of this court.

Judgment reversed for want of jurisdiction, and with costs, under the authority of *Winchester v. Jackson*, at last term. Ante, vol. 3, p. 514.

But on the last day of the term, the court gave the following general directions to the clerk.

That in cases of reversal, costs do not go of course, but in all cases of affirmance they do. And that when a judgment is reversed for want of jurisdiction, it must be without costs.

48*] *THE UNITED STATES
v.
WILLINGS AND FRANCIS.

An American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to her original owners on her return into port, before her entry, does not by that operation lose her privileges as an American bottom, nor become subject to foreign duties.

This was an action of debt brought originally in the district court of the United States for the district of Pennsylvania, for the penalty of a bond dated November 16th, 1802, conditioned to pay to the collector of the customs, "the sum of 7,720 dollars and 41 cents, or the amount of the duties to be ascertained as due and arising on certain goods," &c., "entered by the above bounden Willings & Francis, as imported in the ship Missouri, from Canton, as per entry, dated 16th November, 1802."

The pleadings which ended in a general demurrer to the surrejoinder, brought into view the question, whether the ship Missouri, at the time of her arrival and entry from Canton, was entitled to the privileges of a registered ship of the United States; for if she was, the sum mentioned in the condition of the bond (which had been calculated as if she had been a foreign bottom) was too large by the sum of 702 dollars and 5 cents.

The facts upon which this question arose, appear, by the record, to be as follows:

The ship Missouri, when she sailed from Philadelphia for Canton, was a duly registered ship of the United States, owned wholly by Willings & Francis, citizens of the United States. While at sea, and while the register of the ship was on board in possession of the master, she was in part sold by Willings & Francis, in Philadelphia, to J. G. Koch and others, citizens of the United States, on the 12th of February, 1801, but was not then registered anew by her former name, nor was there an instrument in writing, in the nature of a bill of sale, reciting at length the certificate of registry. On the 15th of November, 1802, after the arrival of the ship at Philadelphia, and before any report or entry, Koch and others, the vendees, made a parol resale of their part of the ship to Willings & Francis, whereby the whole was revested in them. Afterwards, on the same 15th of November, (it being the day of her arrival,) the register *was delivered up by the master [*49 of the ship to the collector of the port of Philadelphia, and the vessel duly reported and entered; and T. W. Francis, one of the part owners, resident at that port, upon the entry of the ship, offered to make oath that the register contained the names of all the persons who were then owners of the ship; that since the granting of the register the ship had been in part sold by Willings & Francis to Koch and others, who had resold the same to Willings & Francis, and that no foreigner had any share or interest in the ship. On the 22d of December, 1802, Willings & Francis made a bill of sale to Koch and others, reciting the register at length in due form of law, whereupon the ship was registered anew by her former name as the property of Willings & Francis, and Koch and others, as joint owners. On the 7th of January, 1803, Koch and others, by a bill of sale reciting the register at length, in due form of law, resold and reconveyed their part of the ship to Willings & Francis; whereupon the register was delivered up, and the ship registered anew by her former name, as the property of Willings & Francis.

By the 14th section of the act of Congress of 31st December, 1792, vol. 2, p. 146, 147, it is enacted,

"That when any ship or vessel which shall have been registered pursuant to this act, or the act hereby in part repealed, shall in whole or in part be sold or transferred to a citizen or citizens of the United States, or shall be altered in form or burden," &c., "in every such case the said ship or vessel shall be registered anew, by her former name, according to the directions herein before contained, (otherwise she shall cease to be deemed a ship or vessel of the United States,) and her former certificate of registry shall be delivered up to the collector, to whom application for such new registry shall be made, at the time that the same shall be made."

"And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel *of [*50 the United States. And further, if her said former certificate of registry shall not be delivered up as aforesaid, except the same may have been lost," &c. "the owner or owners of such ship or vessel shall forfeit and pay the sum of

five hundred dollars, to be recovered with costs of suit."

And by the 17th section it is enacted,

"That upon the entry of every ship or vessel of the United States from any foreign port or place, if the same shall be at the port or place at which the owner or any of the part owners reside, such owner or part owners shall make oath or affirmation that the register of such ship or vessel contains the name or names of all the persons who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by way of trust, confidence, or otherwise, in such ship or vessel."

"And if the owner," &c., "shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States."

The judgment of the district court, upon the demurrer, was in favor of the United States, but it was reversed upon a writ of error in the circuit court, and the United States brought the case up, by writ of error, to this court.

Rodney, (Attorney General,) for the plaintiffs in error, cited 4 Dall. 28, *Priestman v. United States*, and 1 Bos. & Pull. 263, 267, to show the great degree of strictness with which the revenue laws had been construed, both in this country and England.

He contended that the word "when," (in the 14th section of the act,) means at that time, viz., when the ship shall be sold, she shall be registered anew. She was sold on the 12th of February, 1801, and ought then to have been registered anew, but was not. The consequence, 51*] according *to the act, is, that from that time she ceased to be deemed a ship or vessel of the United States.

The want of a new register did not annul the sale; nor was it vacated by the want of an instrument of writing in the nature of a bill of sale, reciting at length the certificate of registry. But the want of such an instrument was a bar to the obtaining a new register, and a sale without a new register causes a forfeiture of all her privileges as a ship or vessel of the United States.

The impossibility of delivering up the old register while it was at sea, so as to obtain a new register, is no excuse for the defendant's neglect to comply with that part of the act which requires an instrument in writing, in the nature of a bill of sale, which shall recite at length the certificate of the registry; because the registry is a matter of record, and a copy might have been had to insert in the bill of sale. 3 T. R. 406, *Rolston v. Hibbert*.

Lewis, contra.

The letter and the spirit of the act are in favor of the defendants. It is a general rule of law that every act which creates a penalty or forfeiture, is to be construed strictly against the United States.

The forfeiture of the privileges of a ship of the United States is a very heavy penalty, and although this penalty is inserted in a revenue law, yet that can make no difference in the rule of construction.

The construction contended for by the United States would put it in the power of the owner of the vessel to subject the owner of the goods to this penalty without any fault of his own. This could not have been the intention of the legislature in the case of a sale from one citizen of the United States to another, when they have taken care in the 16th section to provide, that where there are several citizens of the United States part owners of a vessel, and one of them sells his share to an alien, it shall not forfeit the shares of the other citizens of the United States, who were ignorant of such transfer.

*The act for registering vessels was in- [*52 tended to protect American ship-owners, and American navigation, by giving them exclusive privileges. The true construction, therefore, of the act must be that which will best carry the intention into effect. But if the opposite construction prevail, no person will dare to freight the vessel, or to become a part owner, lest he subject himself to the caprice of the other owners, and after calculating the probable event of his adventure upon the expectation of paying only domestic duties, he find himself defeated by an unforseen imposition of foreign duties, to the utter ruin of his enterprise.

But the great question is, when is she to be registered anew? The words of the act are, "That when any ship" "shall be sold," "in every such case the said ship" "shall be registered anew," "and her former certificate of registry shall be delivered up to the collector, to whom application for such new registry shall be made, at the time that the same shall be made." "And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew." "And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States."

The whole tenor of this section shows that she is not to be registered anew until her return. The law requires that the register should be on board the ship while at sea, and no new register can be granted until the old one is delivered up, which cannot be until the vessel returns to port. The only effect of the want of a bill of sale in writing is to prevent the issuing of a new register; until, therefore, a new register can be applied for, and the old register given up, no bill of sale in writing is necessary.

The only use of a bill of sale in writing, and of the oath required by the 17th section, is to ascertain, at the time of entry, whether any foreigners are interested, so *as to give [*53 the exclusive privileges to American citizens only. While the vessel is at sea there is no use in giving new evidence of her American character. It is only at her return and entry that it becomes necessary to discriminate.

A bill of sale in writing is necessary, but is not of itself sufficient to obtain a new register. It must also be accompanied by an actual delivering up of the old register; and until the latter can be done, the former is useless.

The law did not intend to prevent the sale of a vessel at sea, and as the transfer cannot be complete until her return, it is not necessary

that even the bill of sale in writing should be made until her return. Indeed, the act, by requiring that the certificate of registry should be recited at length in the bill of sale, and by requiring also that the certificate itself should remain on board the vessel while at sea, strongly implies that the bill of sale in writing can be made only while the vessel is in port. Both the sale and resale, by parol, are admitted by the pleadings to be valid and effectual in passing and repassing the property, so that Willings & Francis, at the time of the entry of the ship, could safely take the oath required by the 17th section; and it is evident that that oath contains an averment of all the facts necessary to entitle the ship to the privileges of a vessel of the United States, at the time of entry, if she had been before duly registered as such. This is apparent by comparing the 17th section with the 1st, which declares that vessels registered pursuant to the act shall be entitled to the privileges of vessels of the United States, so long as they shall continue to be wholly owned and commanded by citizens of the United States.

The oath in the 17th section is, that the register contains the names of all the persons who are then owners of the ship; or, if any part has been sold or transferred since the granting the register, that such is the case; and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by way of trust, confidence, or otherwise, in such ship or vessel. And the section provides, that if the 54*] owner shall refuse to take *such oath, the vessel shall not be entitled to the privileges of a vessel of the United States, which strongly implies, that if the owner does not refuse, but offers (as in the present case) to take the oath, the vessel shall be entitled to those privileges.

Again, the oath in the 17th section shows that the owner is not bound to give notice of the sale, till the vessel has arrived and is about to be entered.

The whole argument on the part of the United States is built upon a particular construction, or meaning, applied to the word "when," in the beginning of the 14th section. It is said that "when" means at that time. But this is not the only meaning of the word. It is often used for if, or in case. And in this sense it is used in that section; and in the same sentence the idea intended to be expressed by the word "when" is repeated and explained by the expression "in every such case." The words are not "when any ship shall be sold," "she shall be registered anew;" but, "when any ship shall be sold," "in every such case" "she shall be registered anew," thereby excluding the idea that the registering anew was to be at the moment of sale, and negativing the construction which might otherwise be raised upon the equivocal meaning of the word "when."

The 7th section of the act provides, that if the vessel shall be transferred while at sea, the master shall, within eight days after his arrival within any district of the United States, deliver up the certificate of registry to the collector of such district; and the 14th section shows that no new register can be had until the old one is delivered up. By the 11th section, if the vessel shall arrive in a district other than that in which the new owner usually resides, she may obtain a temporary register, which shall be given up on her arrival at the port to which she belongs. By no clause of the act is it required that notice of sale should be given to any officer of government, until the vessel arrives in port, and is about to be entered at the custom house.

The words of the 14th section are in the future tense. If she shall not be registered anew, she shall cease to be deemed a ship or vessel of the United States.

*The whole tenor and spirit of the act [*55 show that none of the forms are to be complied with while the vessel is at sea.

February 14. MARSHALL, *Ch. J.*, delivered the opinion of the court.[1]

The single question in this case is, whether an American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to the original owners on her return into port, before her entry, does by that operation lose her privileges as an American bottom, and become subject to foreign duties.

This question depends on the "Act concerning the registering and recording of ships and vessels," and more particularly on the 14th and 17th sections of that act.

In construing the 14th section, much depends on the true legislative meaning of the word "when." The plaintiffs in error contend that it designates the precise time when a particular act must be performed in order to save a forfeiture; the defendants insist that it describes the occurrence which shall render that particular act necessary. That the term may be used, and, either in law or in common parlance, is frequently used, in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration.

The particular act to be performed in order to save the forfeiture of the American character, and the privileges attached to it, is the obtaining a new register; and the first inquiry is, whether this new register must be obtained at the time of transfer, or at some other convenient time on the event of a transfer.

This would seem to the court scarcely to admit of a doubt. It has been correctly argued that the precise *time to register the ves- [*56 sel anew cannot be prescribed by the word "when," because the direction does not follow that word in the sentence so as to be limited by it with respect to time. It is not said that when a registered vessel shall be transferred or altered, she shall obtain a new register or cease to be an American vessel, but the continuity of the sentence is broken by interposing the words "in every such case," thereby clearly making the forfeiture to depend on the failure to register on the event described, not on the failure to register at the precise time when the event described occurs.

This observation also applies to a subsequent part of the section, where the forfeiture is repeated, and depends on the failure to register. not on the failure to register at the precise time of transfer.

But this construction, which is the fair and natural exposition of the words themselves, is rendered still more obviously necessary by the nature of the case, and by the context.

1.—Present, Marshall, *Chief Justice;* Washington, Johnson and Livingston, *Justices.*

No man will contend that the transfer or the change in a vessel, and the obtaining a new register, are to be simultaneous. The one must precede the other, and unless the transfer, or the repairs and alterations of the hulk or rigging are in all cases to be made in the office from which the new register is to be obtained, a reasonable interval between these acts must be allowed. This reasonable interval will depend on the nature of the case.

When must a new register be obtained for a vessel which has been altered or partially transferred to a citizen while at sea? The act answers, at the time of delivering up her former certificate of registry. And when can this former certificate be delivered up? Certainly not till the return of the vessel, for the certificate is a paper necessary to the vessel, and is therefore, always retained on board while at sea.

This construction is really so obvious and inevitable, that the endeavor to make it more clear would seem to be a total misapplication 57*] of time. *The question, at what time the new register is to be obtained, and at what time the vessel shall be affected by the failure to obtain it, is susceptible of rather more doubt. There is no impossibility in obtaining a new register before entry, and the necessity of doing so must depend upon the words of the act, and upon the nature of the case.

It is obvious that on her arrival in port, the Missouri was an American vessel, and her cargo, when imported into the United States, was liable to the duties imposed on American, not on foreign bottoms. This is the clear consequence of establishing that a new register was not required before the arrival of the vessel.

If, then, the cargo when imported was liable only to the duties on goods imported in an American bottom, it would certainly require plain words to charge them, on any subsequent failure, with higher duties.

If the words of the section be examined, they are, as has been stated at the bar, prospective, not retrospective. They operate on future, not on past transactions. "The vessel shall be registered anew, otherwise she shall cease to be deemed a ship or vessel of the United States." That is, she shall cease after the lapse of the time when she ought to have been registered anew. But before that time had elapsed, she had, as an American vessel, actually imported a cargo whose liability to duties had commenced.

So in the subsequent clause: "And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States." That is, her future earnings shall not be attended with the advantages annexed to American bottoms.

This construction derives some corroboration from the 17th section. This section provides for the oath which is to be taken by an owner on the entry of an American vessel. "That upon the entry of every ship," &c.

58*] *If upon the entry the owner shall refuse to take this oath, the vessel loses the privileges of an American bottom. If he takes it, and the oath discloses no fact which has already forfeited those privileges, she retains them. It is observable, that in order to retain them she is not required to take out a new register if an alienation has been made, and this strengthens the idea that if such an alienation be not in itself a forfeiture, a new register cannot be requisite so far as respects the voyage already concluded.

In the case of alienation to a foreigner, the privileges of an American bottom are *ipso facto* forfeited; but in the case of an alienation to a citizen they are not forfeited until after she ought to have been registered anew, and the oath which entitles her to enter as an American bottom does not require such new register.

But it has been argued that the omission to execute a bill of sale in writing at the time of sale is in itself a forfeiture of the American character.

The words of the act are, "And in every such case of sale or transfer," &c.

These words attach to the omission the penalty which the law annexes to it, and no other can be inflicted. This is not that the vessel shall lose her American character, but that she shall be incapable of being registered anew. The bill of sale, therefore, can only be required when the new register is to be obtained, and if it be then produced, the new register cannot be refused.

An opinion has already been indicated, that in the case of a transfer or alienation at sea, a new register is not necessary to protect from alien duties the vessel which arrives, and the cargo which was actually imported while the old register was in full force. But it is the opinion of the court that in the case under consideration no new register was requisite.

The new register must be in everything but its date a precise copy of the old one. The oath to be administered on the entry could be truly and fairly taken. The *names of all the [*59 persons who were at the time owners of the vessel were in the old register. The intermediate alienation and repurchase of part of the vessel had worked no forfeiture, and had created no necessity for a new register. The parties to whom the alienation had been made, not having property in the vessel at the time of entry, could not have taken the oath prescribed by law, which is in the present tense, and refers to the actual state of the property at the time of entry; nor could a new register have issued to them, in order to be delivered up for the purpose of making out another register for the original owners, who had become the present owners, without departing from the truth of the case, because the register also speaks in the present tense, and must recite the names of those who are the real owners at its date. Any new register which could have issued must have been, except in date, a duplicate of the old one, and must have been perfectly useless. Suppose the ship had been altered in a foreign port, but before her arrival and entry had resumed the form and dimensions mentioned in her old register, would it be pretended that a new register was necessary? What would such new register be but a copy of the old one? It is believed that in such a case it would not be suspected that any forfeiture of the old register, or any necessity for a new one, was produced, and between the two cases there appears to be no difference made by the letter or the spirit of the act.

The court is, therefore, unanimously of opinion, that the sentence of the circuit court be affirmed.

Judgment affirmed.

60*] *ONEALE v. LONG.

If a bond be executed by O. as a surety for S. to obtain an appeal from the judgment of a justice of peace in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O. the name of W. be interlined as an obligor who executes the bond, and the justice then accepts it, it is void as to O.

ERROR to the circuit court of the District of Columbia, sitting in Washington, in an action of debt upon four joint and several bonds, signed and sealed by Mary Sweeny, as principal, and William Oneale, I. T. Frost and Lund Washington, as sureties, conditioned that she should prosecute her appeal upon four several judgments rendered against her by a justice of peace in Maryland. William Oneale, the defendant below, pleaded *non est factum*, and upon the trial of that issue took a bill of exceptions, because the court below (two judges only being present, and divided in opinion) did not, at his request, instruct the jury, "that if they should be satisfied by the evidence that the bonds were signed, sealed and delivered by Mary Sweeny, as principal, and I. T. Frost, and the defendant as her sureties, and were afterwards presented to C. C. (the justice who had rendered the judgments) for his approbation and acceptance of the securities, and were by him refused and rejected, and after such rejection were interlined, without the license, privity and knowledge of the defendant, by inserting the name of Lund Washington, as a co-obligor, who on the succeeding day, without the privity, knowledge and consent of the defendant, signed, sealed and delivered the bonds, which were afterwards approved of by the justice, that then such interlineation and execution of said bonds, by Lund Washington, rendered them void as to the defendant, and the plaintiff cannot recover in this suit."

By the act of Maryland, 1791, c. 68, s. 5, no execution upon a judgment of a justice of peace shall be stayed by an appeal, unless the person appealing, or some other in his behalf, "shall, immediately upon making such appeal, enter into bond, with sufficient sureties, such as the justice by whom judgment shall be given shall approve of, in double the sum recovered, with condition," &c.

61*] *P. B. Key, for the plaintiff in error, contended that the deeds were void.

1st. By reason of the interlineation.

2d. By the rejection of them by the magistrate.

1. The alteration of the deeds by the interlineation was in a matter essential; it made them the deeds of four, when they were only the deeds of three persons.

It is immaterial whether the alteration is for the benefit of the obligor; the only question is, whether it substantially vary the deeds. Esp. N. P. 223, 224; Cro. Eliz. 626, 627, *Markham v. Gonaston;* Moore, 28 pl. 89; Shep. Touch. 68.

2. After the rejection of the bonds by the justice, they could never be set up again, without a new delivery by the defendant. 5 Co. 19, b, *Whelpdale's Case.* The justice was substituted by the law for the obligee, and his rejection is equally fatal as if the bonds had been tendered to, and refused by, the obligee himself. Shep. Touch. 70. It might have been that the defendant held a counter security, which he released upon the rejection of the bond.

Mason, contra, contended,

That the interlineation was not material; and being made by a third person without the privity of the obligee, did not vacate the deeds, especially as it was for the benefit of the defendant. 11 Co. 27, *Henry Pigot's Case;* Esp. N. P. 224, Shep. Touch. 68.

They were not less the deeds of the defendant, because they became also the deeds of another. This is in the nature of a judicial proceeding, and not a mere matter of contract between man and man. It is a security required by law in a civil action. It does not appear that the defendant was present when the bonds were rejected.

It is to be presumed that he intrusted Mrs. Sweeny, the principal, to deliver them for him, and she had a *right to redeliver them in [*62 his name after the interlineation.

If the defendant had given up any counter security, it was his own folly so to do until his name had been erased from the bonds.

February 14. MARSHALL, *Ch. J.*, delivered the opinion of the court, that there was error in this, that the court below did not instruct the jury as prayed by the defendant. He observed, that the judges did not all agree upon the same grounds, some being of opinion that the bonds were void, by reason of the interlineation, and others that they were vacated by the rejection of them by the magistrate, and could not be set up again without a new delivery.

Judgment reversed, with costs.

SMITH AND OTHERS
v.
CARRINGTON AND OTHERS.

A witness interested to diminish certain admitted items in the plaintiff's account, is still a competent witness to disprove other items.

The defendant having read a letter from the plaintiff's agent, in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy by a witness.

An exception may be taken to the opinion of the judge in his charge to the jury.

The court is bound to give an opinion to the jury on a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact.

ERROR to the circuit court for the district of Rhode Island.

This was an action of assumpsit brought by the plaintiffs in error, subjects of Hamburgh, to recover the balance due upon an account current, the debit side of which consisted principally of the following charges, viz., insurance made in Hamburgh on the defendants' ship Abigail,

from the United States to Hamburgh, and on the ship and cargo from Hamburgh to the Havanna, and on an intended voyage back from the Havanna to Hamburgh; advances made to the defendants to make up a cargo to the Havanna; bills of exchange accepted and paid; cash advanced, and commissions, charges and interest.

63*] *The credit side consisted chiefly of the proceeds of the freight of the ship, and of sundry articles of merchandise; remittances by bills of exchange; the sales of the ship, (she having been condemned and sold in London by virtue of a bottomry bond given by the defendants to the plaintiffs,) and of five per cent. of the premium of insurance on the intended return voyage from the Havanna to Hamburgh, the same having been returned by the underwriters to the plaintiffs, in consequence of the ship having finished her voyage in the United States, instead of returning to Hamburgh.

At the trial below the plaintiffs took a bill of exceptions, which stated,

1st. That the defendants offered as a witness one Peleg Remington, who had become jointly and severally bound with the defendant, Carrington, in a bottomry or respondentia bond to the plaintiffs, in the sum of 31,950 dollars, conditioned to pay to the plaintiffs that sum, on the return of the ship to Hamburgh, the same being the amount advanced by the plaintiffs to the defendants in Hamburgh; and that the ship should so return; for which advance, with other demands, this action was brought. To the admission of which witness the plaintiffs objected, contending that he was interested to diminish the balance due from the defendants to the plaintiffs. But the defendants insisted he was a competent witness as to all the items of the account, except the advances for which he was bound, particularly with respect to a charge of 13,718 dollars and 56 cents, for premium of insurance on the intended return voyage from the Havanna to Hamburgh, and which voyage the defendants contended was never begun, and, therefore, they ought not to be charged with that premium; and especially as the defendants had expressly waived all objections to every other part of the plaintiffs' account. Whereupon the said witness was suffered by the court to testify as to the charge of that premium only. The bill of exceptions states it as admitted, that by the law of Hamburgh, the underwriters are not bound to return the premium upon a change of the voyage, unless that change be notified before the vessel sails.

64*] *2d. That the defendants offered in evidence a paper, purporting to be a copy of a letter from the defendant, Carrington, to Smith & Ridgeway, of Philadelphia, the correspondents of the plaintiffs; and a letter from Smith & Ridgeway to Carrington, purporting to be an answer thereunto; but gave no proof that the said copy of Carrington's letter was a true copy of the original, but it was not denied to be in his hand-writing, and it was proved that he was in Canton, and not in the United States at the time of trial, and had been in Canton for two years before, but had been corresponded with on the subject of this action since its commencement. Whereupon the court permitted the copy and the letter to go in evidence to the jury.

3d. The plaintiffs, after stating in the bill of exceptions, and referring to all the testimony and other evidence in the case, but not stating distinctly the material facts which they supposed to be the result of that testimony and evidence, and on which their prayer was founded, prayed the court to declare their opinion to the jury whether, if the plaintiffs had actually paid the premium to the underwriters, before notice of the change of the destination of the ship, they had a right, "under the circumstances of the case," to recover the same of the defendants. But the court refused to deliver an opinion particularly thereon.

4th. The bill of exceptions further stated, that the court, prior to the request last mentioned, declared to the jury that "the case wholly turned upon the point whether or not the defendants had given due and seasonable notice of the change of the destination of said ship. That it was a question proper for the jury to decide, whether such due and seasonable notice had been given, and that if they were of opinion that it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for the said premium; and with that direction left the same to the jury; and the jury aforesaid then and there gave their verdict for the plaintiffs, for the sum of 13,677 dollars and 8 cents only, and disallowed the said charge and demand of the plaintiffs for the said premium *of insur- [*65
ance, except one-half per cent., which the jury allowed."

The errors assigned by the plaintiffs in error were,

1st. That the court admitted Remington to testify to the point, and under the circumstances mentioned in the bill of exceptions.

2d. That the court admitted the writing purporting to be a copy of a letter from the defendant, Carrington, to Smith & Ridgeway, and a writing purporting to be a letter from Smith & Ridgeway to the said Carrington, to be read in evidence, as stated in the bill of exceptions.

3d. That the court directed the jury that the case turned wholly upon the point whether due and seasonable notice had been given by the defendants of the change of the voyage, as stated in the bill of exceptions; and that this was wholly a question of fact, which it was their exclusive province to determine.

4th. That the court refused to direct the jury, in case it was fully proved to their satisfaction, that the plaintiffs had paid the premium in question previous to any notice or information whatever of the change of the voyage, as stated in the bill of exceptions, that they were entitled to recover of the defendants.

Robbins, for the plaintiffs in error, contended,

1st. That the underwriters, under the law of Hamburgh, had a right to retain the premium; and,

2d. That whether they had or not, the plaintiffs having received the defendants' orders to insure, and having actually done it, and paid the premium before those orders were countermanded, had a right to recover it back from the defendants.

1. That the underwriters had a right to retain the premium even under the English law, because the risk had commenced. It was to begin from the shore. But *the Ham- [*66

burgh law being admitted, and no evidence being given that the change of voyage was notified to the underwriters before the ship sailed, the question is too plain to require argument.

2. But whether the underwriters were liable to refund or not, the plaintiffs have a right to recover from the defendants what they paid for premium under the existing orders of the defendants.

If the underwriters are liable to refund, the plaintiffs are not bound to resort to them. That is the duty of the defendants.

The money being paid by the plaintiffs before the orders for insurance were countermanded, there can be no pretense that the plaintiffs are not entitled to recover.

3. Remington was not a competent witness, because in a suit against him upon the bond, he might show that the whole amount for which he was liable had been paid; which he could not do if the plaintiffs had a right to apply the credit side of the account to discharge the money by them advanced for the premium. He was, therefore, directly interested in the event of the suit.

4. There was no proof that the paper offered as a copy of the defendant Carrington's letter to Smith & Ridgeway was a copy of the original, and, therefore, it ought not to have been received, nor was there any evidence offered of the hand-writing of Smith & Ridgeway to the paper purporting to be a letter from them.

The opinion of the court that reasonable notice was wholly a question of fact, was erroneous. We contend that in all mercantile cases, reasonable notice is a question of law. 1 T. R. 167, *Tindall v. Brown.*

The court did not say of what or to whom notice was to be given.

But the underwriters were not bound to refund without proof as well as notice.

67*] *Ingersoll, contra.

1. As to the competency of Remington. A witness cannot be excluded if he is competent to answer any question. 3 T. R. 27, *Bent v. Baker.* If the suit had been brought only for the premium of insurance, his competency would have been unquestionable. Shall it be in the power of the plaintiffs to deprive the defendants of their witness, by blending other matters of account in their action? Surely not. But here all the other items of the plaintiffs' account were expressly admitted by the defendants before they offered Remington as a witness; and he was offered as a witness to that one item only.

2. As to the copy of Carrington's letter, it is connected with that from Smith & Ridgeway, which the bill of exceptions states to be a letter from them to Carrington, purporting to be in answer to Carrington's letter to them. There was evidence that it was in his hand-writing, and that he had been absent in China for two years, so that he could not have fabricated it for the occasion. Where there is a connected correspondence, the whole ought to go to the jury.

In mercantile cases, the rules of evidence are not so strict as in other cases. 1Dall. 16, 17, *Riche v. Broadfield,* Park. 406; 2 Str. 1127, *Russell v. Boehme;* 3 Dall. 19, *Bingham v. Cabot;* 2 Dall. 384.

3. As to the opinion given and the opinion refused.

The question is not yet settled whether a bill of exceptions will lie to an erroneous opinion given by the judge in his charge to the jury at the trial; or to a proper opinion prayed and refused. 3 Bl. Com. 372.

MARSHALL, *Ch. J.* Is not the reason why the English books do not show such a case, because, upon a doubt as to the correctness of the opinion of the judge in his charge to the jury, a case is always made, and a new trial moved for, on the ground of misdirection?

Ingersoll. If the court had given an opinion upon the reasonableness of the notice, it would have been *error, because it is a [*68 matter of fact. But here the prayer was, that the court should give an opinion as to the fact of notice, as well as to the reasonableness of notice. The expression "under the circumstances of the case" refers the matter of fact to the court. It calls upon the court to say what are the circumstances of the case, and, consequently, to decide the weight of evidence, and to infer one fact from others, which is the peculiar province of the jury.

The jury is certainly to decide the facts; whether upon those facts the notice is reasonable, may be matter of law; but in Pennsylvania, and perhaps in other states, it is usual to submit the whole question to the jury, the court giving them information as to such points of law as have been decided.

If the facts are settled, the court may give instruction as to the law; but if the question of law cannot be abstracted from the question of fact, the whole must be submitted to the jury. 1 Dall. 255, *Robertson v. Vogle;* 2 Dall. 158, *Bank v. M'Knight,* 2 Dall. 195, *Mallory v. Kirwan.*

P. B. Key, in reply.

1. Abandoned the objection to the admissibility of Remington as a witness.

2. As to the copy of the defendant Carrington's letter.

No man can make evidence for himself. 2 Ves. 42. A copy cannot be given in evidence until you have proved that the original existed, and is lost or destroyed, or not in the power of the party to produce; and then the copy must be proved by a witness who compared it with the original.

It does not appear that the plaintiff admitted the paper supposed to be a letter from Smith & Ridgeway, to be genuine, and simply not denying is not admitting. But the plaintiff objected to both the copy and the letter, as appears by the whole tenor of the bill of exceptions.

*3. As to the opinion prayed. [*69

The expression "all the circumstances of the case," means all the circumstances of the case stated in the bill of exceptions, and the evidence to which it refers. This was certainly proper. It was not praying the court to decide the facts, but only the law arising upon those facts. The court has a right to say that under the circumstances of the case, the law is so.

MARSHALL, *Ch. J.* Does not that involve the verity of the facts?

Key. The court can say that there was no evidence whatever of notice, and if so, that the plaintiff had a right to recover. The question what is evidence is matter of law.

But the court erred in submitting the whole question of reasonable notice to the jury. The reasonableness is matter of law. 2 Inst. 222; Co. Litt. 56, b; 1 T. R. 167, and 2 T. R. 186, *Tindall v. Brown.*

February 16. MARSHALL, *Ch. J.*, delivered the opinion of the court.

This case comes up on exceptions to certain opinions given by the judges of the circuit court of Rhode Island, at the trial of the cause before them.

The first exception is to the admission of Peleg Remington as a witness.

This exception appeared to be abandoned by the counsel in reply, and is, indeed, so perfectly untenable, that the court will only observe, that Peleg Remington does not appear to have been interested in the event of the cause in which he deposed, but certainly was not interested in the particular fact to which he was required to depose, and was, therefore, clearly a competent witness.

70*] *The second exception is taken to the opinion of the court admitting as evidence a paper purporting to be the copy of a letter written by the defendant, Carrington, to Smith & Ridgeway, of Philadelphia, the correspondents of the plaintiffs, and also a letter from Smith & Ridgeway to the defendant, Carrington, purporting to be an answer to the said letter.

To the admission of the letter of Smith & Ridgeway no just objection appears. The verity of that letter is acknowledged on the face of the bill of exceptions, and no cause is stated why it should not have been read to the jury. But the admission of the copy of a letter written by one of the defendants stands upon totally different ground.

To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the non-production of the original must be shown.

If in this case the answer of Smith & Ridgeway had authenticated the whole letter of Carrington, the copy of that letter need not have been offered, since its whole contents would have been proved by the answer to it. If its whole contents were not proved by the answer, then the part not so proved was totally unauthenticated, and may have formed no part of the original letter. In this case, the answer cannot have authenticated the copy, because the bill states that the defendants gave no proof of its being true. This copy, therefore, not being proved to be a true copy, ought not to have gone before the jury. Into its importance or operation this court cannot inquire. It was improper testimony, and a verdict founded on improper testimony cannot stand.

For this error the judgment must be reversed, and the cause remanded to the circuit court of Rhode Island, to be again tried.

The third exception is taken to the refusal of the court to give an opinion on a question stated by the counsel for the plaintiffs. The difficulty of deciding on this exception does not arise 71*] from any doubt which *ought to have been produced by the facts in the cause, but from the manner in which the question was propounded to the court.

After a long and complex statement of the testimony, the counsel for the plaintiffs requested the court to declare whether, "if the plaintiffs had actually paid the said premium to the underwriters, before any notice of the change of the destination of the ship, they had a right, under the circumstances of the case, to recover the same of the defendants."

To this question the court refused to give an answer.

There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception; but it is equally clear that the court cannot be required to give to the jury an opinion on the truth of testimony in any case.

Had the plaintiff's counsel been content with the answer of the court to the question of law, he would have been entitled to that answer; but when he involved facts with law, and demanded the opinion of the court on the force and truth of the testimony, by adding the words "under the circumstances of the case," the question is so qualified as to be essentially changed; and although the court might with propriety have separated the law from the fact, and have stated the legal principle, leaving the fact to the jury, there was no obligation to make this discrimination, and, consequently, no error was committed in refusing to answer the question propounded.

The record also exhibits a part of the charge given to the jury, on which the counsel for the plaintiffs have argued as if it composed a part of the bill of exceptions. It is in these words: "And the said court, prior to the request last mentioned, did declare and give their opinion to said jury, that the case wholly turned upon the point whether or not the said defendants *had given due and seasonable notice of [*72 the change of the destination of said ship. That it was a question proper for the said jury to decide whether such due and seasonable notice had been given; and that if they were of opinion it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for said premium."

That a party has a right to except to a misdirection of the jury contained in the charge of the judge who tries the cause, is settled in this court. (*Ante*, vol. 2, p. 239, *Church v. Hubbart.*)

That the opinion which the record ascribes to the judge in this case is incorrect, unless some other part of the charge shall have so explained it as to give to the words a meaning different from that which is affixed to them taken by themselves, is the opinion of this court.

The judges instructed the jury, "that the case wholly turned upon the point whether or not the defendants had given due and seasonable notice of the change of the destination of the said ship," and that if they were of opinion that due and seasonable notice had been given, they ought to find against the plaintiffs, on the question of their right to recover the premium advanced by them for the defendants.

Due and seasonable notice must have been given as soon after the destination of the vessel was changed as it could have been given, whether the premium had or had not been advanced by the plaintiffs before they received

it; or this direction must have left it to the jury to determine whether notice was or was not due and seasonable, although it might not have been received by the plaintiffs before they had actually advanced for the defendants the sum in contest.

On the first exposition, these words would amount to a clear misdirection of the jury; because, if the plaintiffs had paid to the underwriters, at the request of the defendants, the premium of insurance, before they received notice countermanding the directions to make such payment, the right given by subsequent circum-
73*] stances *to the insured to demand its return from the underwriters, could not affect the claim of the plaintiffs on the defendants, for money fairly advanced by them for the use of the defendants.

If the latter construction be adopted, there was still a misdirection on the part of the court. The judge ought not to have left it expressly to the jury to decide whether notice given immediately after the change of the destination of the vessel could be due and seasonable notice, unless it was received before the premium was advanced.

It is, however, not material to the present cause to determine whether this exception does or does not exhibit a misdirection to the jury, since we are unanimously of opinion, that for admitting a paper purporting to be the copy of a letter from Edward Carrington to Smith & Ridgeway, to go to the jury, which was not proved to be a copy, the judgment must be reversed.

Judgment reversed.

PENDLETON AND WEBB
v.
WAMBERSIE *et al.*

An assignee of an assignee of a copartner in a joint purchase and sale of lands may sustain a bill in equity against the other copartners and the agent of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds.

ERROR to the circuit court for the district of Georgia, in a suit in equity, in which Pendleton & Webb were complainants, and Emanuel Wambersie, James Seagrove and the representative of James Armstrong, Jacob Weed and Henry Osborne were defendants.

The bill stated that Henry Osborne, Jacob Weed, James Armstrong, James Seagrove, and the complainant, John Webb, on the 22d of December, 1786, entered into an agreement with each other, under seal, to procure lands on their joint account in the state of Georgia, to an amount not exceeding 200,000 acres, at
74*] *their joint expense, and for their joint benefit. That grants were obtained for about 165,000 acres. That Webb by deed transferred all his right to the lands and contract to John M'Queen, in consideration of 400*l.* sterling, to be paid in four equal annual installments. That M'Queen, not having paid Webb, assigned his right to Pendleton, the complainant, who undertook to indemnify M'Queen against Webb's demand. That Webb has never received the money due from M'Queen. That Wambersie, as agent for the company, had sold 60,000 acres of the land in Holland, at one dollar and fifty-six cents per acre, had received in cash 51,000 dollars, and had made himself liable for the balance. That he has refused to pay to the complainant, Pendleton, the one-fifth of the purchase money. That the other defendants refuse to divide the residue of the lands, and to account for the profits, &c. That the lands are liable, in the hands of the purchasers, for the balance of the purchase money, both to the complainant Webb, for the purchase money due to him, and the complainant Pendleton, for his one-fifth of the amount of the sales. The bill seeks discovery of the amount of lands granted to the company, of the amount sold, &c., and prays that the defendants may account, and that the lands may be charged with the balance of the purchase money, &c.

The defendants demanded for want of equity in the bill, and the count below contained the demurrer, and decreed that the bill be dismissed with costs.

But this court, without argument, overruled the demurrer, reversed the decree, and remanded the cause for further proceedings.

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*EX PARTE BOLLMAN AND EX PARTE SWARTWOUT. [*75

This court has power to issue the writ of *habeas corpus ad subjiciendum.*

To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against government is not sufficient.

When war is levied all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.

Any assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territories, although as a step to, or the means of executing, some great-

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NOTE.—Definition of "levying war" may be found in the following cases:

U. S. v. Burr's Trial, 401, 402, 405, 417; 1 Id. 14, 408; Infra Appendix, 471 to 489.
U. S. v. Burr, 2 Burr's Trial, 401, 402, 405.
U. S. v. Vigol, 2 Dall. 347; U. S. v. Mitchel, Id. 348.
U. S. v. Hanway, 2 Wall. Jr. C. C. 134, 139; 2 Curt. C. C. 630.
U. S. v. Greiner, 4 Phil. 396, S. C. (14 Law Rep. N. S. 91.)
U. S. v. Hoxie, 1 Paine, 265.
Whart. S. Tr. 458, 610, 636.
U. S. v. Greathouse, 2 Abb. U. S. 364; 20 Wall. 92.
Gearing v. U. S. 3 N. & H. 165.
Wallack v. Van Riswick, 92 U. S. 202.
Windsor v. McVeigh, 93 Id. 274.
Constitution of U. S. art 3, § 3.
U. S. Laws, Act of April 30, 1790; Act of July 17, 1862; Act of March 3, 1875; U. S. R. S. § 5331.

By English statute it is high treason "If a man do *levy war* against our lord the King in his realm, and thereof he provably attainted of overt deed by people of his condition." 25 Edw. 3 St. 5, c. 2.

Vaughn's Case, 5 St. Tr. 37, S. C.; 2 Salk. 634; 3 Inst. 9, 10.
Green's Case, Ld. Raym. 1585; 1 Hawk. P. C. c. 17 (49).
Earl of Essex Case, Moor 621.
Bensted's Case, Cro. Car. 583.
Damaree's Case, Fost. 213, S. C. 15, St. Tr. 522.
Walson's Case, 32 St. Tr. 4.
Brandeth's Case, Id. 928.
Lord Gordon's Case, Douglass, 590, 592; St. Tr. 21.

er projects, amounts to levying war. The traveling of individuals to the place of rendezvous is not sufficient; but the meeting of particular bodies of men and their marching from places of partial, to a place of general rendezvous, is such an assemblage as constitutes a levying of war.

A person may be committed for a crime by one magistrate upon an affidavit made before another. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths.

Quere, whether upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the affiant, be admissible evidence?

The clause of the 8th section of the act of Congress, "for the punishment of certain crimes against the United States," vol. 1, p. 103, which provides that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state shall be in the district where the offender is apprehended, or into which he may be first brought," applies only to offenses committed on the high seas, or in some river, haven, basin or bay, not within the jurisdiction of a particular state, and not to the territories of the United States, where regular courts are established, competent to try those offenses.

The word "apprehended," in that clause of the act, does not imply a legal arrest, to the exclusion of a military arrest or seizure.

C. Lee moved for a habeas corpus to the marshal of the District of Columbia, to bring up the body of Samuel Swartwout, who had been committed by the circuit court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

And on a subsequent day, Harper made a similar motion in behalf of Erick Bollman, who had also been committed, by the same court on a like charge.[1]

76*] *The order of the court below, for their commitment, was in these words:

"The prisoners, Erick Bollman and Samuel Swartwout, were brought up to court in custody of the marshal, arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Mead, and the court went into further examination of the charge: Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody until they shall be discharged in due course of law."[2]

The oaths referred to in the order for commitment were affidavits in writing, and were filed in the court below.[3]

*C. Lee, for Swartwout. [*77

Nothwithstanding the decisions of this court in *Hamilton's Case*, 3 Dall. 17, and in *Burford's Case, ante*, vol. 3, p. 448, we are now called upon to show that this court has power to issue a writ of habeas corpus.

By the constitution of the United States, art. 3, s. 2, the grant of jurisdiction to the courts of the United States is general, and extends to all cases arising under the laws of the United States. This court has either original or appellate jurisdiction of every case, with such exceptions and under such regulations as Congress has made or shall make. If Congress has not excepted any case, then it has cognizance of the whole.

The appellate jurisdiction given by the constitution to this court includes criminal as well as civil cases, and no act of Congress has taken it away. This court derives its power and its jurisdiction not from a statute, but from the constitution itself. No legislative act is necessary to give powers to this court. It is independent of the legislature; and in all the late discussions upon the question of putting down courts, it was admitted on all hands that the legislature could not destroy the Supreme Court.

But if this court has no criminal jurisdiction to hear and determine, yet they may have a criminal jurisdiction to a certain extent, viz., to inquire into the cause of commitment and admit to bail. This court has no original jurisdiction, except in certain cases; yet it has power to issue a mandamus in cases in which it has no appellate jurisdiction by writ of error or appeal, and will issue a prohibition even in a criminal case, if a circuit court should undertake to try it in a state in which the crime was not committed. So also if a district court should be

1.—On a former day (Feb. 5,) C. Lee had made a motion for a habeas corpus to a military officer to bring up the body of James Alexander, an attorney at law at New Orleans, who, as it was said, had been seized by an armed force under the orders of General Wilkinson, and transported to the city of Washington.

CHASE, *J.*, then wished the motion might lay over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a habeas corpus in any case.

JOHNSON, *J.*, doubted whether the power given by the act of Congress, vol. 1, p. 101, of issuing the writ of habeas corpus was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.

CHASE, *J.*, agreed that either of the judges might issue the writ, but not out of his peculiar circuit.

MARSHALL, *Ch. J.* The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court to have the motion made in a more solemn manner tomorrow, when you may come prepared to take up the whole ground. [But in the meantime Mr. Alexander was discharged by a judge of the circuit court.]

2.—The warrant by which they were brought before the court was as follows:

DISTRICT OF COLUMBIA, to wit:

The United States of America, to the marshal of the District of Columbia, greeting:

Whereas there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Mead, *(Seal)* and William Wilson, to believe that Erick Bollman, commonly called Doctor Erick Bollman, late of the city of Philadelphia, in the state of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New York, in the state of New York, gentleman, are guilty of the crime of treason against the United States of America;

These are, therefore, in the name of the said United States, to command you that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said district, and them safely keep, so that you have their bodies before the circuit court of the District of Columbia, for the county of Washington, now sitting at the capitol, in the city of Washington, immediately to answer into the United States of America of and concerning the charge aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness the Honorable William Cranch, Esq., Chief Judge of the said court, this 27th day of January, 1807.

WILLIAM BRENT, *Clerk.*

Issued 27th day of January, 1807.

3.—For these affidavits, see Appendix, Note (A).

proceeding upon a matter out of its jurisdiction, this court would grant a prohibition.

By the judiciary act, s. 14, vol. 1, p. 58, "All the before-mentioned courts" (and the Supreme Court was the Court last mentioned in the preceding section) "shall have power to issue writs 78*] of *scire facias*, habeas corpus, *and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." "And either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment: Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

It has been suggested that the words "and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," forbid the issuing of a habeas corpus, but in a case where it is necessary for the exercise of the court's jurisdiction. But the words "necessary," &c., apply only to the "other writs not specially provided for."

In order to restrict in some degree the general expression "all other writs," the subsequent words are used. The writ of habeas corpus was particularly named, because it would not (in all cases where it ought to be granted) come under the general denomination of writs necessary for the exercise of the jurisdiction of the court issuing it.

But admitting, for argument, that a writ of habeas corpus cannot issue but where it is necessary for the exercise of the jurisdiction of the court issuing it, yet the term "jurisdiction" means the whole jurisdiction given to the court; and as this court has, by the constitution, jurisdiction in criminal cases, which jurisdiction is not taken away by any statute, it is a writ necessary for the exercise of its jurisdiction. Again by the 33d section of the same act, "upon arrests in criminal cases, where the punishment may be death, bail shall not be admitted but by the *Supreme* or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their dis- 79*] cretion therein, regarding the nature *and circumstances of the offense, and of the evidence and usages of law." By this section the Supreme Court has jurisdiction to admit a prisoner to bail in criminal cases punishable with death, and for that purpose to examine into the nature and circumstances of the offense, and of the evidence. For the exercise of this jurisdiction the writ of habeas corpus is necessary. There is no other writ, "agreeable to the usages of law," which will answer the purpose.

It is doubtful whether a judge of this court can issue the writ while the court is sitting, and in a district in which he has no authority to act as a circuit judge.

If it be said that the writ can only issue where it is in exercise of appellate jurisdiction, we say it is appellate jurisdiction which we call upon this court to exercise. The court below has made an illegal and erroneous order, and we appeal in this way, and pray this court to correct the error.

Rodney (Attorney General) declined arguing the point on behalf of the United States.

Harper, for Bollman.

There are two general considerations:

1. Whether this court has the power generally of issuing the writ of *habeas corpus ad subjiciendum?*

2. If it has the power generally, whether it extends to commitments by the circuit court?

1. The general power of issuing this great remedial writ is incident to this court as a Supreme Court of record. It is a power given to such a court by the common law. Every court possesses necessarily certain incidental powers as a court. This is proved by every day's practice. If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could not imprison for contempts in its presence. It could not compel the attendance of a witness, nor oblige him to testify. It could not compel *the attendance of jurors, in cases [*80 where it has original cognizance, nor punish them for improper conduct. These powers are not given by the constitution, nor by statute, but flow from the common law. This question is not connected with another, much agitated in this country, but little understood, viz., whether the courts of the United States have a common law jurisdiction to punish common law offenses against the government of the United States. The power to punish offenses against the government is not necessarily incident to a court. But the power of issuing writs of habeas corpus, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature for the protection of the citizen.

It being clear, then, that incidental powers belong to this in common with every other court, where can we look for the definition, enumeration and extent of those powers, but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our judicial systems, of all our legislative and constitutional provisions. It is not possible to move a single step in any judicial or legislative proceeding, or to execute any part of our statutes, or of our constitution, without having recourse to the common law. The constitution uses, for instance, the terms "trial by jury" and habeas corpus." How do we ascertain what is meant by these terms? By a reference to the common law. This court has power, in some cases, to summon jurors, and examine witnesses. If an objection be made to the competence of a witness, or a juror be challenged, how do you proceed to ascertain the competence of the witness or the juror? You look into the common law. The common law, in short, forms an essential part of all our ideas. It informs us that the power of issuing the writ of habeas corpus belongs incidentally to every superior court of record; that it is part of their inherent rights and duties thus to watch over and protect the liberty of the individual.

Accordingly we find that the court of common pleas in England, though possessing no criminal

81*] jurisdiction *of any kind, original or appellate, has power to issue this writ of habeas corpus. This power it possessed by the common law, as an incident to its existence, before it was expressly given by the habeas corpus act. This appears from *Bushell's case*, reported in Sir Thomas Jones, 18, and stated in *Wood's case*, 3 Wilson, 175, by the Chief Justice, in delivering the opinion of the court. *Bushell's case* was shortly this: A person was indicted at the Old Bailey, in London, for holding an unlawful conventicle. The jury acquitted him contrary to the direction of the court on the law. For this some of the jurors, Bushell among the rest, were fined and imprisoned by the court at the Old Bailey. Bushell then moved the court of common pleas for a writ of habeas corpus, which, after solemn argument and consideration, was granted by three judges against one. Bushell was brought up, and the cause of his commitment appearing insufficient, he was discharged. This took place before the habeas corpus act was passed, and this is a conclusive authority in favor of the doctrine for which we contend. *Wood's case*, 3 Wilson, 175, and 3 Bac. Abr. 3, are clear to the same point.

Whence does the count of common pleas derive this power? Not from its criminal jurisdiction; for it has none. Not from any statute; for when *Bushell's case* was decided, there was no statute on the subject. Not from any idea that such a power is necessary for the exercise of its ordinary functions; for no such necessity exists, or has ever been supposed to exist. But from the great protective principle of the common law, which, in favor of liberty, gives this power to every superior court of record, as incidental to its existence.

The court of chancery in England possesses the same power by the common law, as appears from 3 Bac. Abr. 3. This is a still stronger illustration of the principle, for the court of chancery is still further removed, if possible, than the court of common pleas, from all criminal jurisdiction, still more exempt from the necessity of such a power for the exercise of its peculiar functions.

The court of exchequer also, as appears from the same authorities, though wholly destitute of 82*] criminal jurisdiction, *possesses the power of relieving, by habeas corpus, from illegal restraint.

Hence it appears that all the superior courts of record in England are invested by the common law with this beneficial power, as incident to their existence. The reason assigned for it in the English law books is, that the King has always a right to know, and by means of these courts to inquire, what has become of his subjects. That is, that he is bound to protect the personal liberty of his people, and that these courts are the instruments which the law has furnished him for discharging his high duty with effect.

It may then be asked, whether the same reasons do not apply to our situation, and to this court. Have the United States, in their collective capacity, as sovereign, less right to know what has become of their citizens, than the King or government of England to inquire into the situation of his subject? Are they under an obligation less strong, to protect individual liberty? Have not the people as good a right as those of England to the aid of a high and responsible court for the protection of their persons? Is our situation less advantageous in this respect than that of the English people? Or have we no need of a tribunal, for such purposes, raised by its rank in the government, by its independence, by the character of those who compose it, above the dread of power, above the seductions of hope and the influence of fear, above the sphere of party passions, factious views, and popular delusion? Of a tribunal whose members, having attained almost all that the constitution of their country permits them to aspire to, are exempted, as far as the imperfection of our nature allows us to be exempted, from all those sinister influences that blind and swerve the judgments of men—have nothing to hope, and nothing to fear, except from their own consciences, the opinion of the public, and the awful judgment of posterity? It is in the hands of such a tribunal alone, that in times of faction or oppression, the liberty of the citizen can be safe. Such a tribunal has the constitution created in this court, and can it be imagined that this wise and beneficent constitution intended to deny to the citizens the valuable privilege *of resorting to this court for the protec- [*83 tion of their dearest rights?

On this ground alone the question might be safely rested; but there is another, not stronger indeed, but perhaps less liable to question.

Congress has expressly given this power to this court, by the 14th section of the act of 24th September, 1789, commonly called the judiciary act. This section, according to its true grammatical construction, and its apparent intent, contains two distinct provisions. The first relates to writs of *scire facias* and habeas corpus; the second to such other writs as the court might find necessary for the exercise of their jurisdiction. As to writs of *scire facias* and habeas corpus, which are of the most frequent and the most beneficial use, Congress seems to have thought proper to make a specific and positive provision. It was clearly and obviously necessary that such writs should be issued, not merely to aid the court in the exercise of its ordinary jurisdiction, but for the general purposes of justice and protection. The authority, therefore, to issue these writs, is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers which such courts usually possess.

But the legislature foresaw that many other writs might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction, such as subpœnas, writs of *venire facias*, *certiorari*, *fieri facias*, and many others known to our law. To attempt a specific enumeration of these writs might have been productive of inconvenience; for if any had been omitted, there would have been doubts of the power to issue them. Congress, therefore, instead of a specific enumeration of them, wisely chose to employ a general description. This description is contained in the words, "all other writs which may be necessary for the exercise of their respective juris-

dictions, and agreeable to the principles and usages of law."

84*] *The true grammatical construction of the sentence accords with this construction. The words of restriction or description ("which may be necessary for the exercise of their respective jurisdictions," &c.), stand here as a relative, and must refer to the next antecedent. There are two antecedents: 1st. "Writs of *scire facias* and habeas corpus;" and, 2d. "All other writs. The second is the next antecedent to which, of course, the relative terms "which may be necessary," &c., must relate and be confined. Those words, therefore, cannot, either in grammatical construction, or according to the plain object of the legislature, be considered as restricting the grant of power in the first part of the sentence; but, merely as explaining the extent of the power given in the second part.

It is clear, then, that this section bestows on this court the power to grant writs of habeas corpus without restriction. Does this power extend to the application now before the court?

The term habeas corpus is a generic term, and includes all kinds of writs of habeas corpus; as well the writ *ad subjiciendum*, as *ad testificandum*, or *cum causa*, &c.

But the 33d section of the same act must remove all doubt upon that point; for when it gives this court power to admit to bail in cases punishable with death, and commands this court to use their "discretion therein, regarding the nature and circumstances of the offense and of the evidence," it takes it for granted that the prisoner is to be brought before the court for the purpose of inquiring into those circumstances. If this section does not give the power, it shows at least that the legislature considered it as given before by the 14th section. Again, the latter part of the 14th section gives to each of the justices of this court, and of the district courts, the power for which we contend. It cannot be presumed that Congress meant to give each judge singly a power which it denied to the whole court. That it confided more in the individual members of the court than in the court itself. That it considered the weight, dignity, character and 85*] independence of each individual *member as a more firm barrier against oppression than those of the tribunal itself, sitting for the exercise of the highest judicial functions known to our law.

This part of the statute is remedial and beneficial to the subject, and it is a sound maxim of law, that such statutes are to be construed liberally in favor of liberty.

Considering it as settled that Congress intended to give this court the power to issue writs of *habeas corpus ad subjiciendum*, the next question is, whether Congress had authority by the constitution, to confer that power.

The authority of Congress must be tested by the constitution, and if they should appear to this court to have exceeded the limits there prescribed, this court must consider their act void.

The power of the judiciary to collate an act of Congress with the constitution when it comes judicially before them, and of declaring it void if against the constitution, is one of the best barriers against oppression, in the fluctuations of action, and in those times of party violence which necessarily result from the operation of the human passions in a popular government. In the violence of those political storms which the history of the human race warns us to expect, this shelter may indeed be found insufficient; but weak as it may be, it is our best hope, and it is the part of patriotism to uphold and strengthen it to the utmost. But it is a power, of a delicacy inferior only to its importance; and ought to be exercised with the soundest discretion, and to be reserved for the clearest and the greatest occasions.

The question whether Congress could confer upon this court the power of issuing the writ of *habeas corpus ad subjiciendum*, depends upon another question, viz., whether this power or jurisdiction be in its nature original or appellate. The original jurisdiction of this court being limited to certain specified cases, of which this is not one, it follows, that if the issuing such a writ of habeas corpus be an exercise of original jurisdiction, *the power to issue [*86 it cannot be conferred on, or exercised by, this court.

This principle was established by the case of *Marbury v. Madison*, (*ante*, vol. 1, p. 175.) where the court said that "to enable this court to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms; and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true. Yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is in effect the same as to sustain an original action for that paper; and, therefore, seems not to belong to appellate but to original jurisdiction."

This passage needs no comment. The criterion which distinguishes appellate from original jurisdiction is, that it revises and corrects the decisions of another tribunal; and a mandamus may be used when it is for the accomplishment of such a purpose.

The object of the habeas corpus now applied for, is to revise and correct the proceedings of the court below, (under whose orders the prisoners stand committed,) so far as respects the legality of such commitment. If that court had given judgment against the applicants in the sum of one hundred dollars, the power to revise that judgment would have been appellate, and might have been given by Congress to this court. From a decision which might take a few dollars from their pockets they might be relieved. Shall the relief be rendered impossible because the decision deprives them of all that can distinguish a freeman from the most abject slave, of all that can render life desirable?

If the question, respecting the power of this court, under the constitution and the act of Congress, if not *under the common law, [*87 to issue the writ of *habeas corpus ad subjiciendum*, were still open, it ought, on these princi-

ples and authorities, to be decided in our favor. But it is not open. It has been twice solemnly adjudged in this court. First in the case of *Hamilton*, 3 Dall. 17, not long after the court was organized; and very recently in the case of *Burford*. (*Ante*, vol. 3, p. 448.) We contend that the case is settled by these decisions, and that it is no longer a question whether this court has the power which it is now called upon to exercise.

The exercise of this power, the benefit of these decisions, the protection of the law thus established, we claim as a matter of right, which this honorable court cannot refuse.

Shall it be said that no part of our law is fixed and settled, except what is positively and expressly enacted by statute? On the contrary, is it not certain that by far the greatest portion of that law on which our property, our lives and our reputation depend, rests solely on the decisions of courts? Shall it be said that all this important and extensive branch of the law is uncertain and fluctuating, dependent on the ever varying opinions and passions of men, and liable to change with every change of times and circumstances? Shall it be said that each individual judge may rightfully disregard the decisions of the court to which he belongs, and set up his own notions, his prejudices, or his caprice, in opposition to their solemn judgment? This is not the principle of our law; this is not the tenure by which we hold our rights and liberties. *Stare decisis* is one of its favorite and most fundamental maxims. It is behind this wise and salutary maxim that courts and judges love to take refuge, in times and circumstances that might induce them to doubt of themselves, to dread the secret operation of their own passions and prejudices, or those external influences, against which, in the imperfection of our nature, our minds can never be sufficiently guarded. In such times and circumstances, a judge will say to himself, "I know not how far I might be able, in this case, 88*] to form an impartial opinion. *I know not how far my judgment may be blinded or misled by my own feelings or the passions of others, by the circumstances of the moment, or the views and wishes of those with whom I am connected. But here is a precedent established under circumstances which exclude all possibility of improper bias. This precedent is, therefore, more to be relied on than my judgment; and to this I will adhere as the best and only means of protecting myself, my own reputation, and the safety of those who are to be affected by my decision, against the danger of those powerful, though imperceptible influences, from which the most upright and enlightened minds cannot be considered as wholly exempt."

There have, indeed, been instances where precedents destructive to liberty, and shocking to reason and humanity, established in arbitrary and factious times, have been justly disregarded. But when in times of quiet, and in cases culculated to excite no improper feeling, precedents have been established in favor of liberty and humanity, they become the most sacred as well as the most valuable parts of the law, the firmest bulwark for the rights of the citizens, and the surest guardian for the consciences and the reputation of judges.

Such are the precedents on which we rely.

The case of Hamilton was decided soon after the establishment of the government, when little progress had been made in the growth of party passions and interests, and when whatever of political feeling can be supposed to have existed in the court, was against the prisoner. Yet this beneficial power was exerted for his relief. He was brought before this court by habeas corpus, and was discharged. The precedent thus established was, by this court, fifteen years afterwards, in the case of Burford, declared to be decisive.

The case of Burford was wholly unconnected with political considerations, or party feelings. The application was made on behalf of an obscure individual, strongly suspected, though he could not be legally convicted, of a most odious and atrocious crime. The *abhorrence [*89 of his supposed offense, the strong circumstances which appeared against him, the course of his life, his general character, and the universal belief entertained of his guilt, all combined to excite against him every honest feeling of the human heart. Yet he had the benefit of one of those precedents which we now claim; and in his case the authority of another and a more solemn decision was added to the doctrine for which we contend.

Again let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of feeling, and of prejudice? If so, deplorable indeed is our condition.

Misera est servitus, ubi lex est vaga aut incerta.

This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law and by the agency of the courts, is constant and active.

2. The second head of inquiry is, whether the power to issue writs of habeas corpus be restricted by the circumstance of the commitment having been made by the circuit court of the District of Columbia.

Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that Congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible, and duties so unimportant or so odious, as necessarily *and certainly to [*90 exclude every man of character, talents and respectability of every party? Will not such courts, therefore, be necessarily filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can anything like independence or integrity be expected from such judges? Will they not act continually under the influ-

ence, not merely of their own party passions and prejudices, but of hope and of fear, those great preverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of habeas corpus, is to shut the mouth of the Supreme Court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used? We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance. We too are men of like passions, and it behooves us, ere we have reached these fatal extremes, to provide, as far as the imperfection of human nature will permit, against the dangers which have assailed others, and which threaten us. The best mode of making this provision is to establish salutary maxims in quiet times, and to adhere to them steadily. Let it be now declared that there resides in this high tribunal (as respectable as our constitution can make it, and as independent as the nature of our government permits) a power to protect the liberty of the citizen, by the writ of habeas curpus, against the enterprises of inferior courts, which may be constituted for the purposes of oppression or revenge, and you place one barrier more round our safety.

91*] *What stubborn maxim of law, what binding authority, requires the admission of a principle so repugnant to all our feelings and to the spirit of the constitution? On what ground or reason of law can it be pretended that a commitment by the circuit court stops the course of the writ of habeas corpus?

Is it because the circuit court has competent jurisdiction to commit? This cannot be the reason, for every justice of the peace has competent jurisdiction to commit, and the reason, therefore, if it existed, would destroy the whole effect of the writ of habeas corpus.

Is it because the circuit court has competent jurisdiction to try the offense? This cannot be the reason, for in *Bushell's case*, formerly cited from 3 Wilson, 175, it appears that a commitment by the sessions at the Old Bailey, a criminal court of very high authority, and which had jurisdiction over the offense, did not prevent the court of common pleas from relieving by habeas corpus.

So also by the forest laws in England, in former times, the judge of the forest had jurisdiction for the punishment of offenses within the forest; and yet it appears, from 2 Inst. 290, that a person committed by the judge of the forest for such an offense, might be relieved by habeas corpus from the superior courts.

It is well known, too, that by the laws of England, the king has power to erect courts by special commission, with power to try and punish offenses. From *Wood's case*, 3 Wils. 173, it appears that a person committed by such commissioners, in a case which they had authority to try, may be relieved by habeas corpus. This, therefore, cannot be the reason.

Is it because the circuit court is a court of record? So is the court of *piepoudre*. But can it be imagined that if that court were to commit a man in England, the power of relieving by habeas corpus from the superior courts would be thereby taken away? Congress may erect as many inferior courts of record as they please. Can it be imagined that by instituting such *courts they can, in effect, suspend [*92 the writ of habeas corpus indefinitely, and in cases where the suspension is expressly forbidden by the constitution?

This power, moreover, has been shown to be appellate; and it is of the very essence of appellate power to review the decisions of inferior courts of record. Can it be imagined that such a decision may be reviewed where a small amount of property only is affected, and that there is no relief where it deprives a citizen of his liberty?

Between superior courts of record, of equal authority and co-ordinate rank, there may properly be a comity observed which would prevent them from attempting to interfere with the decisions of each other. Perhaps in England the court of common pleas would not attempt to release, by habeas corpus, a person committed by the exchequer, or chancery, and *vice versa*. But this comity cannot exist between superior and inferior courts; and there is no doubt that the court of king's bench, which is a court superior to the common pleas and the exchequer, would grant a writ of habeas corpus, for any person imprisoned by either of those courts for a criminal matter.

But this point does not rest on general reasoning alone, however strong. It has been expressly adjudged by this court. The case of *Burford*, formerly cited, is a complete authority on this point as well as on the former. *Burford's case* had been acted on judicially by the circuit court of this district. He stood committed under its decision. That court did not, indeed, commit him in the first instance, but he was brought before it on habeas corpus; the order of commitment made by the justices of the peace was altered and modified, and he was committed by a new order from the circuit court. This recommitment was as complete an adjudication upon the subject as the commitment in the present case. One was as much a determination on record by the circuit court as the other; and one can no more than the other, preclude the exercise of this court's power to relieve by habeas corpus.

*Again, therefore, we claim the benefit [*93 of this decision. We again appeal to the great maxim *stare decisis;* we again deprecate the mischiefs that must ensue, if precedents in favor of liberty, made in times and under circumstances the most favorable to correct decision, should be disregarded in other times, and in situations where the existence of passion, prejudice and improper influence may be dreaded. We deprecate the dangers and mischiefs that must ensue, should the laws, on which our dearest rights depend, be thus left to fluctuate

on the ever varying tide of circumstances and events, and we trust that the protecting power of this high tribunal will now fix this great landmark of the constitution, and will place our liberties, as far as the imperfection of human things can permit, beyond the reach of opinion, of caprice, and of sinister views.

February 13. MARSHALL, *Ch. J.*,[1] delivered the opinion of the court.

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, 94*] that for the meaning *of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the judiciary act (Laws U. S. vol. 1, p. 58), has been considered as containing a substantive grant of this power.

It is in these words: "That all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

*The only doubt of which this section [*95 can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding.

It has been urged, that in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

It may be worthy of remark, that this act was passed by the first Congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly —when we say the writ of habeas corpus, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.

*The section proceeds to say, that [*96 "either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

It has been argued that Congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States; the right to grant this important writ is given, in this sentence, to every judge of the circuit, or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his

1.—The only judges present when these opinions were given were, Marshall, Ch. J.; Washington, Johnson, and Livingston, Justices. Cushing, J. and Chase, J. were prevented by ill health from attending.

chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the Supreme Court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of habeas corpus, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable 97*] *the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of habeas corpus, as stated and accurately defined by Judge Blackstone. (3 Bl. Com. 129), are, 1st, The writ of *habeas corpus ad respondendum*, "When a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party, having a right to sue in this court, (as a state at the time of the passage of this act, or a foreign minister,) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the United States, or of a state court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and, consequently, could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, and he would already be in charge of the person who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same gaol in which he would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by habeas corpus. They are not inferior courts, because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of *habeas corpus ad satisfaciendum*, "When a prisoner hath had judgment against him in an action, and the plaintiff is 98*] desirous to bring him up to *some superior court to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c., "Which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of Congress; but the power to bring a person up that he may be tried in the proper jurisdiction, is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et recipiendum*, "Which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ*,) to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causâ* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a *state court against a person[*99 having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which, on this limited construction, would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso. "That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of habeas corpus, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view

of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 33d section throws much light upon this question. It contains these words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a 100*] district *court who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of habeas corpus for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If, by the sound construction of the act of Congress, the power to award writs of habeas corpus in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If, then, this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (*United States v. Hamilton*, 3 Dall. 17.)

If the act of Congress gives this court the power to award a writ of habeas corpus in the present case, it remains to inquire whether that act be compatible with the constitution.

In the mandamus case, (*ante*, vol. 1, p. 175, *Marbury v. Madison*,) it was decided that this Court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that case has 101*] *distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol.

It has been demonstrated at the bar, that the question brought forward on a habeas corpus, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts.

The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature.

But this point also is decided in *Hamilton's Case* and in *Burford's Case*.[1]

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislature will be expressed, this Court can only see its duty, and must obey the laws.

The motion, therefore, must be granted.

JOHNSON, *J*. In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the opinion that this court has not authority to issue the writ of habeas corpus now moved for. The prisoners are in confinement under a commitment ordered by the superior *court of the District of [*102 Columbia, upon a charge of high treason. This motion has for its object their discharge or admission to bail, under an order of this court, as circumstances upon investigation shall appear to require. The Attorney General having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

Two questions were presented to the consideration of the court.

1st. Does this court possess the power generally of issuing the writ of habeas corpus?

2d. Does it retain that power in this case after the commitment by the district court of Columbia?

In support of the affirmative of the first of these questions, two grounds were assumed.

1st. That the power to issue this writ was necessarily incident to this court, as the supreme tribunal of the union.

2d. That it is given by statute, and the right to it has been recognized by precedent.

On the first of these questions it is not necessary to ponder long; this court has uniformly maintained that it possesses no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision must, then, rest wholly on the due construction of the constitution and laws of the union, and the effect of precedent, a subject which certainly presents much scope for close legal inquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States in one Supreme Court, and in such inferior courts as the Congress may from *time to time establish. The [*103 second section declares the extent of that power, and distinguishes its jurisdiction into original and appellate.

The original jurisdiction of this court is restricted to cases affecting ambassadors or other

1.—At February term, 1806, in this court.

public ministers, and consuls, and those in which a state shall be a party. In all other cases within the judicial powers of the union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted nor extended. In the latter its powers are subjected to the will of the legislature of the union, and it can exercise appellate jurisdiction in no case, unless expressly authorized to do so by the laws of Congress. If I understand the case of *Marbury v. Madison*, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent, then, I presume, on the counsel, in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court in its original jurisdiction, or that, in its appellate capacity, the power is expressly given by the laws of Congress.

This it is attempted to do, by the fourteenth and thirty-third sections of the judiciary act, and the cases of *Hamilton* and *Burford*, which occurred in this Court, the former in 1795, the latter in 1806.

How far their position is supported by that act and those casos, will now be the subject of my inquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of examining into the cor- **104*]** rectness or consistency of its own *decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of tnis Court, which, in the case of *The United States v. Moore*, February, 1805, acknowledged that in the case of *The United States v. Simms*, February, 1803, it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice.

The claim of the prisoners, as founded on precedent, stands thus. The case of *Hamilton* was strikingly similar to the present. The prisoner had been committed by order of the district judge on a charge of high treason. A writ of habeas corpus was issued by the Supreme Court, and the prisoner bailed by their order. The case of *Burford* was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted.

It appears to my mind that the case of *Hamilton* bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in *Marbury v. Madison*. In this case it was decided that Congress could not vest in the Supreme Court any original powers beyond those to which this court is restricted by the constitution. That an act of Congress vesting in this court the power to issue a writ of mandamus in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional, and void. In the case of *Hamilton* the court does not assign the reasons on which it founds its decision, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original power, *and the principle in *Mar-* [**105** *bury v. Madison* applies as much to the issuing of a habeas corpus in a case of treason, as to the issuing of a mandamus in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

It is necessary to premise that the case of treason is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case, is in these words: "All the before-mentioned courts (of which this is one) of the United States shall have power to issue writs of *scire facias*, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." I do not think it material to the opinion I entertain what construction is given to this sentence. If the power to issue the writs of *scire facias* and habeas corpus be not restricted to the cases within the original or appellate jurisdiction of this court, the case of *Marbury* and *Madison* rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause without taking the whole together; it consists of but one sentence, intimately connected throughout, and has for its object the creation of those powers which probably would have vested in the respective courts without statutory provision, as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and habeas corpus, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause, in which a power is vested in the individual judges to issue the writ of habeas corpus, expressly for the purpose of inquiring into the cause of commitment. That part of the thirty-third section of the judiciary act which relates to this subject is in the following words: "And *upon [**106** all arrests in criminal cases, bail shall be admitted, except where the punishment is death, in which cases it shall not be admitted but by

the Supreme or a circuit court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and usage of law."

On considering this act it cannot be denied that if it vests any power at all, it is an original power. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted." I quote the words of the court in the case of *Marbury v. Madison.*

And so far is this clause from giving a power to revise and correct, that it actually vests in the district judge the same latitude of discretion by the same words that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe that the district court, or any individual district judge, possesses the same power to revise our decision, that we do to revise theirs; nay, more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which, according to our own principle, we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act? There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be subjected to the laws of the state near which he resides. This court may then be called upon to exercise an original criminal jurisdiction. If the power of this court to bail be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means of redress are still held out to the citizen, if deprived of his liberty; and this surely must have been the intention of the legislature. It never could have been contemplated that the mandates of this court **107*]** *should be borne to the extremities of the states, to convene before them every prisoner who may be committed under the authority of the general government. Let it be remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of habeas corpus. This application is not made to us as at chambers, but to us as holding the Supreme Court of the United States, a creature of the constitution, and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion. One more observation, and I dismiss the subject.

In the case of *Burford*, I was one of the members who constitued the court. I owe it to my own consistency to declare that the court were then apprized of my objections to the issuing of the writ of habeas corpus. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: the gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defense of his motion, imposed on me the necessity of vindicating my opinion. I submitted in silent deference to the decision of my brethren.

In this case I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.

*February 16. The marshal of the **[*108** District of Columbia having returned upon the habeas corpus, that he detained the prisoners by virtue of the before recited order of the circuit court of that district,

C. Lee now moved that they should be discharged; or at least admitted to bail; and contended,

1. That from the record of the circuit court, and upon the face of the proceedings, the imprisonment was illegal and oppressive; and,

2. That if the commitment was not illegal upon its face, yet, as the order of the court refers to the testimony on which it was founded, it will appear to be illegal upon the whole proceedings.

The commitment is not for trial at any particular time, before any particular court, nor in any particular place.

By the 3d article of the constitution of the United States, the trial of crimes shall be in the state where they shall have been committed; but when not committed in any state, the trial shall be at such place or places as Congress may by law have directed. So by the 29th section of the judiciary act of 1789, vol. 1, p. 67, in all cases punishable with death, the trial shall be had in the county where the offense was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence; and by the 33d section of the same act, p. 73, offenders are to be arrested and imprisoned or bailed for trial before such court of the United States, as by that act has cognizance of the offense; and copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case, and if the commitment be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of the district where the delinquent is imprisoned to issue a warrant for the removal of the offender to the district in which the trial is to be had.

*These are provisions for a speedy **[*109** and fair trial, in obedience to the constitution; for it has always been considered as necessary to a fair trial that it should be where the witnesses may easily attend, and where the party is known. The 6th amendment to the constitution provides that the accused "shall enjoy the

right to a speedy and public trial by an impartial jury of the state and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law."

By the act for the punishment of certain crimes, s. 8, vol. 1, p. 103, it is enacted, that "the trial of crimes committed" "in any place out of the jurisdiction of any particular state shall be in the district where the offender is apprehended, or into which he may first be brought."

By the English habeas corpus act, whose provisions are considered as extending to cases even out of the act, the prisoner may petition the court for trial at the first term, and if not then tried he is entitled to bail of course. If the commitment is in a district in which he cannot be tried, he will not be entitled to this privilege, for he is still to be removed to the place of trial. Hence it is necessary that the commitment should state the court before whom the trial is to be had. It is also necessary in order that the district judge may know where to send him. No person but the district judge has authority to send him to the place of trial, and if the commitment be not made by the district judge, it is impossible that he should judicially know where to send him, unless the place of trial be mentioned in the warrant of commitment.

It is also necessary that the accused may know where to collect his witnesses together.

The order of commitment ought also to have stated more particularly the overt act of treason. It is too vague and uncertain.

3. The testimony before the circuit court did not show probable cause.

110*] *By the 4th amendment to the constitution it is declared, "that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon PROBABLE CAUSE supported by oath or affirmation."

All the facts necessary to constitute this probable cause must appear upon oath or affirmation. It is not necessary, indeed, that there should be positive proof of every fact constituting the offense; but nothing can be taken into the estimate, when forming an opinion of the probability that the fact was committed by the person charged, but facts supported by oath or affirmation.

No belief of a fact tending to show probable cause, no hearsay, no opinion of any person, however high in office, respecting the guilt of the person accused, can be received in evidence on this examination.

The question, then, is, whether these affidavits exhibit legal proof of probable cause.

If the testimony be vague or ambiguous as to the person, or as to the offense, the court will apply the maxim of law, that every person is to be adjudged innocent unless proved to be guilty.

The facts stated in General Wilkinson's two affidavits of the 14th and 26th of December, consist of the letters of Col. Burr, the declarations of Swartwout, and the belief of General Wilkinson. Neither the letters of Col. Burr, nor the declarations of Swartwout, contain any ground for probable cause to believe that the prisoners, or either of them is guilty of treason: and General Wilkinson's belief, as he himself states, is founded upon those facts.

Mr. Lee went into a minute examination of those affidavits, to satisfy the court that the facts stated in them could at most prove an intent to set on foot an expedition against Mexico, in case of a war between this country and Spain. He contended that if the object was such an expedition at all events, and if they had intended *to force their way [*111 through the United States, for the purpose of attacking Mexico, and even if they had done so, they would not have been guilty of treason, but merely of lawless violence. Even if they had plundered the bank at New Orleans, or any private property, or had seized arms and vessels, the property of individuals, it would have been robbery, but not treason.

But the circumstance that no place of trial can be designated, is a sufficient reason for admitting them to bail. They certainly cannot be tried here, for it is not contended that they have here committed any offense; and this is not the district in which they were first apprehended or brought. They were seized by orders of a military officer 2,000 miles from this place, without any process of law or legal authority, and sent here to be disposed of by the executive. They have been committed for trial, not before any court, or in any particular district, and their imprisonment will be perpetual, unless government can find out when and where the offense was committed, and devise some means of transmitting them to the place of trial.

Mr. Lee attempted to discredit the affidavits of General Wilkinson by the circumstance that they were made, as he contended, to vindicate and justify the illegal seizure and transportation of the prisoners. He contended also that those affidavits ought to be totally discarded, because the oath upon which a warrant of arrest or commitment is to be grounded, must be made before the magistrate who is about to issue the warrant. He must be satisfied of the probable cause. The laws were open in New Orleans. General Wilkinson might have gone before a justice of peace there and made his oath, and obtained a warrant to arrest the prisoners. There was no necessity to proceed in this illegal and unprecedented manner.

F. S. Key, on the same side.

Unless this court can look behind the order for commitment, and examine the grounds upon which it was made, the writ of habeas corpus will be wholly useless; for every court or magistrate who commits a person to *prison, will take care to cover himself [*112 under the strict forms of law.

The constitution declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

An adherence to rebels is not an adherence to an enemy, within the meaning of the constitution. Hence, if the prisoners are guilty, it must be of levying war against the United States.

In England the books speak of two kinds of levying of war; direct and constructive. (East's Cr. Law, 67.) But there is only one kind in this country; and ought not to be in England.

By using the word "only," the constitution

meant to take away all pretense of constructive treason. Every man is to answer for his own acts only. If 100 men conspire, and only 50 actually levy war, the latter only are guilty as principals.

And what reason can be given why there should not be the same distinction between principal and accessory in treason, as in other crimes. In a republican government, whose basis is the affection of the people, it is unnecessary to guard against offenses of this kind with the same vigilance as in a monarchy or a despotism whose foundation is fear. (4 Tucker's Bl. Appendix, p. 39.) But if this construction of the constitution be not correct, and if the English authorities are to be considered in full force, it must be shown,

1st. That war has been levied; and,

2nd. That the prisoners are confederates in that war.

The affidavits of General Wilkinson are not authenticated so as to make them evidence. It does not appear that an oath was administered to him. The act to prescribe the mode of authenticating public acts, records and judicial proceedings, &c. is extended to the territory **113***] *of Orleans, by the act erecting that territory. (Vol. 7, p. 117.) And even if this be not strictly a judicial proceeding, yet it is within the meaning of that act.

The certificate of the Secretary of State[1] only shows that it appears by the official returns to his office, that J. Carrick and George Pollock had been appointed justices of the peace for the county of Orleans; but not that they had taken the oaths necessary to qualify them to act.

But if these affidavits are examinable they do not show any act of treason. They prove no assemblage of men nor military array. There is not a tittle of evidence that any two men have been seen together with treasonable intent, whether armed or not. The supposed letter from Col. Burr speaks indeed of choice spirits, but he does not tell us they are invisible spirits.

The affidavits of Meade and Wilson relate only to rumors derived from General Wilkinson, whose business it was, if he could get such rumors there by no other means, to create them himself.

The territory of Orleans, if it was to be revolutionized, might be revolutionized without levying war against the United States.

There is no evidence that the prisoners knew that Col. Burr had any treasonable projects in view. Even if he had such views, he might have held out to them, as he did to others, only the Spanish expedition.

Again, the bench-warrant issued in this case for the arrest of the prisoners was illegal. The court has no authority to issue a bench-warrant, but upon a presentment by a grand jury, **114***] or for an offense committed in *the presence of the court. It is not a power inherent in the court, nor given by any law. The act of Congress only gives to a judge out of court, or to a justice of peace, the power of arresting offenders. And it is a power inconsistent with a fair trial, because the court would thereby have prejudged the case, and decided upon the guilt of the prisoner. No such practice is known in Maryland, under whose laws the court below was acting.

February 17. Jones, attorney for the District of Columbia, mentioned to the court, that Hiort, being better prepared upon points of practice, would make some observations in support of the form of the commitment.

MARSHALL, *Ch. J.* I understand the clear opinion of the court to be, (if I mistake it my brethren will correct me,) that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.

Rodney, Attorney General.

The affidavit of General Wilkinson is sufficiently authenticated. The justices of peace in the territory of Orleans are officers of the United States; they are appointed by the governor of the territory, who is appointed by the President of the United States; and the secretary of the territory is bound by law to transmit copies of all the executive proceedings of the governor of the territory every six months to the President of the United States. (Laws U. S. vol. 7, pp. 112, 113.) All the officers of the United States are bound to take notice of each other.

The act of Congress respecting authentication of records, &c., is cumulative only. It does not repeal any former law.

There is some weight in the objection that the oath ought to be made before the magistrate who issues the *warrant. But [***115** one magistrate is as competent as another to administer the oath. The constitution is silent on the subject; and if it be taken before a person competent to administer it, it satisfies the provision of the constitution. How else could a criminal be arrested in one part of the United States, when the witness lived in another?

It is true that none of the evidence now offered would be competent on the trial; nor even if it appeared in a proper shape, would it be sufficient to convict the prisoners. But the question is whether, in this incipient stage of the prosecution, it is not sufficient to show probable cause.

The expedition against Mexico would not be treason, unless it was to be accomplished by means which in themselves would amount to treason. But if the constituted authorities of the United States should be suppressed but for one hour, and the territory of Orleans revolutionized but for a moment, it would be treason.

What would be treason by adhering to an enemy, if done towards a rebel, will be a levying of war. (3 Wilson's Lectures, 105, 4 Bl. Com. 92.)

In treason all are principals. There are no accessories. It has been argued (and the respectable authority of Judge Tucker is cited) that none are principals but those present at the treasonable act. The argument may have some weight, but it is a point at least doubtful,

1.—The Secretary of State of the United States had certified under the seal of his office, that George Pollock and James Carrick were appointed justices of the peace for the county of Orleans, in the territory of Orleans, in the year 1805, as appears by the official returns of the secretary of the said territory "remaining in the office of this department." Cranch 4.

and therefore ought to be left to be decided on the trial.

It is true that we cannot at present say exactly when and where the overt act of levying war was committed, but from the affidavits we think it fair to infer that an army has been actually levied and arrayed. The declaration of one of the prisoners was, that Col. Burr "was levying an armed body of 7,000 men." How the fact has turned out to be since we do not know; and it is also true that we do not know that any men have been seen collected in military array. But Dr. Bollman informed General Wilkinson that he had seen a letter from Col. Burr, in which he says that he should **116*]** be at Natchez *with 2,000 men on the 20th of December, and that he would be followed by 4,000 more, and that he could have raised 12,000 as easily as 6,000, but he did not think that number necessary. If Col. Burr was actually levying an armed body of men; if he expected to be at Natchez on the 20th of December with 2,000, and calculated upon being followed by 4,000 more, and if he found it so easy to raise troops, is there not a moral certainty that some troops at least have been raised and embodied.

It may be admitted that General Wilkinson was interested to make the worst of the story, but the declarations of the prisoners themselves are sufficient.

Jones, attorney for the District of Columbia, on behalf of the prosecution.

As to the objection that the commitment must be for trial in some court having jurisdiction over the offense.

It was uncertain whether any, and if any, what place was prescribed for the trial of this offense. But any court of the United States had jurisdiction to commit for trial by the act of Congress for the punishment of certain crimes, &c. vol. 1, p. 103, s. 8. "The trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought." Although the first part of the section speaks of certain crimes committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state," yet the last clause of the section is general, and in its terms applies to the trial of all crimes committed out of the jurisdiction of any particular state. This act of Congress is the only exercise of the provision of the 3d article of the constitution respecting crimes committed not within any state. Unless this act of Congress fixes the place of trial, there is no place prescribed, either by the law or the constitution, and the trial may as well be in the District of Columbia as elsewhere. But if this act of Congress does fix the place, then it is ob- **117*]** jected, *that this district is neither that in which the prisoners were apprehended, nor that into which they were first brought.

The answer is, that the act of Congress means the district in which they shall be legally apprehended, that is, arrested by process of law. It could not mean a mere military seizure. But whether the court below had or had not jurisdiction to try the prisoners, it clearly had jurisdiction to commit them; and if their commitment be irregular, this court will say how they ought to be committed. *Laws U. S.* vol. 1, p. 73, s. 33.

It is objected, that although the judges and justices have power to arrest, yet the courts have not, and therefore cannot issue a bench-warrant but upon the presentment of a grand jury, or for an offense committed in the presence of the court. And the practice of Maryland is cited. But it is stated that at Montgomery court, in Maryland, very lately, a venerable and ancient judge of that court did issue a bench-warrant for an offense not presented by the grand jury, nor committed in presence of the court.[1]

It is not necessary that the commitment should state the place of trial, nor that they are committed for trial. If at the time of commitment it be uncertain where they ought to be tried, they may be committed generally, until discharged by due course of law. In England it is only necessary that the commitment should be to some gaol in England. 2 Hawk. P. C. 120, b. 2, c. 16, s. 18.

As to the authentication of the affidavits of General Wilkinson, it being shown that Pollock and Carrick were duly appointed justices of the peace, and having *undertaken [***118** to act as such, it is to be presumed that they have taken the necessary oaths.

It is admitted that the constitution has prevented many questions as to the doctrine of treason. The intention of having a constitutional definition of the crime, was to put it out of the power of Congress to invent treasons. But it was impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.

Warlike array is not necessary. It is only a circumstance. 1 East's Cr. Law, 66. According to the English books, a direct levying of war, is a war directly against the person of the king. A constructive levying of war, is war against the government.

If men have been levied, and arms provided, with a treasonable intent, this is a sufficient levying of war, without warlike array.

The affidavit of General Eaton establishes the treasonable intent in Col. Burr. The question, then, is, whether that intent, or a knowledge of that intent, can be brought home to the prisoners. Mr. Jones here went into an argument to show the connection of the prisoners with Col. Burr, and their knowledge of his projects. He observed that his argument, on a former occasion, respecting the President's message to Congress, had been misunderstood. A state of war is a matter of public notoriety, and he had considered the President's message as evidence of that notoriety, it being a communication from the supreme executive in the course of his duty, to that department of government which alone could decide on the state of war.

He contended that no specific number, no

1.—F. S. Key stated that he was present at the transaction alluded to. The facts were, that after the court adjourned, and as the judge was going out of the court-house, a man who had been waiting in the yard assaulted a lawyer in the presence of the judge, for disrespectful language used by the lawyer in arguing a cause. The judge considered it as a contempt of court, and therefore directed a bench-warrant to issue.

sufficiency of force to accomplish the object, was necessary to constitute treason.

If soldiers are levied and officered, with a treasonable intent, and equipments prepared, so that they can readily lay hold of their arms; 119*] although no men are *actually armed; although only five men in a detachment should march to assemble at a place of rendezvous, and although there should be no warlike array, yet it would be treason. Anything which amounts to setting on foot a military expedition, with intent to levy war against the United States, is treason.

The distinction between those who are present at the overt act of levying war, and those who are confederated, adhering, acting and assisting, giving aid and comfort, is contrary to all analogy. In treason all are principals.

In murder, if two conspire, and one is acting and assisting at such a distance as to give aid, he is equally guilty with him who gave the wound.

It has been insinuated that General Wilkinson is to be considered as *particeps criminis*. If that were the case, it would be no disqualification of his testimony.

Treason is a greater crime in republics than in monarchies, and ought to be more severely punished.

Harper, in reply, congratulated his country on the triumph of correct principles, in the abandonment, on the part of the prosecution, of the dangerous doctrine, that executive messages were to be received as evidence in a criminal prosecution.

[Jones. The sole purpose for which we introduced the President's message, was to show that the assemblage of a military force by Col. Burr was a matter of notoriety. We did not attempt or wish to introduce it as direct evidence.]

Harper. To use an executive message in a court of justice, for any purpose of proof whatever, so as to aid in the commitment of a citizen under a criminal accusation; to introduce it as evidence of any fact; (of notoriety, for instance, which is a fact;) is to give it the effect of testimony, and is a direct violation of the constitution.

120*] *We object to the translation of the ciphered letter contained in General Wilkinson's affidavits, being admitted as evidence, because General Wilkinson has not sworn that it is a true translation, nor sent the original, with the key, so that the court can have a correct translation made. Nor is it proved that the original was written by Col. Burr, or by his direction, nor that the prisoners were acquainted with its contents.

Another objection to the affidavits is, that they were not made for the purpose of procuring an arrest. They were not made before the judicial officer on whose warrant the proceedings of the court were to be founded; and who would have been bound to cross-examine the witness, to sift the facts, and to judge how far they were proved, and how far they were sufficient to justify the proceedings. But, after a military arrest, the affidavits are drawn up by the author of the arrest, without cross-examination or inquiry, and were sworn to by him, as the justification of his conduct. The persons whom he has thus arrested are sent to a distant part of the country, and these affidavits are sent after them, to operate as the ground of their commitment and detention. No person can lawfully be committed on testimony so taken. In cases of arrests and commitments, the general rules of evidence are no further to be departed from than the necessity of the case requires. On application to a magistrate for a warrant of arrest, the evidence must necessarily be *ex parte*, but no other departure from the common rules of evidence is justifiable, because not necessary. It is a general rule of law respecting testimony, that it shall be taken before the tribunal which is to act upon it, or under the direction of that tribunal; that the person who is to decide, shall also inquire; that the inquiry shall not be before one tribunal, and the judgment pronounced by another. This rule, so important to the safety of persons accused, is equally applicable to arrests and commitments as to trials, and should, therefore, be equally observed. The party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine the witnesses produced against him, and by that means to explain circumstances which, at first view, might criminate him. But if the practice *which [*121 is attempted in this case be sanctioned by this court; if a military officer, or any other person, is to be permitted to seize a man, and send him 2,000 miles from the place of arrest, and from the place of the alleged transaction, and to send after him an *ex parte* affidavit as the ground of his subsequent commitment, the great security provided by law for the protection of innocence and liberty is broken down.

Mr. Harper then went into a minute examination of the contents of the affidavits, and contended that, if they could be considered by this court as evidence, they did not prove that treason had been committed, nor that the prisoners had participated in any crime or offense whatever.

February 18. Martin, on the same side.

The order for the commitment was erroneous in directing the prisoners to be committed to the prison of the court. It ought to have been to the marshal. 1 Salk. 348, *Bethel's Case;* 5 Mod. 19, S. C.

This court cannot remand them, or commit them, upon this habeas corpus, for any crime but that for which they were committed in the court below; and can only commit them for trial before some court. The only power given by the 33d section of the judiciary act, is to cause offenders to "be arrested; and imprisoned or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offense." The place of trial is to be decided by the place where the offense was committed.

The act of Congress for the punishment of certain crimes, s. 8, vol. 1, p. 103, does not apply to crimes committed in any territory of the United States in which there are courts of the United States having cognizance of the offense. It applies only to offenses committed upon the "high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state."

*The courts of the United States [*122 erected in the territory of Orleans are compe-

tent to try the offense of treason against the United States committed within that territory. By the 8th section of the act of Congress of 26th March, 1804, vol. 7, p. 117, erecting the territory of Orleans, a district court of the United States is established therein, having all the original powers and jurisdiction of a circuit court of the United States. And by the same act, the "act for the punishment of certain crimes against the United States" is extended to that territory.

It was, therefore, a wanton and unnecessary exertion of arbitrary power to send the prisoners here, where they cannot be tried. If there is any probability that a crime was committed by the prisoners, it is equally probable that it was committed in the territory of Orleans. It is at all events certain that it was not committed here. The word apprehended, in the act of Congress, cannot mean a legal arrest only. If it did, it would be in the power of a military commander to seize a man, and appoint the tribunal by which he shall be tried.

If it is the duty of this court to commit the prisoners for trial, it is equally its duty to bind over the witnesses to appear at the time and place of trial to testify in the case, and to return copies of the process, together with the recognizances of the witnesses, to the office of the clerk of the court having cognizance of the offense. This shows that, upon every commitment, the witnesses must be in the presence of the tribunal committing.

This court cannot commit, unless they first ascertain in what court the trial is to be had.

There is no legal evidence that General Wilkinson ever made oath to his statement. The certificate of the secretary is only that it appears by the return of the secretary of the territory of Orleans, that Pollock and Carrick were justices. A copy of that return ought to be certified.

123*] *February 19. The court not having made up an opinion, admitted the prisoners to bail until the next day. The Chief Justice stated that the court had difficulty upon two points, viz.:

1. Whether the affidavit of General Wilkinson was evidence admissible in this stage of the prosecution; and,

2. Whether, if admissible, his statement of the contents of the substance of a letter, when the original was in his possession, was such evidence as the court ought to notice.

If the counsel had any authorities on these points, the court said they would hear them.

February 20. The Chief Justice asked if the counsel had found any authorities on the points mentioned yesterday.

Rodney, Attorney General, said he had not; but he relied on general principles.

F. S. Key cited 3 T. R. 707, *The King v. The Inhabitants of Eriswell*, where the principal question was, whether the *ex parte* examination of the pauper taken before two justices, to whom no application was made for a removal of the pauper, was good evidence before two other justices, five years afterwards, upon an application for his removal, the pauper having in the meantime become insane. The judges of the court of king's bench were equally divided. But Grose, J. said, "nothing can be more unjust than that a person should be bound by evidence which he is not permitted to hear."

"The common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross-examine." Buller, J., who was opposed to Grose, upon the principal question, admitted, "that if the taking the examination were not a judicial act, but was merely *coram non judice*, it is *not evidence," and that "it must be a [*124 judicial act at the time it was taken, or cannot become so at all."

Lord Kenyon, Ch. J., said the two justices who took the examination "were not applied to for the purpose of making an order of removal; the overseers called upon them for no other purpose than to examine the pauper; all the proceedings, therefore, were extrajudicial; and the examination on oath might just as well have been taken before the parish clerk, and would have been as much entitled to credit as this."

So in this case we say that, as General Wilkinson did not apply to Justices Carrick and Pollock for a warrant to arrest Dr. Bollman and Mr. Swartwout, and as he did not make the affidavit for the purpose of obtaining from them such warrants, the whole proceedings before those justices were extrajudicial. The affidavits are not such as would support an indictment, if false. In the language of Lord Kenyon, they deserve no more credit than if they had been made before the parish clerk. If the affidavit be a judicial proceeding, it ought to be authenticated according to the act of Congress. If it be not a judicial proceeding, it is not evidence.

MARSHALL, *Ch. J.* If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?

Rodney, Attorney General. The first affidavit would be sufficient, unless disproved or explained by the prisoner on his examination.

Harper. The necessity of the case is the only ground of an exception to the general rule of evidence; and that necessity ceases when the party is taken.

*February 21. MARSHALL, *Ch. J.*,[1] [*125 delivered the opinion of the court.

The prisoners having been brought before this court on a writ of habeas corpus, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. "If," says a very learned and accurate commentator, "upon this

1.—The other judges present were Chase, Washington and Johnson.

The opinion of Chief Justice Marshall, upon the trial of Col. Burr, in the circuit court at Richmond in the summer of 1807, elucidates and explains some passages in this opinion which were supposed to be in some degree doubtful. For that opinion see Appendix (B).

inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to of- 126*] fenses of minor *importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose; all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those 127*] laws and those *institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down, have been the decisions heretofore made by the judges of the United States.

*The opinions given by Judge Pater- [*128 son and Judge Iredell, in cases before them, imply an actual assemblying of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.

He stated the opinion of the court to be, "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime; whether by one hundred, or one thousand persons, is wholly immaterial." "The court are of opinion," continued Judge Chase, on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force con-

nected with the intention will constitute the crime of levying war."

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Col. Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute **129*]** a distinct and separate plan, upon *the success of which other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Col. Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of Col. Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Col. Burr, has been offered, and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extrajudicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extrajudicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as a foundation of a commitment ceases to be extrajudicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

To decide that an affidavit made before one magistrate would not justify a commitment by another, might in many cases be productive of great inconvenience, and does not appear susceptible of abuse if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court, therefore, overrule this objection.

130*] *That which questions the character of the person who has on this occasion administered the oath is next to be considered.

The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New Orleans to be certified to that office; because the certificate is in itself informal, and because it does not appear that the magistrates had taken the oath required by the act of Congress.

The first of these objections is not supported by the law of the case, and the second may be so readily corrected, that the court has proceeded to consider the subject as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Col. Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the Court. Two judges are of opinion that as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects to be such as a Court and jury might hear.

Two judges are of opinion that in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to admit of *its [*131 being obtained, and that a commitment may be founded on it.

Under this embarrassment, it was deemed necessary to look into the affidavit for the purpose of discovering whether, if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Col. Burr to General Wilkinson relates to a military enterprise meditated by the former, has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November, with the first 500 or 1,000 men in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on, or to pass by, Baton Rouge. The people of the country to which we are going are prepared to receive

us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.

132*] *For what purpose seize on Baton Rouge? why engage Spain against this enterprise, if it was designed against the United States?

"The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to General Wilkinson, so far as the letter is laid before the court, one syllable which has a 133*] necessary or a natural reference *to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New York, and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a means of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of *men for [*134 that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "Col. Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of 7,000 men from the state of New York and the western states and territories, with a view to carry an expedition to the Mexican territories."

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7,000 men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and, therefore, the evidence should make the fact unequivocal.

The traveling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr "was levying an armed body of 7,000 men." *If the term levy- [*135 ing, in this place, imports that they were as-

sembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war. It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing perhaps by force from the bank, though indicating a design to rob, and consequently importing a high offense, do not designate the specific crime of levying war against the United States.

It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the District of Columbia is apparent. It is, therefore, the unanimous opinion of the court that they cannot be tried in this district.

136*] *The law read on the part of the prosecution is understood to apply only to offenses committed on the high seas, or in any river, haven, basin or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognizance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offense was committed.

But in this case, a tribunal for the trial of the offense, wherever it may have been committed, had been provided by Congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of Congress, which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace.

There is a want of precision in the description of the offense which might produce some difficulty in deciding what cases would come within it. But several other questions arise, which a court consisting of four judges finds itself unable to decide, and, therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offense which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose *those who have [*137 been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offense has been committed, institute fresh proceedings against them.

SKILLERN'S EXECUTORS
v.
MAY'S EXECUTORS.

If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.

A court of equity will annul a contract which the defendant has failed to perform, and cannot perform, on his part.

ERROR to the district court of the United States for the district of Kentucky, in chancery.

The facts of the case, as they appear upon the record, are as follows:

Skillern put into the hands of Richard May several land warrants to locate in Kentucky, under an agreement that May should have half the land for locating the whole, who accordingly located the quantity of 2,500 acres in the name of Skillern, but not to his satisfaction, and the matter was not settled between them at the time of Robert May's death, when his interest in the lands so located descended to his son, John May, the defendants' testator. Skillern afterwards came to an agreement with John May, on the 6th of March, 1785, by which Skillern was to assign to John May one military warrant for 200 acres of land, and all the treasury warrants located in the name of Skillern with the entries and locations made thereon, which assignment was on the same day executed, but never lodged in the land office, or the office of the surveyor of the county where the lands were situated. In consideration of this assignment, and in full of all demands by Skillern against the representatives of Robert May's estate, John May gave to Skillern a bond, dated March 6th, 1785, to convey to Skillern 1,000 acres of the land to which Robert May was entitled at his death, and which remained unsurveyed, to be chosen by Skillern before the 15th of June, 1786. *It was also agreed by [*138 another writing of the same date, that if Skillern would give up the bond for 1,000 acres, John May should convey to him 1,100 acres of other land described in the writing, and Skillern was to make his election of the one or the

other before the 1st of October, 1786. This last agreement was afterwards canceled, and a bond in lieu thereof given by John May to Skillern, dated October the 9th, 1787, to convey to the latter on or before the 1st of December, 1788, "eleven hundred acres of first rate elk-horn land, well watered, and lying within ten miles of Lexington."

Skillern, notwithstanding the assignment of his military and treasury warrants to John May, afterwards obtained patents thereon for 1,050 acres, of the value of 4,416 dollars and 66 cents.

There was no evidence that Skillern ever offered to convey those lands to May, or his representatives.

The bond of 6th of March, 1785, and that of the 9th of October, 1787, were both fraudulently placed by Skillern in the hands of his agent, for the purpose of enforcing payment of both. The agent, supposing both bonds to be due, entered into an agreement with John May's executors, the present defendant's, for the discharge of the bond of 6th of March, 1785, and the same was given up by Skillern's agent to the defendants, with a receipt thereon. But the agent finding afterwards that the bond of 6th of March, 1785, was vacated by that of the 9th of October, 1787, refused to carry that agreement into effect, but brought an action of covenant upon the condition of the last-mentioned bond, and recovered damages to the amount of 8,433 dollars and 33 cents.

John May devised his lands to his executors for the payment of his debts, and this bill was brought by Skillern in his life-time to subject the same to the payment of the judgment recovered at law. Pending this suit in chancery, Skillern died, leaving infant heirs, and the suit was revived in the name of his executors. Sixty acres, part of the 1,050 acres, had been sold for the payment of the state tax due from **139*]** Skillern, *and the two tracts of 300 and 250 acres had been sold for the direct tax due to the United States, but were redeemed by the purchaser of the 60 acres.

After the filing of this bill, and after the death of Skillern, John May's executors filed a cross bill against Skillern's executors, and it was agreed that both suits should be tried at the same time.

The court below decreed a perpetual injunction as to 4,416 dollars and 66 cents, part of the judgment at law, the same being the value of the 1,050 acres patented in the name of Skillern, and decreed payment of the residue out of the real estate of John May, unless it should be otherwise paid, by a day named in the decree.

Both parties sued out their writ of error.

H. Clay, for Skillern's executors.

C. Lee, for May's executors.

It was contended, in behalf of May's executors,

1st. That inasmuch as both bonds, viz., that for 1,000 acres, and that for 1,100 acres, were given for one and the same consideration, a discharge of either was, in equity, a discharge of both; and that having discharged the first bond by a new engagement, the executors of Skillern could not, in equity, claim satisfaction of either.

2d. That Skillern, having taken to his own use part of the land which he had agreed to assign to May as a consideration of the bonds, could not enforce them in equity.

3d. That as Skillern had suffered a part of the lands to be lost, by not paying the taxes, he had thereby made himself chargeable for the lands, and had in fact received a full equivalent for the consideration of the bonds; and, therefore, there ought to have been a decree for a perpetual injunction as to the whole amount of the *judgment at law; espe- [***140** cially as the fact of fraud on the part of Skillern is expressly found by the jury. The half of 2,500 acres was all he was entitled to, if his conduct had been fair. But as it has been found otherwise by a jury, a court of chancery ought not to have given its aid to enforce any part of the judgment at law.

For Skillern's executors it was said, that it was not in the power of Skillern alone to put an end to the contract. That by surveying and patenting the lands, he had saved them from forfeiture for not surveying within the time limited by law. That although the lands had been sold for taxes, yet the redemption enured to the benefit of the right owner.

The jury found the value of the 1,050 acres of land, but not the value of the title. The land may be worth fifteen dollars an acre, but the title may be worth nothing.

The patents had issued by mistake in the name of Skillern, and that mistake was owing to May's not having filed the assignment in the proper office. Skillern's executors are ready and willing to transfer those titles to the defendants.

This court gave no other opinion in this case than is expressed in the following decree:

"It is the opinion of the court that G. Skillern, by acquiring to himself the legal estate to 1,050 acres of land, the equitable right to which he had transferred to John May, on the 6th of March, 1785, (and having never conveyed or offered to convey the said lands to May, or to his legal representatives,) and it appearing that at the time of the decrees rendered in these causes, certain parts of the said entries to which Skillern had thus acquired the legal title, and which constituted a part of the consideration of the bond on which the judgment at law was entered, had been lost in consequence of the neglect of Skillern to pay the taxes due thereon, the complainants below in the original suit were not entitled to the aid of a court of equity to enforce *the execu- [***141** tion of the obligation of the 9th of October, 1787, or to obtain satisfaction of the judgment at law founded thereon.

"It is therefore decreed and ordered, that the decree of the district court rendered in the original cause be reversed and annulled with costs; and this court doth remand the same to the said district court for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land mentioned in the said assignment of the 6th of March, 1785, be made between the legal representatives of the said George Skillern and the said John May.

"And as to so much of the decree in the cross suit as enjoins 4,416 dollars and 66 cents, part of the judgment at law, this court doth affirm the same; and as to the residue of the

said decree, it is decreed and ordered, that the same be reversed and annulled, with costs; and this court, proceeding to give such decree in the said cross suit as the said district court ought to have given, it is further decreed and ordered, that the judgment at common law mentioned in the said bill be perpetually enjoined."

FRENCH'S EXECUTRIX
v.
THE BANK OF COLUMBIA.

The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice.
If the drawer of a bill of exchange, at the time of drawing has a right to expect that his bill will be honored, he is entitled to strict notice.

ERROR to the circuit court of the District of Columbia, sitting at Washington.

This was an action of assumpsit upon the promissory note of W. M. Duncanson, payable to George French or order, and by him indorsed to the plaintiffs, for 1,400 dollars, at 60 days, dated October 10th, 1798, and due December 9th–12th.

On the trial at law in the court below, the plaintiff in error took a bill of exceptions which 142*] stated the following *facts; that the banking house of the plaintiffs was situated in Georgetown, in the District of Columbia, at the time the note became payable; in which town the defendant's testator also resided. That Duncanson, the maker of the note, lived in the city of Washington, four miles distant from the bank of Columbia. That the last day of grace upon the note expired with the 12th of December, 1798. That the defendant's testator was very ill, and confined to his bed, from the 9th to the 14th of December, 1798, on which last-mentioned day he died; that the defendant proved his will and took out letters testamentary on the 28th of the same month. That on the 15th of December a notary public called at the house of Duncanson, the maker of the note, to demand payment, but was informed that he had gone into Georgetown, whereupon the note was protested; that one Weems, an agent of the defendant, had notice of the dishonor of the note in January, 1799, and conversed with and endeavored to make arrangements with the plaintiffs for the same.

That the note was indorsed by the defendant's testator, without any valuable consideration passing from him to any person for the same, merely to accommodate Duncanson, the maker of the note, and to give him a credit with the plaintiffs for the amount thereof, and that the plaintiffs received the same with a knowledge of its being so drawn and indorsed; that the defendant's testator, in his life-time. and the defendant, since his death, have suffered no loss or injury from the circumstance of the note not having been demanded of the maker before the 15th of December, 1798, or of the want of notice to the defendant's testator, or to the defendant, other than as aforesaid; and that the court, at the plaintiffs' request, thereupon instructed the jury that such laches and neglect of the plaintiffs, as to a demand on the maker, and in not giving other notice than as above stated to the indorser, does not debar and take away the plaintiffs' right to recover upon that note in this action against the defendant.

The defendant below took another bill of exceptions to the refusal of the court to instruct the jury that the neglect of the plaintiffs, to demand payment and to give *notice, as [*143 before stated, discharged the defendant's testator from all liability upon the note, if the jury should be satisfied by the evidence that Duncanson received the money from the plaintiffs, with the assent of the defendant's testator, after his indorsement, and that at the time of the drawing and indorsing of the note, it was the understanding of all parties that the money should be so paid; and that such payment and assent were a sufficient consideration passing from French to Duncanson.

The judgment below being for the plaintiffs, the defendant brought her writ of error.

Harper, for the plaintiff in error.

The plaintiffs below claimed a right to recover upon this note, notwithstanding their laches, upon three grounds.

1st. Because it was an accommodation note, and no consideration passed from French to Duncanson.

2d. That French had suffered no injury by the neglect of the plaintiffs; and,

3d. The assent of the defendant's agent, after the note became payable.

1st. It is not a note for the accommodation of the defendant's testator, but for that of W. M. Duncanson, the maker.

No man ought to be held liable upon a contract further than he has consented to bind himself. If this contract was conditional, he cannot be absolutely bound until the condition has been performed.

What, then, was the contract which the defendant's testator entered into by indorsing the note?

By the law of Maryland, which must decide this case, and which on this subject is precisely the same as the law of England, an exact analogy exists between an indorsed promissory note and an accepted inland bill of exchange. *When an indorsed promissory note, [*144 payable to order, is indorsed by the payee, it is in truth an inland bill of exchange drawn by the payee, in favor of the indorsee, upon the maker, (his debtor by the note,) and by him accepted. Hence the law with respect to both kinds of paper is the same. The contract of the first indorser of a promissory note is the same as that of the drawer of a bill of exchange. It is an express, not an implied contract. An implied contract is that which the law (to prevent a failure of justice) presumes the parties to have made, where they have failed to make an express contract for themselves; and courts will vary the terms of such implied contract according to the principles of natural justice. But by writing his name on the back of the note, the indorser entered into an express contract, the terms of which are as well known, by

a reference to the law merchant, as if they were written at large on the note. He does not thereby bind himself to pay at all events. He only says to the holder, "if you use due diligence in demanding the money of the maker, and he refuses to pay it, and if you give me reasonable notice thereof, I will pay you." It being, then, a part of the express contract between the parties, that the holder should in reasonable time demand the money of the maker, and give due notice of non-payment to the indorser, before the latter can be charged, upon what principle can a court of justice dispense with the performance of those precedent conditions? There is no case upon a promissory note, in which they have been dispensed with, except in that of *De Berdt v. Atkinson*, 2 H. B. 336, and there it was done because the maker of the note was known by all the parties to be insolvent at the time of making and indorsing the note, and, therefore, the contract of the indorser in that case was not supposed to be conditional, but absolute. But the authority of that case, although attended by such special circumstances, is shaken, if not overruled, by the case of *Nicholson v. Gouthit*, in the same book, p. 609, where notice to the indorser of a promissory note was held necessary, although the insolvency of the maker was known to the indorser before the note became payable, and although he indorsed it for the accommodation of the maker, and merely to obtain him a credit. The latter is in its circumstances more **145*]** like the case now before the court, *than that of *De Berdt v. Atkinson*. The judges, in giving their opinion in *De Berdt v. Atkinson*, relied not on the actual insolvency, but on the knowledge of the insolvency by all the parties, at the time of making and indorsing the note; whereby it appeared that the defendant, in that case, had not annexed the usual conditions to his contract as indorser, but had waived them; and that the waiver was known to the plaintiffs.

It is true that in the case of *Nicholson v. Gouthit*, it appeared that Burton, the other indorser, had put into the defendant's hands, funds to meet the payment of the note, but the note not having been demanded when due, the defendant had paid away those funds. But if the defendant was not entitled to notice, he paid away those funds in his own wrong, and, therefore, if any damage arose to him in consequence, it could not make his case the better. It may also be observed that the court, in giving an opinion, did not notice this circumstance as a ground of that opinion; the Chief Justice seems to exclude a presumption of that kind, because he says that the justice of the case is with the plaintiff, which could not be true if the defendant had suffered damages imputable to the laches of the plaintiff. The only ground upon which the court rested their opinion was, that the form of guaranty which the parties had adopted required due notice to the indorser, and therefore, although the justice of the case was with the plaintiff, they could not dispense with such notice.

Upon this ground the opinion is certainly inconsistent with the case of *De Berdt v. Atkinson*; for in the latter the same form of guaranty had been adopted, yet that circumstance was not deemed sufficient to render notice necessary, in a case where the undertaking of the indorser was to pay at all events; an undertaking which, in that case, was presumed from the fact that the insolvency of the maker of the note was known to all the parties at the time of making and indorsing the note. But in the case of *Nicholson v. Gouthit*, the maker was not insolvent, but only embarrassed at the time of the making and indorsing of the note, and did not become insolvent until afterwards, and before the note became payable, so that there was no circumstance upon which *to build the pre- [*146 sumption that the defendant intended to make himself liable at all events.

The true principle which will reconcile all the cases upon this point is, "that notice need not be given to him who is liable in the last resort."

In the present case, the insolvency of the maker of the note is not averred, nor any other circumstance to show that French was liable in the last resort.

If the note had been made by Duncanson to accommodate French, and French had received the money from the bank, then indeed it might have been contended, that as French was the person liable in the last resort, he was not entitled to notice. But the case stated is, that French indorsed the note to accommodate Duncanson, who received the money of the bank. The obligation of French, therefore, was simply that of an indorser of a promissory note; or of the drawer of an inland bill of exchange.

Considered in this point of view, the plaintiffs rely upon those cases which say that the drawer of a bill of exchange, without funds, is not entitled to notice.

It is admitted that an analogy exists between an indorsed promissory note and an inland bill of exchange. But the analogy is not complete until the bill of exchange is accepted.

There is no case in which notice has been deemed unnecessary, when the bill has been accepted, except that of *Walwyn v. St. Quintin*, 1 Bos. & Pull. 652, which will be noticed presently. In all the prior cases, in which the want of funds has been holden as excusing the want of notice, acceptance had been refused; so that the question has never arisen on an accepted bill but in the single case of *Walwyn v. St. Quintin*.

It is admitted that it has been decided, that if the drawer has neither funds in the hands of the drawee before the bill becomes payable, nor a right to draw, he is not entitled to notice; and the reason given is, because *he cannot [*147 expect the bill to be accepted and paid, and therefore practices a fraud upon the holder; and because he cannot suffer injury by the want of notice. These reasons extend only to the case of a drawer who has no right to draw, and the bill is not accepted; for the acceptance is conclusive evidence that the drawer had funds, (or credit, which is the same thing in substance,) against every person but the acceptor, in a suit between him and the drawer. If the drawee has promised to accept the bill, the drawer has a right to expect that his bill will be accepted, and he has practiced no fraud upon the holder of the bill. Notice of non-acceptance, and *a fortiori* of non-payment of such a bill, may be very material to the drawer, as he would be thereby liable for interest, damages and costs, which he would have a right to recover over

against the drawee who had thus violated his faith, in not honoring his bill according to a promise; and by the want of such notice the drawer may lose his remedy against the drawee by his insolvency.

This may be the case where the drawer draws the bill for his own accommodation without funds, and the drawee agrees to accept it to give the drawer a credit.

But in the present case the bill is drawn, not for the accommodation of the drawer, but of the drawee, and the drawee has not only agreed to accept, but has actually accepted it; and if the reasons for dispensing with notice did not apply to that case, much less can they to this.

If a bill of exchange be drawn to accommodate the drawee, the drawer has a right to expect that it will be accepted; and if accepted, has not only a right to expect, but to insist, that it shall be paid, precisely in the same manner as if it had been drawn upon funds in the regular course of mercantile transactions.

He stands precisely in the same situation as if it had been so drawn.

In a regular transaction, if the drawee, having funds after agreeing to accept, refuse accept-
148*] ance, the holder *may immediately call upon the drawer, who, after taking up the bill, may recover against the drawee the principal, interest, damages and costs.

So if the bill be drawn for the accommodation of the drawee, and be not accepted, the holder can immediately call upon the drawer, who upon taking it up, may recover of the drawee the amount of the bill, with interest, damages and costs.

Immediate notice of non-acceptance is, therefore, equally necessary in both cases; a failure of the drawee in either case being equally prejudicial to the drawer.

In a regular transaction, if, after acceptance, the acceptor, having funds, refuse to pay; the drawer, after taking up the bill, may recover against the acceptor the principal, interest, damages and costs.

So if a bill be drawn to accommodate the drawee, if, after acceptance, (which is the present case,) the acceptor refuse to pay, the drawer, after taking up the bill, may recover against the acceptor in like manner.

If the acceptors in both cases should become insolvent, both drawers would sustain precisely the same injury; the one by being unable to withdraw his funds, and obtain security for the interest, damages and costs, and the other by being unable to get a reimbursement of the principal, interest, damages and costs, which he had been compelled to pay for the accommodation of the drawee.

The two cases are precisely parallel; and if notice is necessary in one case, it is equally necessary in the other.

If the note of Christian to 2 Bla. Com. 470, be cited, the answer is, that the author of that note refers to no case but *De Berdt v. Atkinson.*

The only case reported, which has decided that the drawer of an accepted bill is not entitled to notice, is that of *Walwyn v. St. Quintin,*
149*] 1 Bos. & Pull. 652. The *bill there was drawn for the accommodation of the payee, and the action was by the indorsee against the drawer. The acceptor had funds of the payee, but not of the drawer.

It is difficult to understand the Chief Justice in delivering the opinion of the court in that case. He says, "As far as concerns the drawer, it is, what it has been called, a mere accommodation." This is true, but it was not for his own accommodation, which is the only kind of accommodation that will justify the want of notice.

He then proceeds, 'And all consideration of effects of the drawer in the hands of the acceptor may be laid aside." This again is strictly and literally true; but the drawer had a fair pretense for drawing, and the acceptance was on the ground of a fair mercantile agreement; for it is stated that the drawee had actually accepted the bill on the faith of funds put into his hands by the payee to meet the payment. And in the next page his lordship says, "But it may be proper to caution bill holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands notice is not necessary. The cases of acceptances upon the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions; and there may be possibly many others." In the next sentence, also, he seems to admit, that where the drawer has no effects in the hands of the drawee, yet if he has "a fair pretense for drawing," although it is for the purpose of raising money by discount for himself, yet he is entitled to notice. Here, then, is a difference between the opinion and the judgment of the court, which it is difficult to reconcile.

He proceeds, "It seems clear that notice can be of no use to him, (the drawer,) his situation being this, that if the acceptor does not pay, he must; and may then, and not till then, resort to the acceptor to be reimbursed; notice, therefore, can amount to nothing, since his situation cannot be changed." So in the case of a real negotiation, the situation of the drawer is, that if *the acceptor does not pay, he must; [*150 provided he has due notice. If the Chief Justice meant to say that St. Quintin was absolutely bound to pay if the acceptor did not, it was begging the question. But his argument seems to rest on the ground that the drawer could not resort to the acceptor until he (the drawer) had paid the bill. But notice was necessary to him, that he might know where to apply to take up the bill, before the acceptor should become insolvent. Notice might also be of use to him, even before payment, as he might take measures to get security from the acceptor, to indemnify him against the bill when it should come back to him. His situation would certainly be very much changed by the want of notice, if the acceptor should become insolvent after the bill became payable; for if due notice had been given, he might have taken up the bill, and compelled the acceptor to repay him the money.

His lordship, with great force of reasoning, says, "Perhaps, indeed, notice ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty; especially as the grounds for dispensing with it are such as cannot influence the conduct of the holder of a bill, at the time when he is to determine whether he will, or will not, give notice: for ninety-nine times in a hundred he cannot

know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with." In this last position his lordship was certainly mistaken, for there had not then been a single decision that notice was not necessary to the drawer, if the bill had been accepted.

He also says, "Where the drawer has no effects, and has no fair pretense for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and *à fortiori* for the acceptor, which is this case, it is fairly deducible from the cases 151*] *which have been resolved, that notice need not be given."

It is difficult to conceive why there should be a stronger reason for dispensing with notice to a drawer for the accommodation of the acceptor, than to a drawer for his own accommodation. Indeed in the former case, there is no reason for dispensing with notice which will not apply to every possible case.

The case of *Whitfield v. Savage*, 2 Bos. & Pull. 277, has settled the point that the insolvency of the acceptor will not dispense with notice to the drawer.

2. The second ground on which the plaintiffs rest their claim to recover is, that the defendant has shown no actual damage by reason of the want of notice.

But if the drawer, for the accommodation of the acceptor, is as much entitled to notice as the drawer upon actual funds, there is no more reason why the drawer should be bound to show actual damage in one case than in the other. It cannot be because he has paid no consideration for the bill, because, in the case of a bill drawn on actual funds, although the drawer pays a consideration when he deposits the funds, yet he also receives the consideration from the payee when he delivers the bill, so that when he has drawn and delivered the bill, he is nothing out of pocket; he has, in fact, parted with nothing. What he gave he has received.

In the present case, although French paid nothing to Duncanson, yet he received nothing from the bank; so that he stands exactly in the same situation as if he had paid Duncanson the whole money and received the same amount from the bank. In either case nothing rested with French; and he stood precisely in the same situation as if he had loaned the money to Duncanson upon his note, and had afterwards got the money from the bank upon the same note.

152*] *3. As to the third ground on which the action is attempted to be supported, it is sufficicnt to say that the case stated in the bill of excepions shows nothing, at most, but an attempt to compromise with the bank, without a knowledge of the fact of want of notice, or of the law arising upon that fact.

Mason, contra, contended that French was to be considered as the drawer of a bill of exchange without funds, and, therefore, not entitled to notice; and cannot set up the want of it as a defense, unless he can show that he has actually sustained an injury by such want. Chitty, 68, 88.

No consideration passed from French to Duncanson. If French had paid Duncanson for the bill, then that money would have been funds of French in the hands of Duncanson, upon which French might have drawn.

The burden of proof lies on French to show that he had funds, or that he has suffered actual loss by the want of notice.

In the case of *De Berdt v. Atkinson*, the insolvency of Brown did not affect the question, and was not relied on by the court. When Brown signed the note, he was notoriously insolvent, but he might have become solvent when the note became due. There is only one ground upon which that case can be supported, and that is that it was an accommodation note, and governed by the same principle as a bill drawn without funds. Buller's opinion is strong that notice is only requisite in a fair mercantile transaction for value received in the regular course of trade. The same doctrine is laid down by Christian, in his note to 2 Bl. Com. 470. The case of *Nicholson v. Gouthit* is not contradictory to that of *De Berdt v. Atkinson*. The latter case turned upon the fact that the defendant had suffered a loss by the want of notice; he having given up a security which he held.

The case of *Walwyn v. St. Quintin* only decides the old point, tnat notice is not necessary if the drawer has no funds.

*Harper, in reply. [*153

It is said that it must be a mercantile transaction. A mercantile transaction is a transaction usual among merchants; and bills drawn for accommodation are more frequent among merchants than bills drawn upon funds.

The true principle is, that the *lex mercatoria* having fixed the terms of this species of contract, a man is supposed to contract accordingly.

It is said that a bill drawn without funds is not a mercantile transaction; but a man may fairly draw on what he supposes to be funds, but may be deceived.

A merchant may agree to accept, or to give credit, or to lend the money; a bill drawn under such circumstances would be a fair and regular mercantile transaction.

The fallacy of the argument is, that it was not an accommodation to French, but to Duncanson.

French selected this form of guaranty, and is entitled to all its privileges.

February 23. MARSHALL, *Ch. J.*, delivered the opinion of the Court.

The material question in this case is, whether a person who indorses a promissory note for the accommodation of the drawer, be discharged from the responsibility which the indorsement creates, by the failure of the holder to demand payment of the maker in the usual time, and to give notice to the indorser that the note is not paid.

That by tne general rule of law the omission to demand payment from the maker when the note becomes payable, and to give notice to the indorser that payment has been refused, discharges the indorser, is admitted; *but [*154 from this general rule of law exceptions exist, and the counsel for the defendants in error contend that the case stated is comprehended in one of these exceptions.

It is laid down as an exception to the general rule, in its application to bills of exchange, that

if the drawer has no effects in the hands of the drawee, notice of the dishonor of the bill may be dispensed with; and the case of an indorser of a promissory note for the accommodation of the maker, is said to come within the same reason and the same law.

The correctness of this position will be best tested by considering the reason of the rule, and the reason for the exception.

Why is it that notice must immediately be given to the drawer that his bill is dishonored by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the laches of the holder of the bill. To this security, then, it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule.

A drawer who has no effects in the hands of the drawee, is said to be without the reason of the rule, and, therefore, to form an exception to it.

This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason it would seem, that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only 155*] in those cases where *notice must be unnecessary, or immaterial to the drawer.

The reasoning of the judges, in most of the cases which have been cited, would seem to warrant this restriction of the exception.

The case of *Bikerdike v. Bollman* was a bill drawn by a debtor on his creditor, without a single accompanying circumstance which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice Ashhurst gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular reason given by Justice Ashhurst for his opinion, is clearly inapplicable to any case in which the drawer was justified in drawing.

Into the opinion of Justice Buller some general reasoning is introduced, from which it is fairly deducible that he considered the drawer as having no right to expect that the bill would be paid, and as being liable to no injury from want of notice, and that these were the true grounds of the exception.

He says, "If it be proved on the part of the plaintiff, that from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored."

These observations were, in fact, applicable to the case, for the drawer was the debtor of the drawee, and had no right to draw the bill, nor reason to expect that it would be accepted.

*This principle was recognized in [*156 *Goodall et al. v. Dolly*, in which the same idea, so far as respects the impossibility of injury to the drawer, was repeated.

This point came on again to be considered in the case of *Rogers v. Stephens*, 2 T. R. 713, in which, as between the drawer and drawee there was no pretext of a right to draw. It was said that a third person had stated himself to have funds in the hands of the drawee; that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent that, in the opinions of Lord Kenyon and Justice Grose, they would have been decisive in favor of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer. Lord Kenyon states the reason why notice need not be given to the person who draws without funds in the hands of the drawee to be, "because the drawer must know that he had no right to draw on the drawee." The opinions of Lord Kenyon and Justice Grose in this respect, though not assented to, were not controverted by Justice Ashhurst.

The decision in *Rogers v. Stephens* was made on the authority of *Bikerdike v. Bollman*.

It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule.

The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction.

Neither can it be truly said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honored.

*Neither can it be said that he has [*157 virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true when at the time of drawing the drawer has no reason to expect that his bill will be paid.

A person having a right to draw, and a fair right to expect that his bill will be honored, would not come within the reason of the exception, and, therefore, it may well be contended, ought not to be brought within the exception itself.

This doctrine appears to be contradicted in the case of *Walwyn v. St. Quintin*.

In that case the bill was drawn to accommodate the indorser, who had previously placed securities, on which he wished to raise money, in the hands of the acceptor; but the drawer had no effects in his hands. It was determined that, in this case, notice to the drawer was unnecessary.

If this determination should be considered without examining the reasoning on which it was founded, the reader would conclude that the single circumstance of drawing without funds in the hands of the drawee belonging to the drawer, subjected him, without notice, to the payment of his bill, if dishonored, at any period of time when not barred by the act of limitations; and that no demonstration of his perfect right to draw, or of the loss to which the want of notice had exposed him, could relieve him from the claim of the holder of the bill. For in this case, the drawee having accepted on funds, the drawer had a right to expect that the bill would be paid, could not be chargeable with fraud in drawing, nor required to prepare other funds to prevent the disgrace and injury of his bill's being dishonored, or to take measures to secure himself against the acceptor or indorser. He does not appear to have come within any one reason assigned in the cases of *Bikerdike v. Bollman*, or of *Rogers v. Stephens*, for the exception stated in those cases to the general rule.

158*] *This induces the necessity of examining with particular attention the reasons given by the judge, which must be considered as explanatory of the decision.

In delivering the opinion of the court, Lord Chief Justice Eyre said, "The true fact is, that this was the acceptor's bill, and not the drawer's." "The transaction in this case was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor." "It seems clear, that notice can be of no use to him, his situation being this, that if the acceptor do not pay, he must, and may then, and not till then, resort to the acceptor to be reimbursed. Notice, therefore, can amount to nothing, for his situation cannot be changed."

It is observable that the principle supposed to be laid down in the cases previously adjudged as constituting the reason for the exception is here expressly recognized, and forms the great and operative motive for the judgment of the court. It is, that notice could be of no use, that the drawer could not avail himself of it, that he could take nó step which would in any manner change his situation, that he could have no recourse against the acceptor until he paid the bill.

In no case is the reason of the exception more explicitly given, and the only difficulty is to apply the reasoning to the facts as reported.

The court seem to have supposed, that since the drawer could not maintain an action against the acceptor until he had taken up the bill, that it was perfectly useless to enable him, by proper notice, to employ those other various means which he might have taken to secure himself. Such is not the reasoning of the judges in the cases previously decided; and this reasoning certainly would not be permitted to apply to an indorser who nad given value for the bill, not knowing that it was drawn without funds in the hands of the drawee. Yet, he would be unable to recover from the drawer until he had taken up the bill.

159*] *If an action could not have been maintained, might not the drawer have effects of the drawee in his hands which he might retain; or might not various other means of saving himself be neglected, in consequence of the opinion that the bill would be paid? If this might be, how can it be true that notice can be of no use to him?

If the fact even be that the drawer could only sue the acceptor in such a case as this, after having himself discharged the bill, still he ought to have notice, that he might immediately take it up for the purpose of proceeding against the acceptor.

The reasoning of Lord Chief Justice Eyre, to be perfectly consistent with itself and with the principles laid down in previous decisions, would seem to be predicated on an understanding on the part of the drawer when the bill was drawn, that it was not to be paid by the acceptor; or on the idea that a bill drawn without funds is not a commercial transaction, and not subject to commercial rules.

The presumptions are rendered the stronger from the cases afterwards stated, in which a drawer without funds in the hands of his drawee would still be entitled to notice. These are "acceptances on the faith of consignments from the drawer not come to hand," and "acceptances on the ground of fair mercantile agreement;" to which, he says, may possibly be added many others.

If the exception admits of these exceptions and of many others, it would be difficult to apply it to any case of a fair transaction, where the drawer had really a right to draw, unless it be supposed not to be governed by the law merchant.

The judge next proceeds to describe the case in which notice is not requisite.

He says, "Where the drawer has no effects, and has no fair pretense for drawing, or where he draws without effects intended to be applied in payment, and only *for the purpose [*160 of raising money by discount for himself, and *à fortiori* for the acceptor, it is fairly deducible from the cases that notice need not be given."

It is not only necessary that the drawer should have no effects, but also that he should have no fair pretense for drawing. Now he may have a fair pretense, as in the case of a "fair mercantile agreement," without having any funds in the hands of the drawee, which notice of non-acceptance of the bill might enable him to withdraw; and yet in such case it would appear, from the language of the court, that notice could not be dispensed with.

"Where he draws only for the purpose of raising money by discount for himself, and *à fortiori* for the acceptor," notice need not be given.

Where he draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill. But how can the same reasoning be said to apply *à fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor, were funds of the drawer in his hands, on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results

from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was not to pay the bill.

The case of *Walwyn v. St. Quintin*, then, can only be supported on the idea of an understanding that the drawee was not to pay the bill, or that a bill, drawn, not in the usual course of business, is a transaction to which commercial rules do not apply.

161*] *In the case of *Whitfield v. Savage*, (2 Bos. & Pull. 277,) the drawer had funds in the hands of the acceptor, and the decision turned upon that point.

The reasoning on the cases of protested bills has been gone into the more at large, because it has been considered as applicable to promissory notes indorsed under the *statute of Anne*, which is admitted to be in force in Maryland.

The indorser has been considered as the drawer, and the maker of the note as the acceptor; and in all cases of an indorsement for an accommodation, the indorser is likened to a drawer without funds in the hands of the acceptor.

Where the money raised upon the note is received by the indorser, so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is unquestionably without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the maker. But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor before the draft becomes payable; the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of non-payment could be as little dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use.

Notice of non-payment by the maker is necessary, because the undertaking of the indorser is conditional and wherever, in fact, the transaction is such that the maker of the note ought in justice to pay it, and is bound ultimately to make it good, it would seem reasonable that payment should be demanded from him, and that reasonable notice of non-payment should be given to the indorser.

162*] *If, however, the course of decisions be otherwise, the indorser of the note for the accommodation of the maker must come within the exception which dispenses with notice in this case.

The cases which have been adjudged in England on promissory notes, are anterior, in point of time, to the cases of *Walwyn v. St. Quintin*, and of *Whitfield v. Savage*.

The first which has been cited is *De Berdt v. Atkinson*. This note was indorsed for the accommodation of the maker, the indorser well knowing at the time that the maker was insolvent. Four judges who tried the cause were unanimously of opinion, that want of notice did not discharge the indorser. The opinion of the Chief Justice was founded on the known insolvency of the maker, and the consequent impossibility that loss could be sustained by the indorser from want of notice. The opinion of Justice Buller was founded on the circumstance that the note was indorsed for the accommodation of the drawer. He states explicitly, that the general rule is only applicable to fair transactions, and by fair transactions he means "bills or notes given for value in the ordinary course of trade."

Justices Heath and Rooke accorded in the decision, but whether for the reasons assigned by the Chief Justice, or for those assigned by Justice Buller, or for both, does not appear.

The same point came on to be considered in the case of *Nicholson v. Gouthit*.

This was a strong case, because the indorsement was made in consequence of a previous engagement on the part of the indorser to guarantee the payment of a debt due from the maker of the note, who appears, from the transaction, to have been in bad circumstances at the time, and who became insolvent before the note was payable. From his connection with the maker, and from other circumstances, the indorser must have known that the maker would not pay the note, and it was the *un- [*163 derstanding of all parties that it should be paid by the indorser.

The justice of the case was said to be clearly in favor of the plaintiff, and under an impression that the want of notice in this case could not injure the plaintiff, the Lord Chief Justice had at the trial instructed the jury that it was unnecessary, and indeed that it might be considered as received by anticipation.

In this case the note was not made merely to raise money, but was made to pay a debt. The indorser, however, gave no value for it, and, if likened to the drawer of a bill of exchange, he had drawn without funds in the hands of the acceptor, and with a knowledge that the acceptor would not pay the bill.

But in the argument in favor of a new trial, the counsel contended that the law upon a promissory note was different, in this respect, from the law on a bill of exchange, and though notice of the dishonor of a bill drawn without funds in the hands of the drawee need not be given, yet the rule in the case of promissory notes is totally different, and notice must in all cases be given to the indorser.

In delivering the opinion of the court, Lord Chief Justice Eyre assented to this distinction, and admitted the rule with respect to notice to the indorser to be as stated. He, therefore, reversed his own decision at *Nisi Prius*, and granted a new trial upon the strict law, contrary to his ideas of the justice of the case.

Heath and Rooke concurred in this opinion. Buller was not present, and, reasoning from his opinion in the case of *De Berdt v. Atkinson*, it is probable he would not have concurred in the decision of this case.

However, then, the law may be with regard to the drawer of a bill of exchange who from other circumstances may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, by the case of *Nicholson v. Gouthit*, that the law with regard to a promissory note is different, and that, if in *any case where the note is made for [*164

the benefit of the maker, notice to the indorser can be dispensed with, it is only in the case of an insolvency known at the time of indorsement.

In point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice than in the case of an indorsement for accommodation, the maker having received the value.

This court is of opinion that the circuit court erred in directing the jury that the laches of the plaintiffs, in failing to demand payment of the maker of the note, and to give notice of non-payment to the indorser, did not deprive the plaintiffs of their remedy against the indorser, and, therefore, the judgment rendered in this case is reversed, and the cause remanded for further trial. A new trial, with instructions, &c.

Judgment reversed.

HOPKIRK *v.* BELL.

The act of limitations of Virginia is no bar to a British creditor's demand on a promissory note, dated 21st August, 1772, although one of the plaintiffs was in the country after the treaty of peace, viz., in 1784, and remained here until his death in 1785.

THIS case was again certified from the circuit court for the district of Virginia.

It appeared upon the trial, in addition to the facts stated in the former report of the case,[1] that Andrew Johnston, one of the partners of the house, trading under the firm of Alexander Spiers, John Bowman & Co., of whom the plaintiff is the surviving partner, came to this country after the treaty of peace in 1783, viz., in the spring of 1784, and died here in 1785, but that no other partner of the firm has been in this country at any time since the treaty of peace.

C. Lee, for the plaintiff, cited 3 Dall. 240, 242. 281, *Ware v. Hylton.*

165*] *February 28. The Court ordered it to be certified as their opinion that, under all the circumstances stated, the act of limitations of Virginia was not a bar to the plaintiff's demand on the note of 21st August, 1772.

HICKS *et al.* *v.* ROGERS.

In Vermont, tenants in common may maintain a joint action of ejectment.

THIS was a case certified from the circuit court for the district of Vermont, the judges of that court[2] being opposed in opinion upon the question, whether the plaintiffs, devisees of a tract of land to be equally divided between them, could, under the will, support a joint action of ejectment. The declaration did not set forth the title of the plaintiffs, otherwise than by the following averment. "Of which tract or parcel of land, the plaintiffs, on the 6th day of April, in the year of our Lord Christ, one thousand eight hundred and four, were well seized and possessed in their own right, and so continued thereof possessed until the 8th day of April, in the year last aforesaid. when the defendant, without law or right, and contrary to the will of the plaintiffs, thereinto entered and ejected, expelled, drove out and amoved the plaintiffs therefrom, and ever since hath, and still doth keep out the plaintiffs from the premises, taking the whole profits to himself, which is to the damage of the plaintiffs six hundred dollars, to recover which and the quiet and peaceable possession of the said premises, and just costs, they bring this suit."

Bradley, (of Vermont,) for the plaintiffs, contended,

1st. That by the common law of Vermont, the words "equally to be divided between them" do not make a tenancy in common, because a tenancy in common is not thereby necessarily implied. Joint heirs in Vermont hold as coparceners.

*2d. That if the plaintiffs are tenants [*166 in common, yet they have a right, by the common law, to maintain a joint action for an injury to their lands holden in common. (3 Bac. Abr. 216.)

3d. That even if the plaintiffs are to be considered as tenants in common, and could not by the common law join in an action to recover possession, yet by the statute of Vermont of 2d of March, 1797, (Laws of Vermont, p. 118, s. 88,) they must join in an action for the mesne profits, or rather no other action is given for the mesne profits than an action for the possession itself. in which the plaintiffs shall recover the possession as well as damages.

The words of the act are, "and in every such action," (ejectment,) "if judgment be rendered for the plaintiff, he shall recover as well his damage as the seizin and possession of the premises." As, therefore, the action for the mesne profits cannot be severed from the action of ejectment, and as, upon every principle of law, tenants in common must join in the action for the mesne profits, it follows that they must join in the possessory action also.

The principle has also been admitted by the legislature of Vermont, by the act of 29th of October, 1806, s. 4, which declares, "that tenants in common of any lands, &c., may join in any action which concerns their common interest in such land."

There was no argument on the part of the defendant.

February 23. The Court decided that the action was well brought, and that the will ought to be received in evidence to support the declaration.

1.—See ante, vol. 3, p. 454.

2.—The Honorable W. Paterson, late Associate Justice of the Supreme Court of the United States. and the Honorable Elijah Paine, district judge.

NOTE.—*Ejectment by tenant in common*—see note, 18 L. R. A. 789.

167*] *THE UNITED STATES
v.
ZEBULON CANTRIL.

The act of Congress of 27th of June, 1798, to punish frauds committed on the bank of the United States, is in itself repugnant, and will not support an indictment for knowingly uttering as true a false, forged, and counterfeit paper, purporting to be a bank bill of the United States, signed by the president and cashier.

THIS case was certified from the circuit court of the district of Georgia, the opinions of the judges of that court being opposed upon a motion in arrest of judgment, upon a verdict of guilty on the following indictment, viz.

"The jurors," &c. "upon their oath present that Zebulon Cantril, late," &c. on the 1st of January, 1806, "with force and arms, at the house of one William Gibson, in the town of St. Mary's," &c. "a certain false, forged and counterfeit paper, partly written and partly printed, purporting to be a bank bill of the United States for ten dollars, signed by Thomas Willing, president, and G. Simpson, cashier, dated at Philadelphia, the second day of September, one thousand eight hundred and four, payable on demand to R. Beatty or bearer, with force and arms, did feloniously utter and publish as a true bank bill of the United States, with intent to defraud the said William Gibson, and which said false, forged and counterfeit bill, partly written and partly printed, is in the words, figures and letters following, to wit:" (here the bill was inserted:) "he the said Zebulon Cantril," "at the said time of uttering and publishing the said false, forged, and counterfeit bill, partly written and partly printed, there by him in form aforesaid, well knowing the same so by him uttered and published to be false, forged and counterfeited, against the form of the statute in that case made and provided, and against the peace and dignity of the United States."

The reasons assigned in arrest of judgment were,

1. That the indictment is insufficient and repugnant, inasmuch as it charges the prisoner with having uttered and published as true, a certain false, forged, and counterfeit paper, partly written and partly printed, purporting to be a bank bill of the United States for ten dollars, signed by Thomas Willing, president, and G. Simpson, cashier, &c.

168*] *2. Because the act of Congress, passed the 27th of June, 1798, entitled, "An act to punish frauds committed on the bank of the United States," (vol. 4, p. 152,) under which the prisoner is indicted, or so much thereof as relates to the charge set forth in the indictment, is inconsistent, repugnant, and, therefore, void.

The words of the act of Congress, so far as they describe the offense charged, are as follows, viz.:

"If any person shall utter or publish, as true, any false, forged, or counterfeited bill or note issued by order of the president, directors and company of the bank of the United States, and signed by the president, and countersigned by the cashier thereof, with intention to defraud the said corporation, or any other body politic or person, knowing the same to be falsely altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted, according to the due course of law, shall be sentenced," &c.

The question was submitted without argument.

February 28. MARSHALL, *Ch. J.*, delivered the opinion of the Court that the judgment ought to be arrested, for the reasons assigned in the record, and directed the opinion to be certified accordingly.

The same order was made in the case of *The United States v. Baylis*, for a similar offense.[1]

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*STHRESHLEY & OBANNON *v.* THE [*169
UNITED STATES.

A collector of the revenue of the United States, after removal from office, has no authority to collect the duties outstanding at the time of his removal, and which had accrued while he remained in office, but this power and duty devolves upon his successor.

THIS was an action of debt, brought by the United States in the district court of Kentucky district for the penalty of an official bond given by Sthreshley, with Obannon as his surety, dated the 13th of September, 1796, the condition of which was, "that whereas the said Thomas Sthreshley is appointed under the acts of Congress laying duties upon spirits distilled within the United States, and upon stills, a collector of the revenue which shall or may arise, by virtue of the several acts of Congress; to be computed from the first day of July, 1796, and to continue until revoked by the supervisor within the counties of Fayette and Clarke, being the first division of the first survey of the district of Ohio.

"Now if the said Thomas Sthreshley, his heirs, executors or administrators, shall well and truly superintend the several distilleries and stills, and collect all other duties by law required of him, as mentioned in his said commission, in his division; shall do and perform all the several duties which by law is or shall be required to be done at or within the same; shall collect the duties arising thereon according to law, and duly account for and pay the same to the supervisor of the said district, or some other officer of the United States duly authorized; then this obligation to be void, or else to remain in full force and virtue."

The defendants pleaded, 1st. General performance; and, 2d. That the appointment of Sthreshley was revoked on the 1st of July, 1797, and that he faithfully executed and discharged all the duties of his said office according to law, accruing from the said first day of July, 1796, until the first day of July, 1797, inclusive, and all things relative thereto.

The breach, assigned in the replication, was, that Sthreshley "did not well and truly account for and pay *to the supervisor of [*170 the district in his said obligation mentioned, or to any other officer of the United States duly au-

1.—An act of Congress was passed at the session 1806-1807, to amend the law in this respect.

thorized to receive the same, the several duties arising and accruing within his said division during his continuance in office, under the laws of the United States and his said commission, and which, by virtue of the said obligation and commission, the said laws of the United States did require him to account for and pay over; but hath failed therein and is in arrear to the said United States in the sum of two thousand one hundred and seventy-one dollars and twenty-nine cents, and three-fourths of a cent;" upon which breach an issue was tendered and joined; upon the trial whereof a bill of exceptions was taken by the defendants to the refusal of the court to admit evidence that at the time of the revocation of his commission, there were outstanding and uncollected by him duties to the amount of 2,285 dollars and 83 cents which had accrued during his continuance in office, and which constituted part of the account charged against him, and for the balance whereof the present suit was brought; and that the defendant had delivered over to his successor in office true accounts of the said outstanding duties, for collection.

This evidence was rejected under the opinion that the defendant, although his commission was revoked, had authority, and was in law bound, to collect all the outstanding duties which had accrued during his continuance in office.

The verdict and judgment in the court below, being in favor of the United States, the defendants brought their writ of error.

H. Marshall, for the plaintiffs in error, suggested a doubt whether the bond was not void, inasmuch as there was no law of the United States which authorized the supervisor to demand it, or required the officer to give it.

JOHNSON, *J.* How can that question arise upon the plea of performance?

H. Marshall. If the bond is totally void, it will not support a judgment under any form of pleading. He did not, however, mean to press the objection.

171*] *The principal question, viz., whether the power of the officer to collect the outstanding duties which had accrued while he was in office, ceased with his removal, was submitted without argument.

Rodney (Attorney General) referred the court to the laws of the United States, vol. 1, p. 304, s. 5, 6, 16; vol. 2, p. 82; vol. 3, p. 80, 421; and vol. 4, p. 191.

February 28. MARSHALL, *Ch. J.*, delivered the unanimous opinion of the Court, that the power of the officer to collect the outstanding duties ceased upon his removal from office, and devolved upon his successor. A contrary construction would be extremely injurious to the revenues of the United States, and could not have been intended by the legislature.

The officer can only be liable to pay over the money he has collected, unless he is charged with a neglect of duty in not collecting.

In the present case the breach assigned is for not paying, and no breach is assigned in not collecting, the duties. The bill of exceptions shows that the defendant Sthreshley had paid over and accounted for all the duties he had collected.

Judgment reversed.

Cranch 4.

*HUMPHREY MARSHALL and WIFE [*172
v.
JAMES CURRIE.

Loose and vague expressions in an entry of land in Kentucky, may be rendered sufficiently certain, by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects.

ERROR to the district court of Kentucky, in a suit in chancery in which the plaintiffs in error were the original complainants. The bill complained that the defendant had obtained an elder patent for land covered by the complainants' elder entry, and prayed that the defendant might be compelled to convey to them the legal title.

The only question was, whether the entry, under which the complainants claim, described the land with sufficient certainty. It was in these words: "Number two hundred and forty one, Thomas Marshall enters two thousand acres of land on part of a military warrant, number one thousand three hundred and forty nine, beginning on the bank of Green river two hundred poles above a beech tree marked D. L. standing on the bank of the river, a few poles below the mouth of a branch, and a small distance above the place called Glover's, upon the opposite side of the river, thence running south seventy-nve degrees east, one thousand poles, thence north, twenty-fige degrees west, and from the beginning up the meanders of the river, and binding thereon so far that a line parallel to the first shall include the quantity. Entered August the sixth, one thousand seven hundred and eighty-four.

The material facts found by the jury, according to the practice of Kentucky, were, that the complainants' entry was made on the 6th of August, 1784, and the defendant's on the day following. That the defendant's patent bears date on the 14th of June, 1787, and the complainants' patent on the 3d of June, 1796, and that both patents include part of the same land. That the Green river, and the place called Glover's, were notorious by those names before, and at the time of the complainants' entry. That the watercourse delineated on the plat, by the name of Big branch, is a branch running *into Green river, 596 poles above the [*173 place called Glover's, and on the opposite side of the river, and existed at the time of the entry. That the beech tree represented in the plat, stands on the bank of Green river, 18 poles below the mouth of the Big branch, "and is a very conspicuous tree; and that the letters D. L. were marked at or near said tree, upon a beech, about November or December, one thousand seven hundred and eighty-three;" that the beginning corner of the complainants' survey is on the bank of Green river, 200 poles next above the said beech tree, marked on the plat. That two other watercourses empty into the Green river; one called Clover Lick creek, below the Big branch and near to Glover's; the other called Embro's Spring branch, above the Big branch; both of which are laid down on the connected plat. The jury also found that there is a small branch or drain about 250 yards long, running all the year, between Clover Lick creek and the lower line of the plaintiffs' survey, besides those represented on the plat. That

beech bounds all along the bank of Green river, opposite to Glover's Station, and for a considerable distance below and above, except immediately above and below the mouth of the small branch or drain, and that there was no proof that there was any beech tree marked D. L. standing on the 6th of August, 1784, (the date of the complainant's entry,) upon the bank of Green river a few poles below the mouth of a branch, as described in the complainants' entry.

For the plaintiffs in error, H. Marshall contended, that the entry was sufficiently definite in its description of the location, within the meaning of the act of Virginia.

The Green river and Glover's were objects notorious, and respecting which there is no dispute. The branch referred to in the entry, as being a small distance above Glover's, is found at the distance of 596 poles, which was a reasonable distance, according to the decisions in the cases of *Johnson v. Naul, Craig v. M'Craken*, and *Moore v. Watkyns*, in Sneed's Reports, pages 390, 393, 397, 404, 405.

174*] *It is contended, that it does not appear that the letters D. L. were on the tree on the 6th of August, 1784. But the jury have found that those letters were marked on a beech, at or near the tree in question, in December, 1783, from whence a presumption arises that they remained on the tree until the 6th of August following, unless the contrary be shown. For although the jury have found that there was no proof of their being on the tree, on the 6th of August, yet they have not found that they were not, nor have they found any fact to rebut the presumption arising from the existence of the letters a few months before. The jury must have meant to say that there was no positive and conclusive proof, otherwise their last finding contradicts their first finding, for the presumption arising from the actual existence of the letters, is proof until that presumption be removed.

"At, or near," means at, unless the contrary is shown. Sneed, 120, *Crow v. Bannon*.

But if the letters were not on the tree, there is still sufficient certainty in the location. Green river and Glover's are admitted to be certain, but it is said the branch is uncertain, inasmuch as there are two other branches falling into Green river, not far from Glover's. But Clover Lick creek is out of the question, because the course of the river at that place will not answer to the calls of the entry. Embro's Spring branch is further from Glover's than the Big branch, and the nearest branch which will satisfy the location ought to be taken. The small branch or drain mentioned by the jury, is not located on the plat, and therefore we cannot say where it ought to be placed. But the jury have found that beech trees do not abound immediately above and below it, and, therefore, it is not probable that that was the branch referred to by the entry.

The courts in Kentucky have always endeavored to sustain an entry, if by reasonable construction it be possible. For this purpose they will reject an absurd or superfluous call, they will supply a word, they will consider a call not proved as expunged, and although there are more allegations than are proved, yet if enough is proved to render the entry sufficiently certain, the court will support it.

*To support these positions, he cited [*175 the cases of *Consella v. Brisoow, Kenten v. M'Connel*, and *Pawling v. Merewether*, from Hughes's Reports, p. 15, 16, 45, 169, and *Gaither v. Tilford, Morgan v. Robinson, Bradford v. Allen, Craig v. Jones, Craig v. M'Craken*, and *Brown v. Johnson*, from Sneed's Rep. p. 184, 278, 101, 331, 54, 52, 60.

H. Clay, for the defendant in error, contended, that the beginning of the location was uncertain, and therefore that the whole entry was void. It does not appear that the letters D. L. ever were marked on the tree, nor that they existed on any tree at the time of the entry. The whole language of the entry is uncertain. "A few poles," "a small distance," "a branch," are expressions too vague to support an entry.

What is uncertain in point of fact, is not a subject of construction by the court. To support the complainants' entry, the court is now called upon not to give a construction of law to the words of the entry, but to make a new entry in point of fact.

Identity, notoriety, natural objects, are all wanting.

February 28. JOHNSON, J., delivered the opinion of the court.

In the argument of counsel in this case, the only point which has been thought necessary to dwell upon, is the legal certainty of the complainants' entry. Pursuing the principle that a plaintiff must recover upon the strength of his own title, and not on the weakness of his adversary's, the defendant has not entered into any discussion relative to the sufficiency of his claim to the land in question. The circumstances constituting what in the courts of Kentucky are denominated the calls of the complainants' entry, are, Glover's Station, Green river, a marked tree on the bank of the river, and a branch emptying itself into the river. The two former are notorious, and the inquiry is, can the others be sufficiently ascertained with relation to them? We are of opinion that they can. The only objection that can be made to the *identity of the tree and branch [*176 with relation to which the complainants have made their survey, and the actual distance of those objects above Glover's Station, the uncertainty attendant upon calling for a tree of which a large number grow along the banks of the river, and the existence of another stream emptying itself into the same river nearer to Glover's Station, and which it is contended will answer the call.

These difficulties, we are of opinion, are all removed by considering the courses called for by the complainants with relation to the courses of the river.

Above Glover's Station, and until you reach the bend of the river above which the complainants' entry is surveyed, the course of the river is east and west. It there assumes a different direction, and its course is north and south. By surveying the entry at the point where the complainants have located their land, it assumes a shape adapted to the course of the river. At any point below where it is situated, and until you reach the place called Glover's Station, it is impossible that it can be

located. This circumstance is sufficient, in our opinion, to establish the branch which was called for, as it is the first you meet with above the bend; and when that is ascertained, there is no longer any difficulty in locating the complainants' land.

The jury find that the tree called for is very conspicuous, and that previous to the date of the complainants' entry a tree very near the spot where that is situated was marked D. L. Although a tree of a particular species, at a distance not precisely limited, may be uncertain where that tree abounds, the impression of a certain mark upon such a tree is a sufficient identification, when accompanied with the other circumstances of this case, which might have been resorted to by a subsequent locator to prove the identity of this tree.

In giving this opinion the court is not uninfluenced by an anxiety to save the early estates acquired in that country. Such was the laxity of the rules upon which the rights of individuals depended under the land laws of Virginia, 177*] *that this court feels a strong sense of the necessity of liberality in deciding upon the validity of entries.

The court, therefore, reverses the decree of the district court, and decrees a conveyance, to be executed by the defendant to the complainants, of that part of the land contained in his patent which is included in the complainants' survey, and that each party pay their own costs.

Decree reversed.

VIERS and WIFE v. MONTGOMERY.

A court of equity will not interfere between a donee of land by deed, and a devisee under a will of the donor, in a case where there is no fraud.

ERROR to the district court of Kentucky, in a suit in chancery brought originally by Montgomery against W. M. Viers and Patsy his wife, late Patsy Henly, to compel the latter to convey to the former the legal estate in certain lands in Kentucky, which one Ebenezer Brooks, since deceased, conveyed, by deeds dated the 10th of November, 1791, to the defendant's wife, while a widow, and which Brooks, by his last will, devised to the complainant Montgomery. The bill charged that the only consideration of the deeds from Brooks to Patsy Henly was, that she should "take him as her husband," which she refused to do, but inter-married with the defendant, W. M. Viers. It did not aver that the complainant was of kin to the deceased, or that he had any equitable claim other than as a devisee. Nor did it charge the defendant Patsy with any promise of marriage, or any breach of such a promise, nor with fraud in obtaining the deeds. The will of Brooks, referred to in the bill, calls the complainant his friend and cousin. The deeds were of bargain and sale in fee, and purported to be in consideration of 1,100*l.* Virginia currency, and contained a warranty against Brooks, and all claiming under him.

178*] *The answer of the defendants denied that the consideration of the deeds was as stated in the bill, and avers that the defendant Patsy, although solicited, always refused to make any promise of marriage to the deceased; that he often pressed her to accept his land, which she for some time declined; that he declared he did not expect any consideration, but wished her to receive it as a gift, and that he did not expect she would marry him.

It alleged that Brooks had boarded in her house some months, where he had been kindly and hospitably treated, without any charge being made against him, and suggested that this, together with the affection which he entertained for her, but which she always discountenanced, were his motives for giving her the land. That she at last, by the advice of her friends, accepted it, and that when he had executed the deeds he voluntarily declared himself to be fully satisfied, in the presence of the subscribing witnesses.

The facts found by the jury were, that the defendant Patsy, by her conduct to the deceased, induced him to suppose that she would marry him, and that this encouragement or inducement was the only consideration she gave for the land, except his boarding; but that she never made him any promise of marriage. That he had urged her to accept the land before she agreed to take it, and had declared to her that he did not expect to receive any consideration from her, but wished her to accept it as a gift; and that at the time he executed the deeds, he declared he did not expect that she would marry him. That she was advised by her friends to take the land before she agreed to accept it; and that, after the execution of the deeds, she offered to return to him the land, but he would not receive it.

That Brooks boarded in her house, and never paid her anything therefor, except the land. The jury also found the will of the deceased, and the devise to the complainant.

The decree of the court below, upon argument, was that the defendants should convey the land to the complainant, and that the complainant should pay the defendants the amount of Brooks's board, and the taxes which had been paid by the defendants, with interest.

*Which decree was, by this court, [*179 without argument, reversed, and the complainant's bill dismissed, with costs.

Decree reversed.

DIGGS and KEITH v. WOLCOTT.

A court of the United States cannot enjoin proceedings in a state court.

THIS was an appeal from a decree of the circuit court for the district of Connecticut, in a suit in chancery.

The appellants, Diggs & Keith, had commenced a suit at law against Alexander Wolcott, the appellee, in the county court for the county of Middlesex, in the state of Connecticut, upon two promissory notes given by Wolcott to one Richard Matthews, for the purchase of lands in Virginia, and by him indorsed to the appellants; whereupon Wolcott filed a bill in chancery in the Superior Court of the state, against the appellants Diggs & Keith, and also

NOTE.—*Enjoining proceedings in state courts*—see notes, 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.

against Robert Young and Richard Matthews, praying that Diggs & Keith might be compelled to give up the two notes to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof, &c.

This suit in chancery was removed by the appellants from the state court into the circuit court of the United States for the district of Connecticut, where it was decreed that Diggs & Keith should, on or before a certain day, deliver the notes to the clerk of the court, and in default thereof should forfeit and pay to Wolcott 1,500 dollars; and that they should be perpetually enjoined, &c., and that Robert Young should repay to the appellee the amount of principal and interest which the latter had paid on account of the purchase of the lands; and that the appellee should deliver up to the clerk the surveys of the lands, and the bond of conveyance; and in default thereof should pay to R. Young the sum of 20,000 dollars.

180*] *The case was argued upon its merits by C. Lee and Swann, for the appellants, and by P. B. Key, for the appellee; but the court being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court.

Reversed the decree.

WOOD *v.* LIDE.

If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered.

ERROR to the circuit court for the district of Georgia.

The writ of error was dated the 23d of December, 1805, and returnable to February term, 1806; the citation also bore the same date, and commanded the defendant in error to appear at the same term. The writ of error was filed in the clerk's office of the court below on the same 23d of December. The judgment below was not signed until the 4th day of January, 1806. The writ of error was not returned and filed in the clerk's office of the Supreme Court until the 18th of March, 1806, after the court had closed its session.

P. B. Key, for the plaintiff in error, suggested that in such a case the writ of error ought to be dismissed of course.

The Court, however, inclined to be of a contrary opinion, but informed Key that they would give him an opportunity to show the contrary.

On a subsequent day he contended that the writ could not be returned at any other term than that to which it was returnable, and to which the defendant in error had been cited to appear. After the expiration of the term it was void. The execution of a writ of error is the sending up the record according to its command, and to send the record up at another term is no execution of the writ.

*He relied upon the case of *Blair v.* [*181 *Miller*, in this court, 4 Dall. 21, as being decisive.

February 28. The Chief Justice stated that there had been some difference of opinion among the judges, which arose from their not understanding perfectly the facts of the case.

If the writ of error had been served when it was not in force, (that is, after its return day,) such service would have been void. But if served while in force, a return afterwards will be good.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. Laws U. S. vol. 1, p. 63, s. 23.

If it be so served before the return day, the service is good.

In the case cited from 4 Dall. it does not appear which party made the motion, nor whether there was an appearance for the opposite party.

In the present case, the writ of error having been served when in full force, and the writ of error returned although not at the first term, the appearance of the defendant in error has waived all objection to the irregularity of the return.

The judgment was affirmed.

NOTE.—No notice was taken of the fact that the writ of error was served before the judgment below was signed.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 1808.

The following Judges attended at this Term, viz.:

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.

The honorable WILLIAM CUSHING,
The honorable SAMUEL CHASE,
The honorable BUSHROD WASHINGTON,
The honorable WILLIAM JOHNSON,
The honorable BROCKHOLST LIVINGSTON,
AND
The honorable THOMAS TODD,*

} ASSOCIATE JUSTICES.

CÆSAR A. RODNEY, Attorney General.

*The appointment of Judge Todd was under the act of Congress of 24th of February, 1807, directing that the Supreme Court should consist of a Chief Justice and six Associate Justices.

Supreme Court of the United States.

185*] *February Term, 1808.

FITZSIMMONS
v.
THE NEWPORT INSURANCE COMPANY.

Persisting in an intention to enter a blockaded port after warning, is not attempting to ented it.

Quære, whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters?

ERROR to the circuit court of the district of Rhode Island, in an action upon a policy of insurance on the brig John, warranted American property, from Charleston, South Carolina, to Cadiz, captured by a British ship of war on the 16th of July, 1800, carried into Gibralter, and there condemned on the 26th day of August following. The cause of condemnation, set forth in the sentence, was, that the brig was "cleared out for Cadiz, a port actually blockaded," and that the master "persisted in his intention of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade thereby notified." On the trial in the court below, the jury found a special verdict, stating, among other things, that the blockade of Cadiz was not known at Charleston when the John sailed from thence, and that the first notice the master had was from the blockading squadron, who brought to the brig, and warned the master not to proceed to, nor attempt to enter, the port of Cadiz, and indorsed his register; but the master had no notice of such indorsement upon his register until after the condemnation. The mate and some of the seamen were taken out, and a prizemaster and British seamen put on board. She was de-186*]tained by the *blockading squadron from the 16th to the 27th of July, when the master was ordered on board the admiral's ship, and told, "We have thoughts of setting you at liberty, and in case we do, and deliver you your vessel and papers, what course will you steer, or what port will you proceed for?" To which the master answered, that in case he got no new orders, he should continue to steer by his old ones. The admiral then said, "That will be, I suppose, for Cadiz." To which the master replied, "Certainly, unless I have new orders." Upon which the admiral said, "That is sufficient; I shall send you to Gibralter for adjudication." Whereupon the brig, without being liberated, was sent into Gibralter, and condemned on the grounds stated in the sentence. The libel and proceedings in the vice-admiralty are found by the special verdict. An appeal was prayed and granted from the vice-admiralty court, but it does not appear to have been prosecuted. The judgment in the court below was for the original defendants.

This cause was several times argued, having been pending in this court ever since the year 1803.

It was now argued by Dallas and C. Lee, for the plaintiff in error, and by Rawle, for the defendants.

Argument for the plaintiff in error.

1. The plaintiff is entitled in the present action to support his claim by the truth of the case, in opposition to the falsehood of the sentence.

2. The cause expressly assigned for condemning the vessel is not a lawful cause of condemnation, tested by the law of nations, or by the treaty between this country and Great Britain.

I. The question of conclusiveness of a foreign sentence of a court of admiralty, in a case of insurance, has never yet been settled in this court. It is *res integra.*

In a question of principle, and where this court is bound by no authority or precedent, it will take the path which leads to justice.

*1st. How does it stand upon general [*187 principles?

By what principle are we bound to enforce a foreign judgment? Not that of comity and reciprocity; for that would often be to sanction gross error and palpable injustice; but upon the principle of public policy and convenience, and this can extend no further than is necessary to quiet the title to the thing acquired under such a sentence. So far as the title to the thing itself is concerned, a foreign sentence must be considered as conclusive, but no further. A foreign municipal judgment, when brought into our courts to be enforced, is only prima facie evidence; but when set up as a defense it is conclusive, because it is the decision of that tribunal to which the plaintiff has chosen to resort. It is, therefore, conclusive against him, but not in his favor.

Judgments upon attachments, which change the property of the thing attached, are conclusive as to the title of the thing, but not as to the question of debt between the principal creditor and debtor.

Why should a sentence of condemnation as prize be conclusive in a suit for indemnity against capture? Public policy is not concerned in the question whether the insurer or the insured should bear the loss.

The underwriter promises indemnity against capture and its effects, if the property be neutral. The assured warrants the neutrality, but not the acquittal in a foreign prize court. He is bound to sue, labor and travel for the benefit of the underwriter in this case as well as in others. But the loss by capture and condem-

nation is the very peril insured against; and all the assured is bound to do, is to prove that his property was really neutral; he does not take upon himself the risk of the injustice of foreign courts, any more than the injustice of any other department of a foreign government. What is it but the injustice of belligerent nations which makes a difference between a war risk and a peace risk upon neutral property? And what consolation is it to the insured that his property is lost by the injustice of a court, rather than by that of the executive power? All that is required of him is good faith; he 188*] does not *answer for the good faith of a foreign tribunal; a tribunal, too, whose decisions are professedly not founded upon the principles of abstract right, but upon the will of the sovereign.

The capture alone gives the right to abandon, and, consequently, to recover for a total loss. The subsequent claim and litigation is, in truth, by and for the benefit of the underwriter. The assured is only bound to prove the neutrality in the suit between the underwriter and himself.

The doctrine that all the world are parties to a suit upon a question of prize is a mere fiction, and is never applied to any question but that of the title to the thing itself.

2d. How does the principal stand upon precedents of other nations?

Upon a question of general law, or the law of nations, we are not to look to the practice of one nation only. We are as much bound by the precedents of France, as we are by those of England since our revolution.

In France, we are told by Emerigon, the sentence of a foreign prize court is not conclusive upon collateral cases. It only protects the title to the property acquired under it.

In England, a system has been raised; but like an inverted cone, it rests only on a single point. The case of *Hughes v. Cornelius*, reported in 2 Shower, 232; T. Raym. 473, and Skin. 59, is the only basis upon which the fabric is erected. This case only decides, what we admit, that a foreign sentence is conclusive as to the title in the thing itself. This is the only reported case, prior to the revolution; and thus the question remained until the case of *Bernardi v. Motteux*, Doug. 575, which was decided in the year 1781. The point of that decision was, that a sentence of condemnation by a foreign court of admiralty was not conclusive evidence of a breach of the warranty of neutrality, if the sentence does not appear to have pro- 189*] ceeded upon that ground. *Park. p. 365, has given the result of all the cases, and deduces this general doctrine.

1. "That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties;" or

2. "Wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding, and the court here will not take upon themselves, in a collateral way, to review the proceedings of a forum having competent jurisdiction of the subject matter."

3. "But if the sentence be so ambiguous and doubtful that it is difficult to say on what ground the decision turned;" or,

4. "If there be color to suppose that the court abroad proceeded upon matter not rele- 592 vant to the matter in issue, there evidence will be allowed in order to explain." And,

5. "If the sentence, upon the face of it, be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice Buller, any detention by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance."

The counsel for the plaintiff commented at large upon the cases of *Salouci v. Johnson*, Park. 362; *Lothian v. Henderson*, 3 Bos. & Pull. 516; *Geyer v. Aguilar*, 7 T. R. 681; *Garrels v. Kensington*, 8 T. R. 230; *Calvert v. Bovill*, 7 T. R. 526; *Kindersly v. Chase*, in the cockpit, decided by Sir W. Grant, Park, 363, 5th ed. *Mayne v. Walter*, Park, 363; *Pollard v. Bell*, 8 T. R. 134; *Bird v. Appleton*, 8 T. R. 563; *Price v. Bell*, 1 East. 663; *Bearing v. Christie*, 5 East. 398; *Baring v. Clagett*, 3 Bos. & Pull. 212, and 8 T. R. 192, *Christie v. Secretan*, from all which they drew the conclusion that according to English precedents, which, however, they denied to be authorities in this court, except the *case of *Hughes v. Cornelius*, a foreign [*190 sentence of condemnation is not conclusive evidence of the want of neutral character, unless it proceeds upon a ground warranted by the law of nations, or by treaties between the countries of the captor and the captured.

3d. As to domestic precedents, they are not decisive. In New York the law is finally settled against the conclusiveness. 1 N. Y. Cases in Error, 7; 2 N. Y. Cases in Error, 217; 3 N. Y. T. R. 213, 240. But in the supreme court of Pennsylvania the question is still *sub judice*, as it is in most of the other states.

II. The cause expressly assigned for condemnation is not a lawful cause, either under the law of nations, or the treaty between this country and Great Britain.

The capture itself was a total loss, and gave the right to abandon. At the time of abandonment there was no restitution.

The sentence is not a decree of enemy property, nor generally as lawful prize, but it is a condemnation on special grounds. 1. That she was cleared out for Cadiz, a port actually blockaded; 2. That the master persisted in his intention of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade.

It is not stated that the blockade was known at the time of her sailing, nor that any attempt was made to enter Cadiz after notice. The special verdict finds that the blockade did not exist at the time of her sailing; and that after being verbally notified of the blockade, the vessel was at no time at liberty, so that she could have attempted to enter the port. That although the register was indorsed, yet the master had no knowledge of it until after his arrival at Gibraltar.

The offense charged is persisting in an intention to do what he had no power to do. This intention is inferred from the conversation between the master and the admiral, which is detailed in the special verdict, and which, on the part of the latter, was insidious, and calculated to *entrap. From the effect of such [*191 conversations it was the duty of the court to protect the master. 1 Rob. 7, *The Mercurius*.

The answer of the master was honest, simple and proper; "that in case he got no new orders, he should steer by his old ones." This was no more than his duty. Those new orders, if given by the admiral, would have been obeyed, and would have justified the master in his deviation.

But even an intention to violate a blockade, unless followed by some act, such as sailing with that intent, &c., is no cause of condemnation under the law of nations. *Maley v. Shattuck, ante*, vol. 3, p. 488; *The Betsey*, 1 Rob. 280; *The Spes and Irene*, 5 Rob. 76; *The Shepherdess*, 5 Rob. 235; Vattel, p. 3, s. 117; *The Vrow Judith*, 1 Rob. 128; *The Columbia*, 1 Rob. 130; *The Vrow Johanna*, 2 Rob. 91; *The Neptunus*, 2 Rob. 92, 95, 96; *The Appollo*, 5 Rob. 256; *The Columbia*, 1 N. Y. Cases in Error, 7; 1 Rob. 130; 3 N. Y. T. R. 226.

If the intention be not a cause of condemnation under the law of nations, much less is it under the British treaty, article 18, (Laws U. S. vol. 2, p. 484,) the words of which are, "And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested; it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

If condemned without an attempt, the sentence of condemnation is not warranted by the treaty, and, therefore, does not falsify the warranty of neutrality. 8 T. R. 434, *Pollard v. Bell;* 8 T. R. 562, *Bird v. Appleton;* 1 East, 663, *Price v. Bell;* 5 East, 398, *Baring v. Christie*, 1 N. Y. Cases in Error, 7; 3 N. Y. T. R. 226.

Argument for the defendants in error.

This court can only decide what the law is, not what it ought to be.

192*] *We contend for three points.

1. That the vessel was justly condemned for attempting to break the blockade.

2. That the sentence is conclusive evidence of the fact.

3. That the condemnation was the consequence of the improper act of the master, for which the underwriters are not liable.

1. The first point is not denied, if the fact be that there was an attempt to break the blockade.[1]

A verbal notice to the master was as good as if it had been in writing, because he could himself see that a blockade *de facto* existed.

An attempt is a conclusion from a variety of facts and circumstances. 1 Bos. & Pull. 185. A persisting in the intention after warning; a public open avowal of that intention when he had the offer of his liberty to go to any port but Cadiz, amounted to an attempt to break the blockade. The British squadron could not have suffered him to go off with such declarations. He had no right to demand orders from the British admiral, nor had the latter a right to give them. He could not direct him to what port to go. The master was bound to act according to his best discretion in such a case. The only orders which the British commander could give were not to go to Cadiz.

It was a continuance (after notice) of the original attempt to enter the port, which was made before notice. 1 Rob. 123; 5 Rob. 256.

2. The sentence is conclusive evidence against the plaintiff.

*This point is not now to be decided [*193 on principles of policy or comity, but upon principles of law long established and settled. It has been the fashion to consider this as a modern principle, fabricated upon national motives of interest since the revolution.

But it rests on principles of a much earlier date. It is found in existence at earlier periods, when the commerce of England was in its infancy. It is the application only which is modern.

In the "case of copyhold leases," 4 Co. 29, a, it was decided, that the sentence of the ecclesiastical court dissolving the marriage was conclusive evidence that the first marriage was void, and that the issue of the second marriage was legitimate. So in *Kenn's Case*, 7 Co. 42, 43, it was holden, "that the sentence" of the ecclesiastical judge "should conclude as long as it remained in force." So in Buller's N. P. 244, it is said, "In an action upon a policy of insurance, with a warranty that the ship was Swedish, the sentence of a French admiralty court condemning the ship as English property, was holden conclusive evidence. This case is taken from The Theory of Evidence, published in 1761, and, consequently, was before our revolution. It seems to be the first case noticed in the books, where the principle was applied to a case of insurance. The case of *Fernandes v. De Costa*, Park, 177, 178, was in the 4th year of George III. long before our revolution. In that case the sentence of the French prize court was holden to be conclusive evidence in favor of the underwriter. The counsel cited also Carth. 225, *Jones v. Bow*, where the sentence of the spiritual court was holden to be conclusive. Also the *Duchess of Kingston's Case*, 11 State Trials, and the case of *Moses v. M'Pherlan*, 2 Burr. 1005, and *Walker v. Witter*, Doug. 1; *Galbraith v. Nevil*, Doug. 5, in note; Lord Kaim's Principles of Equity, 369–375.

Thus stood the cases before the revolution. The principle of law was fixed and general; and all the later decisions are but applications of the principle to particular cases. Once admit the case of *Hughes v. Cornelius* to be law, and the whole doctrine, to the exent *to which [*194 it has been carried in England, flows as a necessary consequence. As between the parties it is admitted to be conclusive, and as to the title to the thing, the question is at rest. The plaintiff in this case was party to the suit in the vice-admiralty at Gibraltar. He is bound by the sentence at all events, however it might be with regard to another person. As to him it has passed *ad rem judicatam*. If the property in the thing has passed, why not the title to its value? The title is as much gone from the

1.—Rawle offered to read the depositions and evidence contained in the proceedings of the vice-admiralty, which were referred to by the special verdict, and of which a copy was thereto annexed.

But the court stopped him, saying that the proceedings in the vice-admiralty court were only matter of evidence to the jury, into which this court could not look.

underwriter as it is from the assured. He is equally precluded from the chance of recovery and from the benefit of the abandonment. By the sentence the property is changed. It is not by an act of arbitrary power, or of superior force, or by an act of legislation, but by the judgment of a court of competent, peculiar and exclusive jurisdiction. For among nations, the court of the captor is as much a court of peculiar and exclusive jurisdiction of the question of prize, as the ecclesiastical courts are in England of ecclesiastical causes.

It is the adjudication of a court to whose jurisdiction he has submitted, by putting in his claim, and before which he was bound to support the neutrality of the property, in order to give him a right to recover against the underwriters. They do not undertake to support the neutrality of the property. That is entirely his business, and if he fails to do so, and by that means the property is lost, the loss must fall upon him.

It is of less importance which way the question is decided, than that it should be settled. When the law is once ascertained, merchants and underwriters will make their contracts accordingly, and provide against the effect of foreign sentences, if they think proper.

The warranty of neutrality necessarily refers to the decision of foreign prize courts. Neutrality is a question incident to that of prize, which can be tried only in a foreign court, because it can only be tried in a court of the belligerent captor, and our own courts are the courts of a neutral nation. Courts of prize are courts of the law of nations, and their decisions upon questions arising under the law of nations, are 195*] to be *considered as the judgments of domestic courts. The question of neutrality is always expected to be agitated in a foreign tribunal. The underwriters do not take upon themselves the risk of condemnation for want of the neutral character, and it is to protect them from that risk that the warranty of neutrality is inserted. But if the sentence is conclusive to prevent them from all chance of recovering the property, and not conclusive in their favor against the claim of the assured, the warranty of neutrality would afford them no protection from the risk against which it was the understanding of the parties that they should be protected.

The counsel then went into an examination of the cases of *Rapalje v. Emory*, 2 Dall. 51, 231; *Penhallow v. Doane*, 3 Dall. 85, 88, 116; *Vasse v. Ball*, 2 Dall. 270; *Vandenheuvel's Case*, 2 N. Y. Cases in error, 226, and *Maley v. Shattuck*, 3 Cranch, 488, to show that the general inclination of the courts in this country was in favor of the conclusiveness of a foreign sentence.

They also examined the cases of *Bernardi v. Motteux*, Doug. 575; *Barzillai v. Lewis*, Park, 358; *Salouci v. Woodmas*, Park, 360; *Geyer v. Aguilar*, 7 T. R. 681; *Christie v. Secretan*, 8 T. R. 192; *Kindersley v. Chase*, Park. 363, (o), 5th edit.; *Lothian v. Henderson*, 3 Bos. & Pull. 499; *Baring v. Royal Ex. Ins. Co.*, 5 East, 99; *Mayne v. Walter*, Doug. 363; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, 5 T. R. 562; *Price v. Bell*, 1 East, 663, and *Bolton v. Gladstone*, 5 East. 155, not only to show how far the doctrine has been extended in England, but to prove by the declarations of the judges that the principle, as applied to insurance cases, was adopted and undisputed before our separation from Great Britain.

3. The condemnation was the consequence of the improper act of the master, for which the underwriters are not answerable.

Underwriters are not liable for a loss proceeding from negligence or misconduct of the master, unless it amount to barratry. Park. 24; 1 Emerigon, 364, 373, *401, 441; 2 [*196 Valin 79; 7 T. R. 160; 4 Dall. 294, and the case of *Gray v. Myers, MS.*

Argument, in reply.

1. The master of the vessel made no attempt to enter Cadiz after notice. He never had the power, because he never had the possession of his vessel after the warning. An attempt consists of an act as well as of an intent. But here there is evidence of an intent only. All the cases cited show some act done with the intent to enter.

2. As to the question of conclusiveness; all the cases cited from 4 and 7 Co., Carthew, and 2 Burrow, were domestic sentences. The case cited from Bull, N. P. and The Theory of Evidence, is of no authority. It does not appear when, nor where, nor by whom, it was decided. The book is anonymous, and refers only to the case of *Hughes v. Cornelius*, 2 Shower, 232, which does not support it. The case of *Fernandes v. De Costa*, is not against us. There the sentence was supported by an answer in chancery of the plaintiff, and left to the jury by Lord Mansfield, with the other evidence; and the plaintiff was permitted to give evidence to show the ship was Portuguese, as warranted. The case of *Rapalje v. Emory* was a foreign attachment, and the only decision upon it was to give validity to the title of the property condemned. In the case of *Vasse v. Ball*, the court did not decide the sentence to be conclusive, but went into an examination of its merits.

The common law courts have exclusive jurisdiction of questions of insurance, and wherever the question of neutrality is necessarily involved in a question of insurance, they have as complete jurisdiction to try the question of neutrality, as a court of prize has. That court which has jurisdiction of the principal question, has necessarily jurisdiction of all incidental questions. The underwriter takes upon himself the risk of unlawful capture, and the court which is to decide upon his liability in the particular case, must necessarily decide whether the capture were lawful or not; and if found to be unlawful, the plaintiff must recover.

*3. No words of the master could [*197 amount to such conduct as would exonerate the underwriters. He did no act whatever.

February 8. MARSHALL, *Ch. J.*, (all the seven judges being present) delivered the opinion of the court as follows, viz.:

This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron, then blockading that port; was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the

defense is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are,

1. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so,

2. Does this sentence, upon its face, falsify the warranty contained in the policy? If not,

3. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it as present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned, in which it is said to constitute the sole question. In that case, it will of course be determined.

198*] *Passing over the consideration of the first point, therefore, the court proceeded to inquire whether this cause could be decided on the second and third points.

Admitting for the present that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property?

The sentence declares "the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the King, and that the master of said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified."

The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters, that a ship warranted to be American is impliedly warranted to conduct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.

This position cannot be controverted.

It remains, then, to inquire, whether the sentence proves the brig John to have violated the laws of blockade; that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence.

The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offense; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence.

Is this intention (evidenced by no fact whatever) a breach of blockade? This question is 199*] to be decided by *a reference to the law of nations, and to the treaty between the United States and Great Britain.

Vattel, b, 3, s. 177, says, "All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the besieged, without my leave."

The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested: it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband; be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade from the departure of the vessel. *Without giving any [*200 opinion on that point, it may be observed, that in such cases the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that instrument without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt, after receiving notice, must be made in order to constitute the offense which will justify a confiscation. "It is agreed," says that instrument, "that every vessel so circumstanced" (that is, every vessel sailing for a blockaded port, without knowledge of the blockade) "may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if **201***] watching for an opportunity *to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offense, the offense itself is attempting again to enter, and "unless, after notice, she shall again attempt to enter," the two nations expressly stipulate "that she shall not be detained; nor her cargo, if not contraband, be confiscated." It would seem as if, aware of the excesses which might be justified, by converting intention into offense, the American negotiator had required the union of fact with intention to constitute the breach of a blockade.

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive, then, the sentence may be, of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her captain and crew, so as to enable her either "again to attempt to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the captain of the John into a conversation which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be **202***] liberated; *that availing himself of some equivocal, unguarded, and, perhaps, indiscreet, answers on the part of the captain, the vessel was sent in for adjudication; and on those expressions was condemned.

This court is of opinion that these facts do not amount to an attempt again to enter the port of Cadiz, and, therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibralter, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

MARSHALL
v.
THE DELAWARE INSURANCE COMPANY.

The right of the insured to abandon and recover for a total loss, depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received.

The technical total loss arising from capture, ceases with a final decree of restitution, although that decree may not have been executed at the time of the offer to abandon.

ERROR to the circuit court for the district of Pennsylvania, in an action for a total loss, on a policy of insurance on the brig Rolla, her cargo and freight.

The material facts stated, were, that the brig Rolla, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libelled as prize of war. On the 9th of July, 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about 1 o'clock P. M., restitution was made. On the 17th of July, the assured in *New York received informa- [*203 tion of the capture, and immediately gave orders to his agent in Philadelphia to abandon to the underwriters. In pursuance of these orders the offer to abandon was made on the morning of the 19th.

The judgment of the court below was for the defendants.

Hopkinson, for the plaintiff.

The question in this case is, whether the plaintiff is entitled to recover for a total, or only for a partial loss.

The proceeds of the cargo have been received by the plaintiff, who sold the same for account of the underwriters, if they will receive them.

If the abandonment was made before the restoration in fact of the cargo to the captain on the 19th of July, the plaintiff has a right to recover for a total loss, according to the decision in *Rhinelander's Case*, at last term, (*ante*, p. 41.)

The plaintiff having shown a total loss, by the capture, it is incumbent on the defendants to show that the property was restored before the abandonment. On the 17th the plaintiff received information of the capture; on the 18th he wrote and put into the post-office at New York, the letter to his agent in Philadelphia, directing the abandonment to be made; on the 19th it was received in Philadelphia, and the abandonment offered. The abandonment must

NOTE.—*When insured may abandon*—see note, 9 L. ed. U. S. 1123.

relate to the 18th, when the plaintiff wrote his letter and made his election to abandon. Abandonment is an *ex parte* act, and if the plaintiff has a right to abandon at the time when he elects and offers to abandon, the defendants are liable from that time. No consent is necessary on the part of the defendants. The plaintiff was bound from the date of his letter; and the defendants must be equally bound.

But although the property may have been in fact restored before the abandonment, if that restoration was unknown to the plaintiff, it is yet an undecided question, whether the abandonment is not valid.

204*] *The opinion of Lord Mansfield in *Hamilton v. Mendez*, unlike the opinions of that great man, is confused and contradictory, sometimes making the question of right to abandon depend upon the state of the information, and sometimes on the fact itself.

It is not reasonable that the insured should be bound to abandon upon receipt of the first intelligence, and yet the underwriter be permitted to take advantage of subsequent events. There would be no mutuality in this principle. It would be ruinous to merchants thus to be kept out of their money. Besides, the contract is for indemnity, and there can be no fairer mode of ascertaining the indemnity than to give the underwriters the thing itself, subject to the chance of recovery, and let them pay the price. If the thing is restored, and goes to a good market, the underwriters derive the benefit; if a loss happens, it is what they are bound by their contract to sustain. But as to the state of the fact itself, we contend that there was no actual restoration of the property before the offer to abandon. If there was, it is for them to show it. The *onus probandi* is on them.

If it is necessary to the justice of the case, the court will divide the day, and ascertain which event did first actually happen. 3 Burrow, 1434, *Combe v. Pitt*.

Dallas and Rawle, contra, contended,

That the peril being at an end, at the time of the offer to abandon, the plaintiff cannot recover for a total loss, unless the consequences of the capture created a total loss either in fact or in law.

The peril by capture was at an end on the 9th of July, when the final decree of restitution was pronounced in the court of *dernier* resort.

The right to restitution was consummate, and the authority to restore absolute. What remained was mere matter of form. The vessel and cargo were in the hands of the public officer, who held the same, after the decree, in trust for the owner. There was no longer any hostile or adverse possession. The property was in no danger of condemnation, or even of further detention.

205*] *The state of the fact, and not of the information, is the test of the right to abandon. If intelligence were the test, any idle vague rumor might compel the underwriters to pay a total loss when the property was in fact in perfect safety the whole time.

The contract is, that the property shall not perish by the peril, not that it shall not encounter the peril. A storm may injure it, but if the injury does not exceed half the value, and the voyage be not broken up, it is not a total loss. The underwriters are only bound to pay the partial loss. It is a contract of indemnity only; the liability of the defendants, therefore, must depend on the state of the fact, and not of the intelligence. Park, 77, 155, 160, 144, 145, 146, 148, 152, 156, 167; Esp. Ca. N. P. 237; *M'Masters v. Schoolbred; Rhinelander v. Ins. Co. of Pennsylvania*, (*ante*, p. 42;) *Dutilgh v. Gatliff*, cited in *Rhinelander's case*, 1 N. Y. Cases in Error, 21, 22; 1 Johns. Rep. 205.

It is not contended that the consequences of the capture created a total loss, either in fact or in law. The expenses, pillage, and damage did not amount to more than one-fourth of the insured value, and these the underwriters are willing to pay. The vessel arrived at her destined port. She performed the voyage insured.

Ingersoll, in reply.

It is said that the restitution is to be considered as referring back to the time of the decree; but that point was otherwise decided in the case of *Dutilgh v. Gatliff*, in the supreme court of Pennsylvania. It was there decided that although at the time of the offer to abandon, there was a decree of restitution, yet as that decree was not known to the party who offered to abandon, and as in fact the property was then in possession of the captors, the insured had a right to recover for a total loss.

February 23. MARSHALL, *Ch. J.*, after stating the facts of the case as above, delivered the opinion of the court as follows:

*The question submitted to the con- [*206 sideration of the court is this: is the assured entitled to recover for a partial or for a total loss?

In support of the claim for a total loss, two points have been made:

1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon.

If this be otherwise, then, it is contended,

2d. That the right to abandon is coextensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

1. Does the right to abandon depend on the fact, or on the information of the parties?

The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information? A seizure which scarcely interrupted the voyage might be, and frequently would be, converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one and act upon the other.

This point came under the consideration of the court in the case of *Rhinelander v. The Insurance Company of Pennsylvania*, in which case it was said, that "where a belligerent has taken full possession of a vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require, that the con-

207*] tinuance of the possession *up to the time of the abandonment, or a technical total loss incurred notwithstanding the restoration, was necessary to justify a recovery as for a total loss.

In considering the second point, the court proceeded to inquire whether the technical total loss on which the right to abandon depended, was terminated by the decree of restitution, or continued until that decree was carried into execution, and restitution was made in fact.

The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss.

But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage, or ruin the assured, by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage. There is no reason to presume a subsequent detention on the 208*] part of *the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor.

Had the facts on which this question depends been known at New York and Philadelphia as they occurred, could it have been said that there existed a technical total loss? After a decree of restitution, could it be said that while means were taking to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost, and to abandon to the underwriters? To this court it seems that the right to make such an election, at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was terminated by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger, or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost, without the loss of the vessel.

There is no error in the judgment of the circuit court of Pennsylvania, and it is to be affirmed, with costs.

Judgment affirmed.

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*M'ILVAINE *v.* COXE'S LESSEE. [*209

On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof.

A person born in the colony of New Jersey before the year 1775, and residing there until the year 1777, but who then joined the British army, and ever since adhered to the British, claiming to be a British subject, and demanding and receiving compensation from that government, for his loyalty and his sufferings as a refugee, has a right to take lands by descent, in the state of New Jersey.

THIS cause was now argued again by Duponceau and Ingersoll, for the plaintiff in error, and by Rawle and E. Tilghman, for the defendant.

The report of the former argument[1] having been so full, it is deemed unnecessary to state more of the argument, at this term, than will be sufficient to show the points to which additional authorities were adduced.

For the plaintiff in error, it was contended,

1. That Daniel Coxe was born an alien to the state of New Jersey; and when the revolution commenced, had a right to choose his side in a reasonable time, and could not be made a citizen of the new state against his will. Upon this point were cited 2 Dall. 234, *Coignet v. Pettit;* 2 Rutherford, 30; 1 Bl. Com. 212; 3 Dall. 225, *Ware v. Hylton;* Plowden on Alienage, 3, 4, 7, 15, 19, 24, 119; Laws of the U. S. vol. 7, p. 147; vol. 3, p. 165; vol. 6, p. 80.

2. That even if he could, contrary to his natural allegiance, be compelled by force to become a citizen of the new state, his consequent allegiance to such new state could be temporary only, and could not exist longer than the pressure of the force existed. He had a right to escape from that force, and to throw off that allegiance, if he could. Natural allegiance, *i. e.* the allegiance due from birth, is the only kind which, by the rule of the common law, cannot be shaken off. Voluntary allegiance, by naturalization, and, *à fortiori*, allegiance imposed by force, is not perpetual. No fiction can make a natural born subject. 7 Co. 13, 38, 19; Vaughan, 280, *Craw v. Ramsay;* 1 Bl. Com. 369; 5 Vesey, jun. 781, *Somerville v. Somerville;* Zouch, de Jure inter Gentes, 144 ed. 1659, pars. 2, s. 2, n, 16.

1.—*Ante*, vol. 2, p. 280, Feb. term, 1805.

210*] *It was also contended that the doctrine relied upon from *Calvin's Case* was an extrajudicial *dictum*, and even upon the principal point of that case, the judgment of the court was influenced by the known wishes of King James. To shake the authority of that case, the counsel cited Collectanea Juridica, 16; 3 Biographia Brittanica, art. Coke; 5 Co. 40, *b*, Rapin's Hist. Eng. anno 1606, 1607; Hume's Hist. Eng. anno 1604; Hargrave's Introduction to the case of the Postnati; 11 State Trials, 75; Id. 85, Lord Bacon's Speech; 1 H. H. P. C. 68; 11 State Trials, 106, Lord Ellesmere's Opinion; Sir Robert Phillip's Speech in the 2d part of Car. I, anno 1628; Stat. de prerogativa regis, anno 1324.

On the part of the defendant in error, it was contended,

1. That whatever might be the principles of natural law, the state of New Jersey was sovereign and independent, and had a right to legislate upon the subject of allegiance, and to declare who were the citizens from whom it was due.

That by the principles of the common law, Daniel Coxe had a right to inherit lands in New Jersey.

In support of these points the following authorities were cited: 1 Bl. Com. 366, 370; The Laws of New Jersey of the 20th September, 1777, and 29th of December, 1781. A manuscript opinion given by Lord Kenyon, on the 19th of February, 1784, while he was at the bar, that the American *antenati* were entitled to hold lands in England. The case of *Hamilton v. Eden*, decided by Ch. J. Ellsworth, in North Carolina, stated in the printed account of the proceedings of the commissioners under the British treaty. The case of Dr. Ingles, stated in the same proceedings. Plowden on Alienage, 19; Laws of New Jersey, 28th September, 1782; Vattel, Preliminary Discourse, s. 9, 211*] 21, 24, 25; Grotius, b, 2, c. *5, s. 24; 3 Dall. 153, 162, and *Brown's Case*, in Scotland, as stated by Mr. C. Lee.[1]

February 23. CUSHING, *J.*, delivered the opinion of the court, as follows:[2]

The court deems it unnecessary to declare an opinion upon a point which was much debated in this cause, whether a real British subject, born before the 4th of July, 1776, who never from the time of his birth resided within any of the American colonies or states, can, upon the principles of the common law, take lands by descent in the United States; because Daniel Coxe, under whom the lessor of the plaintiff claims, was born in the province of New Jersey, long before the declaration of independence, and resided there until some time in the year 1777, when he joined the British forces.

Neither does this case produce the necessity of discriminating very nicely the precise point of time when *Daniel Coxe lost his right [*212 of election to abandon the American cause, and to adhere to his allegiance to the King of Great Britain; because he remained in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government. The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by the ties of allegiance.

This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted. We do not mean to intimate an opinion that even a law of a state, whose form of government had been organized prior to the 4th of July, 1776, and which passed prior to that period, would not have been obligatory. The present case renders it unnecessary to be more precise in stating the principle; for although the constitution of New Jersey was formed previous to the general declaration of independence, the laws passed upon the subject now under consideration were posterior to it.

Having thus ascertained the situation of Daniel Coxe, on the 4th of October, 1776, let us see whether it was in any respect changed by his subsequent conduct, in relation to the new government. Without expressing an opinion upon the right of expatriation as founded on the common law, or upon the application of that principle to a person born in the State of New Jersey, before its separation from the mother country, we think it conclusive upon the point, that the legislature of that state *by the most unequivocal declarations, [*213 asserted its right to the allegiance of such of its citizens as had left the state, and had not attempted to return to their former allegiance.

The act of the 5th of June, 1777, contains an express declaration that all such persons were subjects of the state, who had been seduced by the enemy from their allegiance. The law speaks of them as fugitives not as aliens, and

1.—The case was stated by Mr. Lee, as follows: Alexander Brown, born in Virginia, where he always lived, and where he died on or about the year 1802, was the eldest brother in the elder line, of a numerous family, some of whom always lived in Scotland. By the death of a collateral relation in Scotland since his death, the descent of a landed estate was cast, and the question arose whether the eldest son of Alexander Brown, born since the year 1784, or his sisters, born before the treaty of peace, or the eldest son of William Brown, the second brother, born before the treaty of peace in Virginia, where he always has lived, or the relations of the intestate in Scotland, who always lived there, and were real British subjects, or any of them, inherited the estate.

Upon a contestation of these rights, it was determined in the court of competent jurisdiction, lately in Scotland, that the estate descended to the eldest son of Alexander Brown, under the statute of Anne, and the treaty of 1794. The cause was carried by appeal to the superior court, who affirmed the sentence in his favor. By his guardian the young man is now in receipt of the annual income. This decision was made about two years ago.

February 4th, 1808.

CHARLES LEE.

2.—Johnson J., did not vote upon this question; and Todd. J., gave no opinion, as he had not been present at the argument.

they are invited, not to become subjects, but to return to their duty, which the legislature clearly considered as still subsisting and obligatory upon them.

The inquiry which the jury is directed to make, by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives is, whether the person had, between the 4th of October, 1776, and the 5th of June, 1777, joined the armies of the King of Great Britain, or otherwise offended against the form of his allegiance to the state. The 7th section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them the inquiry is to be, whether the offender has joined the armies of the king, or otherwise offended against the form of his allegiance to the state.

During all this time, the real estates of these persons remained vested in them; and when by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be forfeited for their offenses, not escheatable on the ground of alienage. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced. Those who joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, (when an express declaration upon the subject was made,) and who had not since returned and become subjects in allegiance to the new government, by taking the oaths of abjuration and allegiance, are pronounced guilty of high treason, not for the purpose of effecting them personally, which would **214***] have *been most unjust, but with a view to the confiscation of their estates. And consistent with this distinction, the jury are to inquire in respect to these persons, not as in the case of those who had left the state after the 4th of October, 1776, whether they had offended against the form of their allegiance, but whether they are offenders within this act; that is, by having joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, and not having returned and become subjects in allegiance to the state.

Having taken this view of the laws of New Jersey upon this subject, it may safely be asserted that prior to the treaty of peace, it would not have been competent, even for that state, to allege alienage in Daniel Coxe in the face of repeated declarations of the legitimate authority of the government, that he continued to owe allegiance to the state, notwithstanding all his attempts to throw it off. If he was an alien, he must have been so by the laws of New Jersey; but those laws had uniformly asserted, that he was an offender against the form of his allegiance to the state. How, then, can this court, acting upon the laws of New Jersey, declare him an alien? The conclusion is inevitable, that, prior to the treaty of peace, Daniel Coxe was entitled to hold, and had a capacity to take lands, in New Jersey by descent.

But it is insisted that the treaty of peace, operating upon his condition at that time, or afterwards, he became an alien to the state of New Jersey in consequence of his election, then made to become a subject of the king, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression, which by any implication could work this effect.

It contains an acknowledgment of the independence and sovereignty of the United States, in their political capacities, and a relinquishment on the part of His Britannic Majesty, of all claim to the government, propriety and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period citizens of the *United [*215 States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective states, who in their sovereign capacities had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens who had by the laws of any of the states been declared aliens, nor releasing from their allegiance any who had become, and were claimed, as citizens. It repeals no laws of any of the states which were then in force and operating upon this subject, but on the contrary it recognizes their validity by stipulating that Congress should recommend to the states, the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty, nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the states, anterior to and independent of the treaty, but its indiscriminate adoption might be productive of more mischief than it is possible for us to foresee.

If, then, at the period of the treaty, the laws of New Jersey which had made Daniel Coxe a subject of that state were in full force, and were not repealed, or in any manner affected by that instrument; if by force of these laws he was incapable of throwing off his allegiance to the state, and derived no right to do so by virtue of the treaty, it follows that he still retains the capacity which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover.

Judgment must be affirmed, with costs.

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*THE UNITED STATES [*216
v.
THE BRIG UNION, THE SLOOP SALLY AND CARGO, AND THE SLOOP DEBORAH AND CARGO.

It is incumbent upon the plaintiff in error to show that this court has jurisdiction of the case.

This court will permit *viva voce* testimony to be given of the value of the matter in dispute.

The appraisement made by order of the district judge by three sworn appraisers, is not conclusive evidence of the value, but it is better evidence than

the opinion of a single witness examined *viva voce* in open court.

After deciding the question of value upon the weight of the evidence, the court will not continue the cause for the party to produce further evidence as to the value.

THESE were three separate libels against these three vessels, which were seized by the collector of the district of Delaware for a supposed breach of the revenue laws. The sentence of the court below being in favor of the claimants, the United States appealed.

Broom, for the appellees, objected to the jurisdiction of this court, because there was no rule to consolidate the cases, and in neither of them separately did the value of the thing in dispute, exclusive of costs, appear to be 2,000 dollars.

Reed, United States Attorney for the district of Delaware, said it was incumbent on the claimants to show the value, as they had submitted to the jurisdiction below.

But the court said that the plaintiff in error must show that this court has jurisdiction. The circuit court can neither give nor take away the jurisdiction of this court. This court must judge for itself of its own jurisdiction.

A witness was then introduced in behalf of the United States, who was sworn and examined *viva voce* in open court to prove the value.

Broom, for the appellees, read from the record an appraisement, made by three sworn appraisers, by order of the district judge, by which the brig Union was appraised at 1,800 dollars, the sloop Sally at 400, and the sloop Deborah at 600, and contended that this appraisement, being made by order of the judge, was conclusive evidence of the value of the matter in dispute, although that appraisement was never 217*] acted upon by the claimants *giving caution so as to liberate the vessels, which was the reason of the order for appraisement, according to the 89th section of the revenue law, vol. 4, p. 428. But if it should not be deemed conclusive evidence, yet it is better evidence than the opinion of a single witness who now forms a judgment from his recollection of the vessels two years ago. It is the testimony of three persons who formed their judgment at the time from an actual view and examination of the property. It was returned to the court and filed and entered upon record, without any objection on the part of the United States.

Rodney, Attorney General, contra.

If the court below cannot by any act oust this court of its jurisdiction, much less can any of its officers or apraisers. If this valuation be conclusive, it puts it in the power of appraisers appointed by the court below to deprive this court of its jurisdiction.

MARSHALL, *Ch. J.* The appraisement is not conclusive evidence of the value, but in this case it is the best evidence. It was made by officers of the court under its order, and was regularly returned and filed. It does not impeach the credibility of the witness now examined, for the value is a matter depending upon opinion, and with respect to which the judgments of men may honestly vary. The appraised value would have been the matter in dispute if the property had been delivered up to the claimants upon security given.

Todd, Livingston, Washington, Chase and Cushing, Justices, concurred.

JOHNSON, *J.*, contra. The appraisement was a thing not perfected. It was not acted upon, and might have been impeached.

The appeals were all dismissed for want of jurisdiction in this court.

No objection was made to the *viva voce* examination of the witness as to the value.

*On the next day, [*218

Rodney, Attorney General, moved the court for a continuance of these causes, and leave to take affidavits respecting the value of the property, so as to sustain the jurisdiction. This court has only decided that its jurisdiction does not appear upon the record. It is like the case of *Course v. Stead's Executors*, 4 Dall. 25, where the court continued the cause, and suffered affidavits to be taken to show the value of the matter in dispute. If the court should be of opinion that the decision of yesterday upon the weight of testimony differs this case from that of *Course v. Stead's Executors*, they will reject the motion.

Broom, contra.

If this motion had been made yesterday, before the decision of the court upon the weight of testimony, perhaps it might have been proper, but after the parties have put themselves on trial upon the evidence then before the court, and the decision has been made, it is not usual to open the case and grant a new trial, unless new evidence is suggested to have been discovered since the trial, not known to the party at the time of trial.

MARSHALL, *Ch. J.* Cannot the United States sue out a new writ of error, and take new affidavits to show the cause to be within our jurisdiction? If so, perhaps the court would not put the United States to that expense.

Rodney apprehended it would be final, it being an appeal, and not a writ of error.

The court overruled the motion.

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*PAWLING AND OTHERS [*219
v.
THE UNITED STATES.

Upon a demurrer to evidence, the testimony is to be taken most strongly against him who demurs, and such conclusions as a jury might justifiably draw, the court ought to draw.

A bond may be delivered as an escrow, by the surety to the principal obligor.

If one of the obligors, at the time of executing the bond, in the presence of some of the other obligors say, "We acknowledge this instrument, but others are to sign it," this is evidence from which the jury may infer a delivery as an escrow, by all the obligors who were then present.

ERROR to the district court for the district of Kentucky, in an action of debt upon an official bond given by Ballinger, as collector of the revenue, and signed and sealed by Pawling, Todd, Adair, and Kennedy, as his sureties, who pleaded that they delivered the same as an escrow to one Joseph Ballinger, to be safely kept; upon condition, that if Simon Ingleman and William Patton, named on the face of the bond, should execute the same as co-sureties, then the bond should be delivered to James Morrison, supervisor, on behalf of the United States, as their deed, and not otherwise; and that the same never was executed by Ingleman

and Patton; yet Ballinger delivered it to Morrison, on behalf of the United States, and so not their deed. The delivery as an escrow being traversed by the United States, issue was thereupon joined; in the trial of which the United States demurred to the evidence produced on the part of the defendants, which consisted of the depositions of T. T. Davis, W. G. Bryant, one of the subscribing witnesses, Elijah Stapp, another subscribing witness, John P. Wagnon, another subscribing witness, and a letter from Morrison, the supervisor, to Ballinger. The deposition of Davis states a conversation between Ballinger and Pawling, some time before the signing of the bond, in which the former told the latter that Todd, Kennedy, Shelby, Knox, Ingleman, Logan, Lewis and Adair, had agreed to be security for him; upon which Pawling also agreed to become his security, but upon the express condition that the other persons also should join in the bond. It also states a subsequent conversation between the deponent and Todd, before signing the bond, in which the latter denied that he had agreed to become Ballinger's surety, but said that he should not be apprehensive of danger, if all the men whom Davis had named would join in the bond. The deposition of Bryant states that he saw Pawling, in the presence of Ballinger, sign 220*] the bond, on condition *that Kennedy, Todd, Adair, Davis, and others, whom the witness did not recollect, should also sign the bond; and he understood that Pawling was to be exonerated if they did not. The deposition of Elijah Stapp states that he saw Pawling, in the hearing of Ballinger, acknowledge the bond as his act and deed, upon condition that others mentioned should also sign it. The deposition of Wagnon states, that when Todd, Adair and Kennedy signed the bond, Todd, in the presence of the other two, after inserting in the bond the names of other persons who he said were to sign it, called upon the witness to take notice that others were to sign it, and said, "We acknowledge this instrument of writing, but others are to sign it." The letter from Morrison to Ballinger says, "I have received your favor by Mr. Davidson, who carries back your bond; not that I require more securities, but that you appeared anxious to have more; those who have already signed are very sufficient." It was admitted by the attorney for the United States, that the names of Thomas Kennedy, John Adair, Simon Ingleman and William Patton, inserted in the body of the bond as obligors, were in the hand-writing of the defendant Todd. This evidence upon the demurrer was, by the court below, adjudged insufficient. The defendants, the sureties, took a bill of exceptions to the refusal of the court to suffer Ballinger, the principal obligor, to be examined as a witness for them, they having severed in their pleas. But as that question was not decided by this court, it is deemed unnecessary to state the arguments of counsel on that point.

Pope, for the plaintiffs in error.

Upon a demurrer to evidence, it is a general rule of law, that the evidence must be taken most strongly against the party demurring; and that the court ought to infer every thing which a jury could reasonably have inferred from the testimony. Doug. 134, (3d ed.) *Cocksedge v. Fanshaw;* 2 Wash. 210, 211, *Stephens v. White.*

In the present case, there can be no question as to the defendants, Pawling and Todd; the only possible doubt *which can be [*221 raised is, whether the testimony of Wagnon supports the pleas of Adair and Kennedy.

Rodney, (Attorney General,) for the United States, contended,

That the delivery as an escrow ought to have been to a third person, and not to Ballinger, the principal obligor.

Pope, in reply.

The law of the plea is admitted by the joining of issue upon the fact. No exception can be taken to the legality of the defense, if the facts of the plea are found to be true. Courts ought to lean against demurrers to evidence, because they take the cause from the jury, which is the proper tribunal to decide the facts of the case, and throw that burden upon the court, whose only duty it is to decide the law. Demurrers to evidence are also extremely inconvenient in practice, especially demurrers to parol testimony, which consume a vast deal of time.

February 27. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In this case two points are made for the consideration of the court.

It is contended by the plaintiffs in error.

1st. That judgment on the demurrers to evidence should have been rendered for the defendants in the court below.

2d. That Joseph Ballinger ought to have been admitted as a witness.

The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, *and also [*222 those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw.

The point in issue between the parties was the delivery of the instrument on which the suit was instituted. The plaintiffs below contending that it was delivered absolutely; the defendants that it was delivered as an escrow.

The bond, upon its face, purports to be delivered absolutely; and it is not to be doubted that obligees would be much more secure against fraud, if the evidence that the writing was delivered as an escrow appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed by this court.

The subscribing witnesses to the bond were examined to prove its delivery. Henry Pawling executed it at one time; the other defendants, Kennedy, Todd and Adair, at a different time. With respect to Pawling, the testimony is as complete as can be required. William G. Bryant deposes that Pawling signed the bond, on condition that other persons, whom he named, should also sign it. The witness understood that if those other persons should not sign it, Pawling should be exonerated. Elijah Stapp, the other subscribing witness to the signature of Pawling, deposed that "he saw Pawling acknowledge it as his act and deed, upon condition that others, whom he mentioned, should also sign it."

These are the subscribing witnesses to the bond, and certainly a jury believing them could not have avoided declaring, by their verdict, that the bond was delivered on condition. That condition not having been performed, the bond, as to Pawling, remains an escrow.

The testimony, with respect to the other defendants, is less positive. The witness, John P. 223*] Wagnon, was *called in to attest the bond. Thomas Todd, one of the defendants, then sat down and inserted in the body of the bond the names of other persons who, he said, were also to execute the instrument which he then held in his hand.

Some distinction was taken at the bar between the case of Todd and that of the other defendants. But the court is of opinion that no such distinction exists. The other defendants said nothing. They did not even acknowledge their signatures. Todd holding the instrument in his hands, called upon the witness to take notice that "we" (in the plural) "acknowledge this instrument, but others are to sign it." The two other obligors being present, and making no other acknowledgment, are clearly to be considered as speaking through Todd, and executing the bond on the terms on which he executed it. Their condition, then, is the same. It is either an escrow or a writing obligatory with respect to all of them.

A jury might certainly have found the issue in favor of the plaintiffs below, and a court would have been well satisfied with their verdict. But might they not, without going against evidence, have found the issue in favor of the defendants below.

When words are to be proved by witnesses who depend on their memory alone, the precise terms employed by the parties will seldom be recollected, and courts and juries must form their opinions upon the substance and upon all the circumstances. Now to what purpose did the defendants call upon the subscribing witness to take notice that others, as well as themselves, were to execute the writing? To what purpose did they qualify their acknowledgment with this declaration? It could not be in order to show that they depended on Ballinger to procure additional securities, for that was an affair between him and them, of which it was perfectly unnecessary to call on the witness to take notice, if it was to have no influence on the particular fact he was required to attest. There is certainly strong reason for believing that the obligors 224*] considered that declaration as *explaining and affecting the act with which they connected it.

It is also of some importance that the defendant Todd had previously declared that he should not be apprehensive of becoming a security for Ballinger, provided others, whom he named, should also become securities, and that he inserted the names of others in the bond, in the presence of the witness.

Although the judges who compose this court might not, perhaps, as jurors, be perfectly satisfied with this testimony, they cannot say that a verdict would not be received, or ought not to be received, which should find the issue in favor of the defendants below. They cannot say that such a verdict would be against evidence. Thinking so, the court is of opinion that the judgment on the demurrer ought to have been in favor of the defendants below.

It is unnecessary to give any opinion on the second point. The judgment of the court for the district of Kentucky is to be reversed.

Judgment reversed.

GRANT *v.* NAYLOR.

A letter of credit addressed by mistake to John and Joseph, and delivered to John and Jeremiah, will not support an action by John and Jeremiah for goods furnished by them to the bearer, upon the faith of the letter of credit. It is not a written contract between the plaintiffs and the defendant, and parol proof cannot be admitted to make it such. It is not a case of ambiguity, or of fraud, or of mistake on the part of the plaintiffs.

Semb. That the certificate of commissioners named in a *dedimus*, that they took in due form of law the oath annexed to the commission, is sufficient evidence of that fact.

That it is not necessary to give notice to the opposite party of the time and place of executing the commission.

That if the return of the commissioners be inclosed in an envelop which is sealed by the commissioners, no other sealing by the commissioners is necessary.

ERROR to the circuit court for the district of Maryland, in an action of assumpsit brought by John and Jeremiah Naylor against Daniel Grant.

The verdict and judgment below were for the plaintiffs on the second count of the declaration, which stated, in substance, that it was agreed between the plaintiffs and defendants, that if the plaintiffs would at the request of the defendant sell and deliver to a John Hackett and Alexander Grant "divers goods, wares and merchandises," he, *the defendant, in considera- [*225 tion of the same, promised to pay the plaintiffs as much money as they reasonably deserved to have therefor, in case Hackett & Grant did not pay for them; and that, in consideration of the defendant's promise, and at his request, they sold and delivered to Hackett & Grant "divers goods, wares and merchandises," and reasonably deserved to have therefor 2,168*l.* sterling, of which the defendant and Hackett & Grant had notice; and which Hackett & Grant did not pay, but refused, and are insolvent; of all which the defendant had notice, and in consideration of the premises promised to pay the plaintiffs the said sum of 2,168*l.* sterling of the value, &c., which he has failed to do.

Upon the issue of *non assumpsit*, the plaintiffs read in evidence a letter, admitted to be signed by and with the name of the defendant, and directed "To Messrs. John and Joseph Naylor & Co." in the following words:

"*Baltimore, 6th April, 1795.*

"GENTLEMEN:

"By the recommendation of Mr. Travis, I take the liberty to address you by my son Alexander, who visits England with a view of establishing connections in the commercial line there in the different manufactories and others. He is concerned with Mr. John Hackett, of this place, under the firm of Hackett & Grant. For their plan I refer to themselves. Have therefore only

to add, that I will guaranty their engagements, should you think it necessary, for any transaction they may have with your house."

The plaintiffs also produced and offered to read in evidence a commission, (with interrogatories, and an exhibit and depositions,) directed to two persons, in the usual form, commanding them to take the examination of the witnesses in writing upon the interrogatories, and to send them to the court closed up and under the seals of any two or one of them, and requiring them 226*] to take the *oath annexed to the commission, but not directing before whom, or in what manner, the oath should be taken.

The depositions under this commission went to prove that there was no commercial house at Wakefield, (the town where the plaintiffs lived,) under the name of John and Joseph Naylor & Co. That the firm of the plaintiffs was John and Jeremiah Naylor & Co., and that the Mr. Travis, mentioned in the letter, was the agent of the plaintiffs. That the letter was in fact intended for that house, and was delivered to it by Alexander Grant, of the house of Hackett & Grant, who obtained goods upon the credit of it, and who became insolvent.

To the reading of this commission and depositions the defendant objected, contending that the commission was illegally and defectively executed; but the court below overruled the objection, and suffered them to be read.

The defendant then prayed the court to instruct the jury, that upon this evidence the plaintiffs were not entitled to recover upon either count in the declaration; but the court refused, and instructed the jury that the evidence was proper and legal to support the issue on the part of the plaintiffs, and sufficient in law for that purpose, if by the jury believed to be true, and if they should believe that the letter was intended to be addressed, and was addressed, by the defendant to the plaintiffs.

To which opinions of the court the defendant excepted, and brought his writ of error.

Martin, for the plaintiff in error.

1. The first bill of exceptions brings into view the informality of the execution of the commission to examine witnesses. The authority to issue such a commission, and the mode of executing it, depend upon the act of assembly of Maryland, passed at November session, 1773, c. 7, s. 7, by which it is enacted, "that such commission shall issue, and the commissioners shall 227*] be appointed and *qualified, and such interrogatories be proposed or exhibited, and such commission be executed and returned; and the depositions or affidavits taken in pursuance thereof shall be published in the same manner and form as in the case of a commission issuing out of the court of chancery for the examination of witnesses residing and living out of this province; and the depositions or affidavits which shall be duly made or taken in virtue of any commission which shall issue in pursuance of this act, or copies thereof duly attested, shall be admitted in evidence at the trial of the cause."

The mode of issuing and executing commissions from the court of chancery in Maryland has always been conformable to the English practice, except that, by the act of Assembly of 1785, c. 72, s. 15, the parties are permitted to be present at the examination, and may put additional interrogatories.

1st. We object to the execution of the commission, because it does not appear that the commissioners were sworn according to law. They themselves certify that they took the oath annexed to the commission, but do not say before whom, nor in what manner. It ought to have been certified by some person who administered the oath, and who was competent in law to administer it; and such certificate ought to show how it was done. It is like the case of a commission to ascertain the boundaries of lands, in which case it has been uniformly holden in Maryland, that if the commissioners only return that they have acted according to law in general terms, their return is insufficient. They must certify in what manner they have executed their commission, that the court may judge whether it be legally executed.

2d. The commissioners were only authorized to examine witnesses upon the interrogatories sent out with the commission. But it does not appear that any interrogatories were sent with the commission.[1]

*3d. The defendant had no notice of [*228 the time and place of executing the commission. He filed no interrogatories. Notice is required by the principles of natural justice, and by the constant practice of the court of chancery. 1 Harrison's Ch. Prac. 444.

4th. The return of the commissioners ought to have been under seal.

LIVINGSTON, J. Was not the envelop under their seals?

Martin. Yes; but that is not sufficient; they ought to have put their seals to their certificate.

LIVINGSTON, J. I have never seen any other seal to the return of commissions than the seal to the envelop.

5th. Martin. The commission was taken out upon the first issue which was made up, and before the second issue upon the amended pleadings,[2] upon which the cause was finally tried.

LIVINGSTON, J. Did not the old declaration contain a count like the second count of the new, upon which the verdict was found?

Martin. Upon the filing a new declaration, it is to be considered as a new case altogether. Eq. Ca. Abr. 490, vol. 2, pt. 1, pl. 5, new edition.

2. The second bill of exceptions draws in question the applicability of the evidence to the counts of the declaration, and its sufficiency to support the plaintiffs' action. The verdict, being for the plaintiffs upon the second count only, confines the inquiry to that count.

*The letter upon which the action is [*229 founded was not addressed to the plaintiffs, but to John and Joseph Naylor and Company.

1.—Harper. The rule of the court below is, that no commission shall issue until ten days after interrogatories filed. It is to be presumed that the clerk did not disobey the rule of court. The commissioners have returned the interrogatories with the depositions.

2.—On the first trial a juror was withdrawn, and the plaintiff had leave to amend. Upon which he filed a new declaration, and a new issue was made up, in substance, the same as the first.

A person cannot take by a grant made to him by a wrong name. Moor, 197, *Panton v. Chose;* 1 Salk. 7, Cro. Eliz. 897, ca. 22, *Field v. Wilson;* Willes. 554, 556, *Evans v. King.*

No parol evidence is admissible to vary a written agreement. 3 Dall. 416, *Clarke v. Russel;* 1 H. Bl. 289, *Gunnis v. Erhart.*

This was a promise to pay the debt of another, and within the statute of frauds. Cowp. 227, *Jones v. Cooper;* 2 T. R. 80, *Matson v. Wharam;* 1 Salk. 23.

The written agreement must show the consideration as well as the promise. The whole agreement must be in writing. 5 East, 10, *Wain v. Warlters.* No parol testimony can supply the defect.

The declaration must set forth the special agreement precisely. The *probata* must agree with the *allegata.* 2 Bos. & Pull. 281, *Wilson v. Gilbert;* 3 Bos. & Pull. 559, *Whitwell v. Bennet;* 6 T. R. 363, *Spalding v. Mure;* 5 East, 111, note, *Bordenave v. Bartlett;* 3 Esp. Rep. 205; 3 Bos. & Pull. 456, *Turner v. Eyles.*

The plaintiffs cannot, upon this evidence, recover either upon the special counts or the money counts. 4 Bos. & Pull. 351, *Cooke v. Munstone.*

The letter is not an absolute guaranty, but upon condition that John and Joseph Naylor should think it necessary. There is no evidence of notice to the defendant that the plaintiffs thought it necessary. They ought to have given the defendant notice that they held him responsible, in order that he might take means to secure himself.

It was not a continuing guaranty. It is to be considered as extending only to the first impor- [*230] tation of goods; *but the plaintiffs have recovered upon the transactions of several years.

The declaration ought to have set out specially what engagement Hackett & Grant had made and failed to comply with.

Ingersoll, contra.

There are only three questions made in this case.

1. Whether the letter of credit rendered the defendant liable to the extent of the plaintiffs' demand.

2. Whether the objection, arising from the mistake in addressing the plaintiffs as John and Joseph, instead of John and Jeremiah, is not obviated by the proof, without an averment in the declaration that the same persons were meant.

3. Whether the evidence under the commission was admissible.

1. On the first point he contended that it was apparent on the face of the letter, and from the nature of the business in which Hackett & Grant were about to engage, that a continuing guaranty was intended. And that if there was any ambiguity in the expressions of the letter upon that point, they ought to be taken most strongly against the writer, and that a letter of credit was a contract which required to be executed among merchants with peculiar good faith.

2. Parol evidence was admissible to show that John and Joseph meant John and Jeremiah. 10 Co. 124, 125, b.

It is admitted that if the obligor be sued by the name in the bond, and it be proved by parol that the defendant delivered the bond, he is estopped to deny his name to be as in the bond. So in assumpsit, parol evidence may be given to show that the contract was made with A. by the name of B., and to show that the writing was delivered to A.

*It is the custom in Europe among [*231] merchants to keep the name of a firm long after the original copartners are dead. Suppose a letter of credit addressed to the old firm be delivered to persons not named in the letter, and they furnish the goods, shall they not be entitled to recover upon this letter of credit?

In the present case, suppose there is no such person as Joseph, then his name is a surplusage, and it is a letter to John. And then what is the objection to a suit in the name of John and Jeremiah?

It may state the contract according to its legal import. If a bond be made in the name of John, and James deliver it, it is the bond of James. So may a letter addressed to John and Joseph, delivered to John and Jeremiah, constitute a contract with John and Jeremiah. It was competent to prove that Alexander Grant delivered the letter to John and Jeremiah, and that there was no other firm in Wakefield of the name of Naylor. It was not necessary to state in the declaration that the contract was in writing, nor that John and Joseph meant John and Jeremiah. If John and Jeremiah had drawn a bill of exchange in the name of John and Joseph, John and Jeremiah would have been liable. So on a policy of insurance in the name of A., but for the use of B., it is not necessary to aver it to be so, but an action may be brought directly in the name of B.

So if I direct my correspondent, having funds in his hand, to make insurance, and he fails to do so, I may charge him as insurer, without stating specially the circumstances which render him liable. So in a case of *executor de son tort,* I charge him as executor generally, without stating the facts of intermeddling with the goods, &c. whereby he is liable to be sued as executor.

Ingersoll inquired of the court whether it was required that he should say any thing upon the execution of the commission and the depositions.

MARSHALL, *Ch. J.* The only doubt entertained by the court upon that point is as to the change of the issue.

*Ingersoll. The case cited from Eq. [*232] Ca. Abr. furnishes the answer. In that case there was no issue when the depositions were taken, but here was an issue the same in substance as that upon which the cause was tried.

On the next day, Harper, on the same side, was stopped by

The court, as to the point of the change of the issue, saying that the issue was in substance the same, and that the court was satisfied that the judgment was not erroneous on that account.

Harper. The cases in which parol evidence is admitted to explain a written agreement, are,

1st. Of ambiguity; and,

2d. Of mistake.

1. Of ambiguity, where it is patent, it is the province of the court to explain it from the instrument itself, and the judges cannot resort to evidence *dehors.*

When there is no ambiguity upon the face of the instrument, but an uncertainty arises from facts out of the instrument, (as where there are two persons of the same name and description,) there the ambiguity may be explained by parol testimony.

You may not by parol evidence vary, extend or curtail a written instrument, but you may explain it. 2 Vez. 216, *Hampshire v. Pierce;* Powell on Contracts, 431.

The case of *Clarke and Russel* was a case of patent ambiguity.

2. But we say this is not a case of latent or patent ambiguity, but of mistake, and there are many instances where a mistake may be corrected by parol. 3 T. R. *The King v. The Inhabitants of Scammonden;* 6 T. R. 671, *Thomas v. Thomas;* Powell on Contracts, 432; Gro. Car. 501, *Nevison v. Whitney;* 2 P. Wms. 141.

233*] *CHASE, *J.* There was a case of Lord Baltimore's devise to his son Benjamin, when his name was Benedict. Benedict recovered in an ejectment, having proved himself to be the person meant.

Harper. The case from 10 Co. 124, is no authority. It is the opinion of one judge only, and the other appears to have been the better lawyer. And even in that case parol evidence must have been admitted to show that there was not another corporation of that name.

There is a difference between proving that something was agreed which does not appear in the writing. and proving that it was agreed that something should be inserted in the written agreement which was omitted by mistake. 3 Wilson, 275, *Meres v. Ansel.* This was a mistake of Travis, the agent. It was agreed that the guaranty should be by Grant to John and Jeremiah, but by mistake it was directed John and Joseph.

3. No averment was necessary in the declaration that John and Jeremiah were the persons meant, because it was not necessary to set forth the written agreement in the declaration.

4. There can be no doubt that the guaranty was general. By the very terms of the letter the defendant undertook to guaranty any engagements which Hackett & Grant should enter into any for transaction they might have with the plaintiffs.

5. No notice was necessary to inform the defendant that a guaranty was necessary. The contract did not require notice.

Martin, in reply.

Although the name of a firm sometimes continues after some of the original partners are dead, yet when they sue they must declare that A., B. and C., trading under the name and firm of D., E. & F., &c.

So in this case, if the fact would justify them, the plaintiffs might have declared that the de-
234*] fendant promised *the plaintiffs trading under the name and firm of John and Joseph Naylor & Co.

The plaintiffs are bound to name all the persons entitled to be joined as plaintiffs, at their peril.

The action cannot be supported by any acts done by the plaintiffs. There can be no assumpsit in law. The whole contract arises from the letter. Its legal import must appear upon the face of it.

We offer no parol evidence to create an ambiguity, and there is none on the face of the instrument. The variance is apparent upon comparing the evidence with the declaration.

It is true that equity will interpose in some cases of mistake, where it was agreed that something should be inserted in the writing, which was not done, and the writing was drawn by the other party; or where there is any thing omitted through fraud, one party being illiterate, &c. But here the plaintiffs were not bound to part with their goods upon such a letter; it was their own folly to do it. They made no mistake.

March 29. MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows:

In this case three points are made by the plaintiff in error on the letter which constitutes the basis of this action. He contends,

1st. That this letter being a collateral undertaking, and being addressed to John and Joseph Naylor & Co., the plaintiffs below cannot be admitted to prove by parol testimony that it was intended for, and is, an assumpsit to John and Jeremiah Naylor.

2d. That the undertaking was conditional, and required notice to be given to the writer of the intent and nature of his liability.

*3d. That it is confined to the ship- [*235
ments made during the year in which it was written.

On the first objection the court has felt considerable difficulty. That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles.

Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion.

On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case.

This is not a case of ambiguity.

It is not an ambiguity patent, for the face of the letter can excite no doubt.

It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co., to either of which this letter might have been delivered.

It is not a case of fraud. And if it was, a court of chancery would probably be the tribunal which would, if any could, afford redress.

If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced, and who claims the benefit of the promise.

*Without reviewing all the cases [*236
which have been urged from the bar, it may be said with confidence that no one of them is a precedent for this.

A letter addressed by mistake, it is admitted, to one house, is delivered to another. It con-

tains no application or promise to the company to which it is delivered, but contains an application and a promise to a different company not existing at that place. The company to which it is delivered are not imposed upon with respect to the address, but knowing that the letter was not directed to them, they trust the bearer, who came to make contracts, on his own account. In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract, is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it.

It being the opinion of a majority of the court that John and Jeremiah Naylor could not maintain their action on this letter, it becomes unnecessary to consider the other points which were made at the bar. It is the opinion of this court that the circuit court erred in directing the jury that the evidence given by the plaintiffs in that court was proper and sufficient to support the issue on their part. The judgment of the circuit court is, therefore, to be reversed, and the cause sent back for further trial.

Judgment reversed.

237*] *WOODS AND BEMIS v. YOUNG.

The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria.

The plaintiffs below, Woods & Bemis, took a bill of exceptions to the refusal of the court to continue the cause till next term, upon their motion grounded on an affidavit stating the absence of a witness, the facts which they expected to prove by him, on a belief that he would prove those facts, (which appeared to be material to the issue,) that he resided in the state of Maryland, about 25 miles from the place of trial, had been summoned, and promised to attend; that the cause had been called at a former day for trial in the regular course of the docket, and was then postponed at the request of the plaintiffs, on account of the absence of that witness; that the cause being now again called for trial, the witness was still absent, but it was expected that his attendance might be had at the next term.

The bill of exceptions stated a general rule of practice which had been made at a former term, and entered on the minutes of the court, and which was still in force, "that when a motion shall be made for the continuance of a cause for want of a witness, the affidavit must state the fact or facts which the party making the affidavit expects to prove by such witness, and that the said party verily believes that the said witness will prove such fact or facts, and that he the deponent has used all proper means to obtain the attendance of such witness, and that he believes he shall be able to procure the testimony of such witness at the next term, or in a reasonable time, to be therein stated."

No motion had been made for an attachment against the witness, or any other process to compel his attendance.

*The case was submitted to the court [*238 without argument, by Swann, for the plaintiffs, and Youngs, for the defendant.

By the Court. The question is, whether a refusal to continue a cause can be assigned for error.

The impression of the court is, that it cannot. Has the party, by law, a right to a continuance in any case? If he has it will have weight. Is it not merely a matter of favor and discretion?

This is a case in which this court cannot look into the merits of the question, whether the court below ought to have granted a continuance of the cause.

Judgment affirmed, with costs.[1]

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*YOUNG v. PRESTON. [*239

If A. agree, under seal, to do certain work for B. and does part, but is prevented by B. from finishing it according to contract, A. cannot maintain a *quantum meruit* against B. for the work actually performed, but must sue upon the sealed instrument.

ERROR to the circuit court for the District of Columbia in an action of assumpsit, brought by Preston against Young, upon a *quantum meruit* for work and labor.

At the trial below, the defendant, Young, offered in evidence a sealed agreement between the parties, and offered further evidence that the work and labor for which this action was brought were done in consequence of that agreement; and prayed the court to instruct the jury that if, from the evidence, they should be of opinion that the said work and labor was done in consequence of the sealed agreement, the action of assumpsit would not lie: which instruction the court refused to give, evidence having been offered to the jury that the plaintiff was prevented from completing the work mentioned in the agreement by the defendant, who employed another person to finish it.

But the court instructed the jury that if, from the evidence, they should be of opinion that the plaintiff was prevented by the defendant from proceeding to complete the said work, according to the said agreement, in a reasonable time, then the plaintiff had a right to recover, in this form of action, from the defendant, as much money as the plaintiff deserved to have for the work done by him for the defendant, although the same was done in consequence of the said agreement, and although the whole work mentioned in the said agreement was not completed. To which refusal and instruction the defendant excepted; and

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1.—This case was brought up in expectation that this court would have decided the question whether an attachment can be served upon a person who resides out of the district, but within 100 miles of the place of trial, and who has been summoned and fails to attend as a witness in a civil cause.

But the court having intimated an opinion that the refusal to continue the cause could not be assigned for error, the counsel did not argue the other point.

NOTE.—*Effect of part performance of contract for services*—see note, 24 L. R. A. 231.

the judgment below being against him, he brought his writ of error.

Upon the opening of the case, this court, without argument, reversed the judgment.

240*] *On a subsequent day, C. Simms, one of the counsel for the defendant in error, not having been present at the opening of the case, was permitted by the court to cite authorities in support of the opinion of the court below, and cited the following: *Towers v. Barrett*, 1 T. R. 133, where it was decided that assumpsit for money had and received will lie to recover money paid on a contract which is put an end to; as where, either by the terms of the contract it is left in the plaintiff's power to rescind it by any act, and he does it, or where the defendant assents to its being rescinded. In that case, the counel for the defendant admitted, that when the party has done anything to preclude himself from going into the contract, then money had and received will lie. Buller, J. said, "The defendant left it in the power of the plaintiff to put an end to the contract. If the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract."

So in *Giles v. Edwards*, 7 T. R. 181, there was a special contract between the plaintiff and the defendant, which the defendant had prevented the plaintiff from completing. The court was clearly of opinion, that "as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it." So here, Simms contended, that as the defendant had prevented the plaintiff from completing the contract, the plaintiff had a right to put an end to it. If he had paid money under the contract, he would have had a right to recover it back; but as instead of advancing money, he had done work and labor, which could not be recovered back in specie, he had a right to recover its value.

So in 1 Powell on Contracts, 417, "If he, who is benefited by another's fulfilling his contract or agreement, is the occasion why it is not carried into execution, the contract or agreement is thereby entirely dissolved, and the party bound discharged from his obligation."

But notwithstanding these authorities, the court adhered to their first impression, some of 241*] the judges saying, *that the plaintiff had a clear right of action upon the sealed instrument; he might aver in his declaration that he had, in part, performed the work, and was ready to do the rest, but was prevented by the defendant. And whenever a man may have an action on a sealed instrument, he is bound to resort to it.

Judgment reversed.

ROSE *v.* HIMELY.

If a claim be set up under the sentence of condemnation of a foreign court, this court will examine into the jurisdiction of such court; and if that court cannot, consistently with the law of nations, exercise the jurisdiction which it has assumed, its sentence is to be disregarded; but of their own jurisdiction, so far as it depends upon municipal laws, the courts of every country are the exclusive judges. Every sentence of condemnation by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it.

The prohibition, by France, of all trade with the revolted blacks of Santo Domingo, was an exercise of a municipal, not of a belligerent right; and seizures under that prohibition were only authorized within two leagues of the coasts of that island.

A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such a seizure cannot give jurisdiction to the courts of the offended country; especially if the property seized be never carried within its territorial jurisdiction.

Quære, whether a French court can, consistently with the law of nations, and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States.

THIS was an appeal from the sentence of the circuit court for the district of South Carolina, which reversed that of the district judge, who awarded restitution to Rose, the libellant, of certain goods, part of the cargo of the American schooner Sarah.

This vessel, after trading with the brigands, or rebels of St. Domingo, at several of their ports, sailed from thence, with a cargo purchased there, for the United States; and had proceeded more than ten leagues from the coast of St. Domingo, when she was arrested by a French privateer, on the 23d of February, 1804, carried into the Spanish port of Barracoa, in the island of Cuba; and there, with her cargo, sold by the captors, on the 18th of March, 1804, before condemnation, but under authority, as it was said, of a person who styled himself agent of the government of St. Domingo, at St. Jago de Cuba. The greater part of the cargo was purchased by —— Cott, the master of an American vessel called the Example, into which vessel the goods were clandestinely transferred from the Sarah, in the night time, and brought into the port of Charleston, in South Carolina, where they were followed by Rose, the supercargo of the Sarah, who filed a libel against them, in behalf of the former owners, complaining of the unlawful seizure on the high seas, and praying for restoration of the goods: whereupon process was issued, and *the goods were arrested by the marshal, [*242 on the 4th of May, 1804. No steps appear to have been taken by the French captors, towards obtaining a condemnation of the vessel, until time enough had elapsed for them to receive information of the proceedings against the goods in this country. The forms of adjudication were begun in the tribunal of the first instance, at Santo Domingo, in July, 1804, and the condemnation was had before the middle of that month.

This condemnation purports to be made conformably to the first article of the *arrete* of the captain general, (Ferrand,) of the 1st of March, 1804, which was issued six days subsequent to the seizure of the vessel.

This article was as follows: "The port of Santo Domingo is the only one of the colony of Santo Domingo, open to French and foreign commerce; consequently, every vessel anchored in the bays, coves and landing places of the coast occupied by the revolters, those destined for the ports in their possession, and coming out with or without cargoes; and, generally, every vessel sailing within the territorial extent

of the island, (except between Cape Raphael, and the bay of Ocoa,) found at a less distance than two leagues from the coast, shall be arrested by the vessels of the state, and by privateers bearing our letters of marque, who shall conduct them, as much as possible, into the port of Santo Domingo, that the confiscation of the said vessels and cargoes may be pronounced."

On the 6th of September, 1806, no sentence of condemnation having been produced in evidence, the judge of the district court decreed restitution of the property to the libellant, from which sentence the other party appealed to the circuit court, and there produced the sentence of condemnation, by the tribunal of the first instance, at Santo Domingo. The circuit court reversed the sentence of the district court, and 243*] dismissed the libel.[1] *From this sentence, the libellant appealed to this court.

For the libellant, the case was argued by C. Lee, Harper, S. Chase, Jun., Dallas, Rawle, Ingersoll and Drayton; and,

For the respondent, by Duponceau, E. Tilghman and Martin.[2]

For the libellant it was contended,

1. That this was not a seizure as prize of war, but as a forfeiture for violation of the municipal law of France; and,

2. That whether it were seized *jure belli*, or *jure civili*, it was not competent for the court, 244*] sitting at *Santo Domingo, to condemn the property, while it was in a neutral foreign port.

1st point.

This is not a case of prize of war, but of municipal forfeiture.

The tribunal of the first instance was a municipal court; and it is doubtful whether it had cognizance of questions of prize of war. But if it had a general prize jurisdiction, it could not, consistently with our treaty with France, (Laws U. S. vol. 6, p. 34, art. 22,) condemn a prize not carried into a French port. The words of the article are, "it is further agreed that, in all cases, the established courts for prize causes, in the country to which the prizes may be conducted, shall alone take cognizance of them." Hence it is to be inferred, that as they could not, consistently with the treaty, take cognizance of the case as prize of war, they themselves must have considered it as a mere seizure, for violation of a municipal regulation. It is characteristic of prize of war, that it is done with a view to annoy an enemy. When a neutral violates his neutrality, he becomes, *quoad hoc*, an ally to the enemy, and the ground of condemnation is always as enemy property. But here was no feature of public war. It was merely an insurrection. All the world considered the blacks of St. Domingo as revolted subjects. Our government has acknowledged the right of France to legislate over those colonies. The French *arrete* is not a measure of war, but of government; and is a mere municipal regulation to enforce obedience to her laws, and for the reduction of the insurgents. The law of France rendered the trade illicit, but a seizure for illicit trade is not the exercise of a right of war. It had no relation to a state of war; and might have been passed, if the most profound peace had existed throughout the world.

In the year 1802, France, Spain and England were at peace with each other, and with all the world. The proceedings of France against her revolted colonies were of a civil nature; at least they were so considered by her. (See Bonaparte's letter to Toussaint, and Le *Clerc's letter of November, 1802, and [*245 his address to the people of St. Domingo.) Toussaint also considered himself as holding under the government of France, and to show his confidence, left his children in France as hostages.

The tribunals in Santo Domingo were the ordinary tribunals of municipal jurisdiction, and not exclusively courts of prize. Their jurisdiction depended upon the *arretes* of the consuls of France, of the 18th of June, and 2d of October, 1802,[3] (a time of profound peace,) *and which refer to the year 1789, a [*246 time when France was also at peace with all the world. There was, then, no necessity of a prize court; and neither of those *arretes [*247 allude particularly to the insurrection of the blacks. That of 2d October, 1802, relates gen-

1.—The reasons of the circuit court are stated by Judge Johnson, in this sentence: see Appendix, note (C).

2.—This case was argued in connection with the case of *Rose v. Groening*, which was a libel for another part of the cargo of the Sarah, and with the case of *La Font v. Bigelow*, from Maryland, which was an action of replevin by the original owner of goods condemned by the tribunal at Santo Domingo, under similar circumstances; and with the case of *Hudson & Smith v. Guestier*, also from Maryland, which was trover for the cargo of the Sea Flower, condemned upon similar grounds; and with the case of *Palmer & Higgins v. Dutligh*, from Pennsylvania, which was replevin for the cargo of the brig Ceres, condemned under similar circumstances; and with the case of *Plummont v. The Brig Ceres*, which was a libel in the district court of the United States at Philadelphia, for restoration of the vessel. These cases were all supposed to depend on the same questions, and by consent of counsel, with leave of the court, were argued as one cause. This accounts for the great number of the counsel employed, and for the great length of the argument, which consumed nine days.

Upon the opening of these cases, six judges being present, it appeared that three of the six judges had given opinions in the circuit court upon the principal points which were about to be argued, and that if each judge, who had given an opinion, should withdraw from the bench, as had been customary heretofore, there would not remain a quorum to try the cause. It was thereupon agreed, by all the judges, that they would sit. Chase, Johnson and Livingston, Justices, expressed themselves strongly against the practice of a judge's leaving the bench because he had decided the case in the court below. Washington, Justice, said he should not insist upon the practice, if it should be generally abandoned by the judges. The whole six judges (Todd, Justice, being absent) sat in the cause; so that the practice of retiring seems to be abandoned.

3.—The following is the *arrete* of 18th of June, 1802.

"*Arrete* of the consuls concerning the mode of administration of civil and criminal justice in the colonies restored to France by the treaty of Amiens.

"The consuls, &c., on the report, &c., decree:

"1. In the colonies restored to France by the treaty of Amiens of 6th of Germainal last, (27th March, 1802), the tribunals which existed in 1789, shall continue to administer justice in civil as well as criminal matters, according to the forms of proceedings, laws, regulations and tables of fees then observed, and so that nothing be innovated as to the organization, jurisdiction and competence of the said tribunals.

"2. The denominations of *senescohalsea*, admiral-

erally to the smuggling trade of the colonies, and refers to the ancient laws, not to the laws of war; but the municipal laws. From the jurisdiction of the court, then, it cannot be inferred that this was a case of prize of war; nor will such an inference be drawn from the colonial regulations respecting the trade.

The first of these is the *arrete* of the captain general, dated the 22d of June, 1802,[1] which is entirely municipal, and applies as well to French as to foreign vessels, and is limited in its operation to within two leagues of the coast.

The next is that of the 9th of October, 1802, which is to the same effect.

The last is that of 1st March, 1804, which as to these cases was clearly *ex post facto*, but if applicable at all, shows itself to be merely an exercise of a municipal right. The sentence of condemnation itself does not pretend to consider the vessel as prize of war, but as a seizure made for the violation of those municipal regulations of trade which it recites. The order that the proceeds should be distributed according to the laws respecting prizes, would have been unnecessary, if it had been a case of prize, to which those laws would have applied independent of the order.

There would have been a gross inconsistency in France treating the revolters as rebels, and yet claiming that other nations should consider them as acknowledged enemies. Yet before France can claim the rights of war from neutrals, in regard to the insurgents of St. Domin-
248*] go, she must *admit them to be enemies, and not rebels. If they are independent, and France is at war with them, France can claim from us only the rights which war gives. We shall have a clear right to trade with them, unless in contraband of war, or to blockaded ports.

It either is, or is not, prize of war. There are only two sides to the question. Prize is a seizure *jure belli*. There must be a war to raise a question of prize. No open war then existed with any nation. It is said that by aiding rebels we make a common cause with them; but the assistance, to justify such an inference, must be the act of the nation, not the unauthorized act of individuals. Until the year 1806, the United States had never declared the trade to be unlawful; nor did France require our government to take notice of the trade, until the fall of 1805. The law of nations does not authorize the seizure and confiscation of the property of foreigners trading with rebels. No authority to that effect has been cited from any writer upon that law. A state has, by the law of nations, a right to regulate its own trade. A parent state may choose to exercise greater or less degree of severity, with regard to the trade of its colonies. England did not, until 1776, wholly prohibit trade with her North American colonies. The statute of 16 Geo. III, c. 5, prohibiting such trade, would have been altogether useless, if such trade had been unlawful in consequence of the rebellion. It declares "that all manner of trade and commerce is and shall be prohibited with the colonies of New Hampshire," &c., (naming the colonies,) "and that all ships and vessels of, or belonging to the inhabitants of the said colonies, together with their cargoes," &c., "and all other ships and vessels whatsoever, with their cargoes," &c. "which shall be found trading in any port or place, of the said colonies, or going to trade, or coming from trading, in any such port or place, shall become forfeited to His Majesty, as if the same were the ships and effects of open enemies, and shall be so adjudged, deemed and taken, in all the courts

1.—The 13th article of that *arrete*, which is the only article referred to in the sentence of condemnation, is as follows:

"Every vessel, French or foreign, which shall be found by the vessels of the Republic anchored in any of the ports of the island not designated by these presents, or within the bays, coves, or landings of the coast, or under sail at a distance less than two leagues from the shore and communicating with the land, shall be arrested and confiscated."

ty, and royal jurisdiction courts, shall be supplied by that of tribunal of the first instance; but from this change of denomination no change is to be inferred as to the jurisdiction of the ancient tribunals, and particularly of the courts of admiralty.

"3. The public ministry shall be exercised by commissaries of the government and their substitutes.

"4. There shall be provided a special regulation for the changes to be made in the present tribunals at Tobago.

"5. Judgments shall run in the name of the French Republic.

"6. The members of the tribunals shall be provisionally nominated according to the requisite forms, by the captain general. He shall receive from each of them a promise of fidelity to the French Republic."

The following is the *arrete* of 2d October, 1802.

"*Arrete* for regulating the forms to be observed for the proceedings and judgment of contraventions to the laws concerning foreign commerce in the colonies.

"The consuls, &c., on the report, &c., decree:

"1. The contraventions to the dispositions of the laws and regulations concerning foreign commerce in the colonies shall be proceeded on and adjudicated in the form hereinafter mentioned.

"2. The instruction" (proceedings in *preparatorio*) "and first judgment shall belong to the ordinary tribunal of the place where the prize shall have been conducted, subject to an appeal in all cases to special commissioners, who shall pronounce in the last resort,

"The said instruction shall be made summarily and on simple memoirs.

"3. Within the extent of each captain generalship, the commission shall be composed of the captain general, the colonial prefect, the commissary of justice, or the grand judge; and in case of impediment of any of them, then of a substitute, (*celui qui le remplace*,) and besides, of three members of the court of appeal, chosen for each cause by the captian general.

[Here follows a particular regulation as to Tobago.]

"4. In case of a division of opinions, that of the president shall preponderate.

"5. The inspector of the marine, or the officer of administration doing the duty of inspector, shall, of right, exercise the functions of the public ministry in the said commission of appeal.

"The functions of clerk shall be exercised by a secretary appointed for that purpose by the captain general.

"6. As to the residue, the ancient laws shall be executed, so far as they are not altered by the present regulation.

"7. The minister of the marine and the colonies is charged with the execution of the present *arrete*, which shall be inserted in the bulletin of the laws.

(Signed) "BONAPARTE."

of admiralty, and in all other courts whatsoever."

The French *arretes* limit the right of seizure to the extent of their territorial jurisdiction; 249*] but if they had *claimed a right under the law of nations, they would have authorized seizures as well on the high seas as within two leagues of the coast.

The title of the *arrete* of General Ferrand, of the 10th Ventose, year 12, (1st March, 1804), which is referred to in the sentence of condemnation is, "an *arrete* relative to vessels taken in contravention to the dispositions of the laws and regulations concerning the French and foreign commerce, with the colonies;" and the reason of passing the *arrete*, is stated in the preamble to be, "that some of the French agents in the allied and neighboring islands had mistaken the application of the laws and regulations concerning vessels taken in contravention upon the costs of Santo Domingo, occupied by the rebels, and had confounded these prizes with those made upon the enemies of the state; wishing to put an end to the abuses which may result therefrom, and which are as derogatory to the territorial sovereignty, as they are to neutral rights," &c., &c., thus clearly taking a distinction in terms between these municipal seizures and prizes of war. The 8th article also speaks of acquitting the accused of the contravention; and the sentence of the appellate court, speaking of its jurisdiction, describes it thus: "For pronouncing in the last resort upon appeals from judgments rendered in the first instance, by the provisional commission of justice, sitting in the town of Santo Domingo, upon prizes made by the vessels of the state, and by French privateers upon neutrals, taken in contravention of the laws and regulations, concerning the smuggling trade of the colony," (a l'occasion des prises faites par les batiments de l'etat, et par les corsaires Francois, sur les neutres pris en contravention aux lois et reglemens concernant le commerce interope de la colonie.)

If this trade was illegal by the law of nations, there was no necessity for these French laws upon the subject.

2d point.

Whether the seizure were made as prize of war or for violating a municipal law of trade, 250*] it was not competent *for the court sitting at Santo Domingo to condemn the property while lying in a foreign neutral port.

No title could vest in the purchaser by a sale, without a condemnation; although, perhaps, a subsequent legal condemnation might relate back to the time of the sale, and vest a legal title in the purchaser. But the condemnation of the property in this case could not be a legal condemnation, while the property was not only in South Carolina, but actually in the custody of our law. It had got back to the country of its original owner, who had claimed the protection of our laws.

The mere capture, even by a belligerent and *jure belli*, does not devest the title of the property out of the neutral owner; but an order or sentence of some competent tribunal is necessary for that purpose.

The title of the captor, before condemnation, does not extend beyond his actual possession; and if he loses or quits the possession, his title is entirely gone. Here had been a change of possession before condemnation. If a captured vessel escape before condemnation, the title revests in the former owner. 4 Rob. 50, *The Henrick and Maria;* Collection of Sea Laws, 629; 8 T. R. *Havilock v. Rockwood;* 1 Rob. 114, *The Flad Oyen;* 2 Burr. 693, *Goss v. Withers;* Institute 2, 1, 17.

Although new evidence may be admitted upon the appeal, yet the sentence of condemnation in this case ought not to have been admitted, because it was not the sentence of a competent tribunal. The question of competence is always open, whatever may be the law as to the conclusiveness of a foreign sentence. The court at Santo Domingo had no jurisdiction over this coffee.

Incompetence may arise from want of jurisdiction, as to the subject of litigation, or as to the place where the tribunal sits. Neither by the law of nations nor by treaty, could it condemn property, while it was in the custody of our laws, and in contest in our courts. Even if the property had been in France, it is very doubtful whether the court of Santo Domingo could have condemned it. The proceeding was *in rem*, and from the nature of things, the *res*, the thing against which the *suit is instituted, ought to be within the power and jurisdiction of the court before which it is tried; it ought at least to be in the same country. If it be a case of mere municipal jurisdiction, the court cannot proceed if the thing be in the country even of an ally; for an ally in a war is not an ally as to the execution of the municipal laws of the co-ally. Suppose a seizure to be made by Spain, for an illicit trade in contravention of her municipal laws, and the vessel never carried into a Spanish port, but into a French port. The Spanish court could not proceed. One country will not enforce the municipal laws of another. In this country no court has jurisdiction *in rem*, unless the thing be within its jurisdiction. So by our treaty with France, no court has jurisdiction of a cause of prize but the court of the place or country to which the prize was carried. But here the vessel was carried to a Spanish country, and condemned in a French court. [*251

This court has an undoubted right to examine into the competency of the court whose sentence is produced in evidence. That question was decided in the case of *Glass v. Gibbs*, (*The Betsey*,) 3 Dall. 7, and if not competent, this court will disregard its sentence.

Sir W. Scott, in a great number of cases, has looked into the question of the competency and jurisdiction of the court, and inquired whether the court proceeded according to the law of nations. 1 Rob. 142, *The Flad Oyen;* 8 T. R. 270, *Havilock v. Rockwood*, and 2 Rob. 172, *The Christopher*.

In the case of *Sheafe & Turner v. A. Parcel of sugars*, in the circuit court of South Carolina, in 1800, the sugars, it is said, were carried into a Spanish port and condemned in a French port; but Spain was then an ally of France, and the capture was *jure belli*.

When it is said that a neutral court has no cognizance of prize, it means that a neutral court cannot interfere between belligerents, but not that a neutral court shall not interfere between a belligerent and one of its own neutral citizens. 3 Rob. 82. *The Kierlighett;* 2 Rob. 239, *The Preservance*. Of what use is a treaty

252*] if a sentence *contrary to that treaty is to be respected by the nation whose rights are thereby violated? In *Mayne v. Walter*, Park, 414; *Pollard v. Bell*, 8 T. R. 437, and *Bird v. Appleton*, 8 T. R. 562, it is decided that a condemnation grounded upon an arbitrary *arrete* is void. Browne (Civ. Law, vol. 2, p. 332,) says, that where the proceeding is *in rem*, it must be where the thing is. The powers of condemnation and restoration belong to the same court. It must have the possession of the thing in order to restore it.

The court is said to proceed *instanter, velo levato*. If the court of Santo Domingo had decreed restitution, it could not have enforced its decree. In the case of the *Henrick and Maria*, 4 Rob. 52, Sir W. Scott, while he acknowledges that the English practice has been to condemn vessels lying in a neutral port, seems to express a wish that the superior court would recall the practice to the proper purity of the principle. In p. 46, he says, that "upon principle it is not to be asserted that a ship brought into a neutral port, is, with effect, proceeded against in the belligerent country. The *res ipsa*, the *corpus*, is not within the possession of the court; and possession, in such cases, founds jurisdiction."

It was upon this pure principle that the 22d article of the French convention was founded. It is no argument to say that the courts of each nation must have an equal right to expound that convention, and that if we think their construction incorrect, we must apply to government for redress. If application were to be made to government, we should be sent back again to our courts of law; and not until it should be there pronounced that the French construction was incorrect, would our government make application to that of France for redress. In case of rescue or escape, the government is never bound to restore. The capturing nation takes redress in its own way, and by its own strength, and cannot require the aid of our arm. The penal laws of a foreign country can affect only the property in its power, (1 H. Bl. 134, 135,) and cannot be executed by the courts of another. 2 Wash. 295, 298. Municipal law cannot make prize of war. 2 Dall. 4; 3 Dall. 77. 253*] *And if the thing be not within the jurisdiction of the court, it cannot proceed. 3 Dall. 86. It must at least be in the country of the captor, or his ally. 2 Browne's Civ. Law, 268.

No property can be acquired by capture, unless it be carried *infra præsidia; i. e.*, into the ports of the enemy of the captured; and according to Lee, the ports of an ally will not answer. Lee on Captures, 87–96. A capture cannot give a title, unless it be of enemy's property. 2 Dall. 2, 34. The case of *Wheelwright v. Depeyster*, 1 Johns. Rep. 471, was in all its circumstances exactly like the present, and the supreme court of New York decided the court at Santo Domingo to be incompetent to condemn a vessel lying at St. Jago de Cuba. Spain was not an ally in the war. She professed to be neutral, and was bound to neutral duties. (See her own declaration to her subjects, dated the 10th of September, 1804, and her manifesto and declaration of war of 10th December, 1804, in the New Annual Register of that year.) Although there was a treaty of alliance between her and France, yet, by the terms of that treaty, Spain was not bound to assist France until called upon; and France had not then demanded her aid. She was, therefore, neutral, and was bound to refrain from giving any direct aid to either of the belligerents. But to allow one belligerent to carry prizes into her ports, and deposit them there for safe keeping, is a violation of neutrality; it is a direct aid. Spain did wrong to permit this kind of deposit, and therefore no right can be derived from it. It is not always necessary to make application to government for redress by negotiation of war. If the title derived from the captor be bad, and the thing is brought within the jurisdiction of our courts, it is competent for those courts to give redress, and restore the thing to its lawful owner. But when a neutral becomes an ally, she is no longer bound to perform these neutral duties; she becomes a partner in the war, and is bound to belligerent duties. She is bound to give her aid to her co-belligerent. The exception of the country of an ally, therefore, strengthens the general rule, that the property cannot be lawfully condemned while lying in a neutral country.

*The possession of one ally is *quoad* [*254 *hoc* the possession of the other.

Proceedings for forfeitures are always proceedings *in rem;* and to make them valid, it is always necessary that the court should have possession of the thing. Possession is the foundation of all its proceedings. How can it condemn what is not in its power to give? Or how restore what is not within its control? This principle applies as universally to captures *jure belli*, as to seizures for municipal offenses. If this be a municipal seizure, it is immaterial whether Spain was an ally in the war or not; because she could not be an ally as to municipal offenses. One ally never gives up offenders against the municipal laws of the other, unless bound so to do by treaty. One ally is not bound to aid the other in maintaining the authority of its own laws. So if property be carried to the country of one ally, the laws of the other cannot reach it. The former is not bound to give it up to the latter, nor to enforce its municipal judgments or decrees.

The *arrete* of 2d October, 1802, gives the jurisdiction only to "the ordinary tribunal of the place where the prize shall have been conducted;" so that by the *lex loci* the court at Santo Domingo had no jurisdiction, even if the vessel had laid at another French port.

Captors gain no right by mere capture. Whatever is acquired *jure belli* belongs to the sovereign. No title is gained until condemnation. 3 Rob. 193. France herself, when neutral, will not permit a belligerent to detain his prize in her ports more than 24 hours. 2 Azuni, 256. A man can sell only what he has. But the captor, before condemnation, had at most a right of possession. The right is said to be in abeyance, subject to the chance of recapture, and to the *jus postliminii*. If it be said that *jus postliminii* does not apply to neutrals, we say, that when a belligerent treats a neutral as an enemy the latter becomes entitled to belligerent rights. If rescued, what becomes of the right acquired by capture? There is no instance of a condemnation after such a rescue, nor of a complaint to *the government of [*255 neutral. The rule in all cases of sale of captured goods is, *caveat emptor*.

On the part of the respondent (the purchaser under the sale at Barracoa) it was admitted that there were only two questions in the case, viz.:

1. Whether the vessel was seized *jure belli*, or in execution of the municipal laws?

2. Whether the condemnation by a court in Santo Domingo, while the vessel was in a Spanish port, was a legal condemnation?

1. The condemnation was in exercise of belligerent rights, and not for violation of a municipal law.

England, during the contest with these states, always claimed and exercised the rights of war. France never complained, even before she became a party. So France is to be considered as a belligerent with respect to Hayti. There were armies on both sides, arrayed against each other, fighting battles, taking towns, and carrying on a war in fact. It was not a trifling and partial insurrection, but a most cruel and bloody war. It was a civil, or rather a servile war, but not to be distinguished from other wars as to belligerent rights. The non-intercourse act, passed by Congress in 1798 or 1799, if it had stood alone, might have been considered as a municipal regulation; but connected with other facts, it was taken by this court, to be an act of the partial war then waging against France. So the act of the British Parliament, in 1776, prohibiting all trade with the North American colonies, was an act of war. The word war was not used, because England, as a matter of punctillio, would not acknowledge us as an independent nation. This court said we were at war with France in 1798, but Congress did not say so; and France always denied it. So the Netherlands were at war with Spain for 70 years, but Spain would never acknowledge it.

If there was war between France and Hayti, the *arrete* seems clearly to be a war measure, an exercise of *belligerent rights. Its [*256 only object was the annoyance of the enemy. There are many acts which, if considered alone, might appear equivocal whether intended as measures of peace or of war, and can only be explained by concomitant circumstances. Municipal rights may be brought in aid of belligerent rights, and when hostilities are actually existing, an act which might be done in time of peace may be considered as a measure of war.[1]

*It is not necessary that a prize court [*257 should be a court of admiralty. Prizes are sometimes condemned in a tribunal of commerce. 2 Azuni, 262; 3 Bos. & Pull. *526. But this was a court of admiral- [*258 ty. It was founded upon the model of the

1.—In answer to a question from the court, Mr. Duponceau observed as follows, viz.:

The question is, whether France can, by the mere force of the law of nations, seize and confiscate vessels of neutral nations trading to Hayti.

If it is admitted that the situation of France with Hayti is a war, it follows, that France is at war, and we are neutrals.

If neutrals, we cannot judge of any thing as *de jure* which is the subject of the controversy between France and Hayti.

Hayti contends that *de jure* she is an independent state.

France contends that *de jure* Hayti is her dependent colony.

Of this, as neutrals, we are not permitted to judge.† We find them at war together, and at issue on this question of dependent or independent; we must take them both to be right.

We cannot, therefore, acknowledge the right of France to make and enforce municipal regulations for Hayti; it would be acknowledging the sovereignty of France over Hayti, and thus deciding the question between them, which we are not permitted to do as neutrals.

Nor can we permit our subjects to trade with Hayti, contrary to the prohibition of France, for that would be acknowledging the independence of Hayti, and as such would be a violation of our neutrality, by deciding in favor of one side the very question in controversy between them.

But it will be said, that if we consider France merely as a power at war with Hayti, she has no right to prohibit our trading with them, as one nation at war cannot forbid neutrals to trade with its enemy, except in contraband articles.

This is true in the case of a war between independent states, but this war is of a different character, and produces different effects.

It is a principle of the law of nations, that in war both belligerents and neutrals have a right, with respect to each other, to do all that they had a right to do in time of peace, and immediately before the war, but no more.‡

But in time of peace France prohibited other nations from trading with Hayti; that is, she prohibited them if she thought proper; in war she must continue to have the same right for the above reason, and because denying it to her would be judging the question in controversy between her and Hayti, which we have no right to do.

True, France claims it as a municipal right; it is the only object of her going to war; but she claims it of the Haytians, not of us, and if she did, we cannot concede it to her as such; we cannot grant her the right of binding the inhabitants of Hayti, or preventing them from trading with us; that we have nothing to do with; it is the question between them which we are not to decide; but we must grant to her the right of binding us, and preventing us from trading with Hayti, not as a municipal right, which right our neutrality prevents us from acknowledging, but as a belligerent right, which she has to prevent us from interfering by our overt acts in the question of dependence or independence between her and the people of Hayti.

If she has the right to prevent us from interfering in that manner, she has incontestably by the law of nations the right of punishing that interference by the seizure and condemnation of our ships and goods found in contravention.

France then claims two sorts of rights, municipal and belligerent; but the former claim is only between her and Hayti, and that we have nothing to do with; the latter is between her and all the world, and those we are bound to notice.

From her claim of those two concurrent rights, she, as Britain did in our revolutionary war, clothes her prohibitions in the shape of municipal regulations, thereby pretending to assert her claim of jurisdiction over her revolted subjects; that form she adopts for the sake of her national dignity; but we, who are not bound to support that dignity, recognize her rights only so far as they are sanctioned by the laws of a war of the nature of that in which she is engaged, and no further; and they do not bind us further than the laws of war, applied to the particular war existing, expressly authorize; but they bind us so far.

It may be said that as France claims the right of sovereignty over Hayti, she cannot complain of us if we should allow her that right, though we are not bound to do it as neutrals. It is answered, that she indeed claims that right, but she claims it of the subjects of Hayti, and not of us; those which she claims of us are those of a belligerent; she knows that she cannot claim any other of a neutral state, which has nothing to do with her quarrel; and she would have a right to complain of our adding insult to injury, if we were to allow her a right which she does not claim of us, by way of reason or pretext for denying her one which she actually, and we think justly, claims.

†3 Vat. § 188; Ibid. § 190; 2 Azuni, 63, &c.; Hubner.

‡The prohibitions of England respecting the colonial trade of her enemies are founded on this principle, and carried to a degree of rigor which it does not seem to warrant.

council of prizes at Paris. It is no part of the ordinary judicature; it is a political institution, established by a special commission from the government, to decide, in an executive capacity, on the validity of maritime captures. 2 Azuni, 268; 2 New Code des Prises, 1070; Arrete of 18th June, 1802.

2. The condemnation of the vessel was valid, although lying in a neutral country.

The correctness of such condemnations is questioned on the single dictum of Sir W. Scott. When in the *Flad Oyen*, 1 Rob. 119, 120, he said that there were only two cases of ships carried into foreign ports and condemned in England, he was not candid; he knew there were more than two such cases. And in 4 Rob. 52, *The Henrick and Maria*, he admits that the practice is too inveterate to be altered, and shows that the practice has been adopted or sanctioned by fourteen out of eighteen states in Europe. England adopted it as long ago as 1695. (4 Rob. 40.) In 1 Wilson, 191, as early as 1745, it was mentioned without exciting any astonishment; and in 4 Rob. 50, Sir W. Scott himself admits it was the practice in the wars of 1739, 1745, 1756, 1776 and 1793. France began it in 1705, and has continued it to this day. Sir W. Scott was mistaken in saying that the editor of the New Code des Prises speaks of it as an innovation. 1 New Code des Prises, 357. Russia adopted it in 1787, or perhaps earlier, and Spain during the last war, and probably before. It appears by 4 Rob. 259*] *50, that it was tolerated by Portugal, Tuscany, Naples, Sicily, the Pope, Genoa, Sardinia, Venice and Denmark. We do not find a contrary practice in the remaining states of Europe, Holland, Sweden, Prussia and Austria. We do not know what their practice is, but none of them have complained. It has therefore become the usage of nations; and Congress, in the year 1781, by their resolve, declared the United States to be bound by the usage of nations. The practice is also approved by Galliani, in his treatise on the duties of nations and princes towards each other, p. 443, by Azuni, 2 Azuni, 326, and by Lampredi, on the commerce of neutrals in time of war, p. 192. The quotation from Lampredi, in *Wheelwright v. Depeyster*, 1 Johns. Rep. 481, is incorrect; it makes him speak a language different from his sentiments. 2 Azuni, 254, 255.

The inconveniences of the contrary practice would be very great. If the captors are obliged to carry the prize a great way out of her course for adjudication, the risk of the seas is great, and the loss of the voyage inevitable. It will be a temptation to the captors to plunder the vessel and destroy her, and perhaps expose the prisoners to great dangers, by sending them adrift in the boat, or subjecting them to severe imprisonment.

The commissioners of England established at Lisbon and Leghorn had no power to adjudicate or condemn. They could only examine the prisoners on oath, and in certain cases restore the property captured.

In our partial war with France, we carried our prizes into neutral ports; and during the war with Tripoli, our cruisers were authorized by an act of Congress to carry their prizes into neutral ports.

The treaty with France cannot be construed strictly. It must be expounded by the law and usage of nations.

There is no reason why the *res ipsa*, the *corpus*, should be within the territory. It is not that which gives jurisdiction.

*The principle which confines juris- [*260 diction of prizes to the courts of the captor, is the right which the sovereign has to inquire into the conduct of his subjects, and to enforce the law of nations. 2 Rutherford, 566. Sir W. Scott holds the same doctrine *totidem verbis*. 3 T. R. 330, *Smart v. Wolff*.

It is but of late that a condemnation has been holden necessary to transfer the property.

3. But Spain was an ally in the war with St. Domingo, although she might not be an ally as to the war with England. The treaty between France and Spain, of August 19th, 1796, created an alliance offensive and defensive as to whatever concerned the mutual advantage of the two nations, and contained a guaranty of the islands.[1] *New Annual Register [*261

I.—EXTRACT FROM THE NEW ANNUAL REGISTER, 1796, PAGE 167, PUBLIC PAPERS.

Treaty of Alliance, offensive and defensive, between the French Republic and the King of Spain, August 19, 1796.

The Executive Directory of the French Republic, and His Catholic Majesty, the King of Spain, animated by the wish to strengthen the bonds of amity and good understanding happily re-established between France and Spain by the treaty of peace concluded at Basle, on the 4th Thermidor, in the third year of the Republic, (22d July, 1795), have resolved to form an offensive and decisive treaty of alliance, for whatever concerns the advantage and common defense of the two nations; and they have charged with this important negotiation, and have given their full powers to the undermentioned persons, namely: The Executive Directory of the French Republic, to Citizen Dominique Catherine Perignon, General of Division of the Republic, and its ambassador to His Catholic Majesty, the King of Spain; and His Catholic Majesty, the King of Spain, to his Excellency, Don Manuel de Godoi, Prince of Peace, Duke of Alcudia, &c., &c., &c., who, after the respective communication and exchange of their full powers, have agreed on the following articles:

I. There shall exist forever an offensive and defensive alliance between the French Republic and His Catholic Majesty the King of Spain.

II. The two contracting powers shall be mutual guarantees, without any reserve or exceptions, in the most authentic and absolute way, of all the states, territories, islands and other places which they possess, and shall respectively possess. And if one of the two powers shall be in the sequel, under whatever pretext it may be, menaced or attacked, the other promises, engages, and binds itself to help it with its good offices, and to succor it on its requisition as shall be stipulated in the following articles.

III. Within the space of three months, reckoning from the moment of the requisition, the power called on shall hold in readiness, and place in the disposal of the power calling fifteen ships of the line, three of which shall be three deckers, or of 80 guns, and twelve from 70 to 74; six frigates of a proportionate force, and four sloops or light vessels, all equipped, armed and victualed for six months, and stored for a year. These naval forces shall be assembled by the power called on, in the particular port pointed out by the power calling.

IV. In case the requiring power may have judged it proper for the commencement of hostilities to confine to the one-half the succor which was to have been given in execution of the preceding article, it may, at any epoch of the campaign, call for the other half of the aforesaid succor, which shall be furnished in the mode and within the space fixed, this space of time to be reckoned from the new requisition.

V. The power called on shall in the same way place at the disposal of the requiring power, within the space of three months, reckoning from the mo-

for 1796, p. 167.) When one part of the nation separates from the other, and seeks to maintain its independence by force of arms, a war subsists *de facto*, and the *casus fœderis* has **262***] arisen. The *guaranty of the islands was against all men, traitors as well as enemies. The revolt of the negroes was a matter which concerned both nations. It was equally the interest of both that they should be suppressed.

263*] *The trading with the revolted slaves was in itself a violation of the law of nations. It is immaterial whether it be a violation of a municipal law, or of the rights of war. A vessel may be lawfully seized and condemned **264***] *as prize for a violation of the law of nations, whether there be war or not. A French prize court does not come into existence, nor cease, with a war, but, like our district courts, always exists as a prize court.

The *arretes* of Le Clerc, Ferrand, &c., were mere proclamations; not laws, but declarations of what the law was before. The vessel was as liable to seizure after she had got out of the territorial jurisdiction, as if she had violated a blockade.

Whether it be a case of prize of war, or of municipal cognizance, the court had a right to order a sale before condemnation, and a purchaser under such sale gained a good title against all the world. The sale was made under the order of the court by its authorized agent.

The communications of the French ministers, Pichon and Turreau, to our government, consider this trade as a violation of the law of nations, and our government has considered it in the same light. If it was only a violation of the municipal law of France, this country must have been prostrated in dust and ashes, when Congress passed a law to carry into effect the municipal law of France. But the truth is, that if this government had not put a stop to the trade, it would have sanctioned a violation of the law of nations.

In the Baltimore case, the court ought to have left the jury to decide, under all the circumstances of the case, whether the brigands had such a title to the property as to make a valid sale to the plaintiffs. The purchase was made only a few months after the slaves had driven out or murdered all the whites, and had confiscated their property. The probability is, that this very property was the property of the whites, obtained by plunder and robbery. If so the robbers gained no title. It was, therefore, a matter of fact for the jury to decide.

But the principal question, whether a French court can condemn a prize lying in a neutral port, is to be determined, not by adjudged cases in one nation only, but by the law and practice of the civilized maritime *nations of [***265** Europe. It has been shown to be the practice of most, if not of all the maritime nations of Europe for a century; and if we have no practice on the subject, and are now called upon to establish one, it will certainly be our interest to conform to that of Europe.

This is a civil war of the most odious kind; slaves against their masters. It is said, indeed, that they were free. But the same power which had declared them free, had since declared them to be slaves. But whether they are to be considered as free rebels, or as revolted slaves, we had no right to trade with them.

There are duties which one state owes to another in the case of rebellion. If a nation joins or assists the rebels, it becomes an enemy. Upon this point, authorities are not necessary. Reason alone is sufficient. The United States have never acknowledged the independence of Hayti; and the citizens of the United States have no right to consider it as an independent nation.

A law of a nation regulating the trade of foreigners in the territory of that nation, is not a municipal law, but a modification of the law of nations. By the law of nations, every state has a right to regulate the trade of foreigners with that state, and every such regulation is only a modification of that law.

To succor rebels is as much a violation of the law of nations, as to succor a blockaded port, or a besieged city.

A prize may be condemned while lying in a

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ment of the requisition, eighteen thousand infantry and six thousand cavalry, with a proportionate train of artillery, ready to be employed in Europe, and for the defense of the colonies which the contracting powers possess in the gulf of Mexico.

VI. The requiring power shall be allowed to send one or several commissioners, for the purpose of assuring itself whether, conformably to the preceding articles, the power called on has put itself in a state to commence hostilities on the day fixed with the land and sea forces.

VII. These succors shall be entirely placed at the disposal of the requiring power, which may have them in the ports and on the territory of the power called on, or employ them in expeditions it may think fit to undertake, without being obliged to give an account of the motives by which it may have been determined.

VIII. The demand of the succors stipulated in the preceding articles, made by one of the powers, shall suffice to prove the need it has of them, without its being necessary to enter into any discussion relative to the question, whether the war it proposes be offensive or defensive, or without any explanation being required, which may tend to elude the most speedy and exact accomplishment of what is stipulated.

IX. The troops and ships demanded shall continue at the disposal of the requiring power during the whole continuance of the war, without its incurring in any case any expense. The power called on shall maintain them in all places where its ally shall cause them to act, as if it employed them directly for itself. It is simply agreed on, that, during the whole of the time when the aforesaid troops or ships shall be on the territory or in the ports of the requiring power, it shall furnish from its magazines or arsenals whatever may be necessary to them, in the same way and at the same price as it supplies its own troops and ships.

X. The power called on shall immediately replace the ships it furnishes, which may be lost by accidents of war or of the sea. It shall also repair the losses the troops it supplies may suffer.

XI. If the aforesaid succors are found to be, or should become, insufficient, the two contracting powers shall put on foot the greatest forces they possibly can, as well by sea as by land against the enemy of the power attacked, which shall employ the aforesaid forces either by combining them, or by causing them to act separately, and this conformably to a plan concerted between them.

XII. The succors stipulated by the preceding articles shall be furnished in all the wars the contracting powers may have to maintain, even in those in which the party called on may not be directly interested, and may act merely as a simple auxiliary.

XIII. In the case in which the motives of hostilities being prejudicial to both parties, they may declare war with one common assent against one or several powers, the limitations established in the preceding articles shall cease to take place, and the two contracting powers shall be bound to bring into action against the common enemy the whole of their land and sea forces, and to concert their plans so as to direct them towards the most convenient points, either separately or by uniting them. They equally bind themselves, in the cases pointed out in

neutral port, or at the bottom of the sea, or even if the thing be consumed.

The condemnation does not give property; it only establishes the fact that the captor or his sovereign had a lawful title by the capture. 1 Wilson, 211; 2 Azuni, 262; 12 Mod. 134, *Rex v. Broom;* Carthew, 398, S. C.

266*] *The owner of goods captured can only resort to the courts of the captor for redress. Doug. 614, *Le Caux v. Eden.* No other nation can interfere. He has no right to apply to the courts of his own country, even if his goods are carried there. Neutrals cannot interfere; if they do, they make themselves parties in the war.

The treaty of alliance bound Spain to assist France against the revolted slaves. Vattel (p. 234, b. 2, s. 197,) says, "An ally ought doubtless to be defended against every invasion, against every foreign violence, and even against his rebellious subjects." Spanish port was, therefore, to be considered as a port of an ally.

A neutral, whose property has been seized for violation of the law of nations, has no right to rescue it. He may escape with it if he can; but there is no *jus postliminii* in favor of neutrals.[1]

The court at Santo Domingo was the sole judge of its own jurisdiction. Its decision upon that point is conclusive upon this court.

The questions of *jus postliminii*, and *infra præsidia*, and of 24 hours' possession, can only arise in a case *between the recaptor [*267 and the first owner, or between the latter and a vendee of the captor. As between the captor and the captured, the title passes by the seizure. A condemnation is only evidence of the lawfulness of the seizure. But it is not the only evidence. This doctrine is acknowledged by all the nations of Europe, except England. But England cannot make the law of nations. Grotius, p. 580, 581, b. 3, c. 6, s. 2, 3, tit. 4; Vattel, p. 570, b. 3, s. 195, 196, 212, p. 585; Burlemaqui, (last part,) p. 222, s. 13, 14; Lee on Captures, 68, 69, 70, 73, 76, 101, 102. *Jus postliminii* does not arise with regard to moveable goods, except ships; but a belligerent acquires the right to immoveable things immediately upon capture. 1 Emerigon, 4to. ed. (French,) p. 513; 2 Azuni, 236, 238; Lee on Captures, p. 64, c. 5; 1 Rob. 114. The reason of a distinction being taken between ships and other moveables, is, that the identity and title of a ship may be as certainly traced as that of land; and there is the same reason for the rule *caveat emptor.*

If the title to all foreign merchandise is to be thus questioned, it will be necessary to trace it up, in all instances, to the original manufacturer, or to the cultivator of the soil. No purchaser will be safe. Such are not the principles of the common law.

A sale under a *fieri facias* is good, although the judgment may be afterwards reversed. 3 Bl. Com. 448, 449. So in Maryland, although the statute forbids an administrator to sell the slaves of his intestate, if there be sufficient other personal estate to pay the debts, yet if in violation of that law he sells the slaves, the title of the purchaser is good.

Even a municipal seizure vests the title in the

1—MARSHALL, *Ch. J.* Do you contend that, after its escape, the captor may proceed to libel and condemn the property in the courts of the captor?

Martin. Unquestionably. The property vests by the capture.

JOHNSON, *J.* Is not a neutral vessel, captured as prize for a breach of the law of nations *quoad hoc* an enemy, and as much entitled to rescue herself as an open enemy?

Martin. No. The offended nation would have a right to demand that she be given up by her government; and if it refuses, it sanctions the inimical act of its subject, and makes itself a party in the war. So if the seizure be for violation of a municipal law, the government of France has a vested right; but not if there be no seizure. If an American neutral vessel, not having a commission therefor, should assist in rescuing another neutral American vessel from a belligerent who had seized her as prize for violation of the law of nations, she would be guilty of piracy.

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the present article, not to treat for peace unless with one common consent, and in such a way as that each shall obtain satisfaction which is its due.

XIV. In the case in which one of the powers shall act merely as an auxiliary, the power which alone shall find itself attacked may treat of peace separately, but so as that no prejudice may result from thence to the auxiliary power, and that it may even turn as much as possible to its direct advantage. For this purpose advice shall be given to the auxiliary power of the mode and time agreed on for the opening and sequel of the negotiations.

XV. Without any delay there shall be concluded a treaty of commerce on the most equitable basis, and reciprocally advantageous to the two nations, which shall secure to each of them with its ally a marked preference for the productions of its soil or manufactures, or at least advantages equal to those which the most favored nations enjoy in their respective states. The two powers engage to make instantly a common cause to repress and annihilate the maxims adopted by any country whatever, which may be subversive of their present principles, and which may bring into danger the safety of the neutral flag, and the respect which is due to it, as well as to raise and re-establish the colonial system of Spain on the footing on which it has subsisted, or ought to subsist, conformably to treaties.

XVI. The character and jurisdiction of the consuls shall be at the same time recognized and regulated by a particular convention. The conventions anterior to the present treaty shall be provisionally executed.

XVII. To avoid every dispute between the two powers, they shall be bound to employ themselves immediately, and without delay, in the explanation and development of the 7th article of the treaty of Basle, concerning the frontiers, conformable to the instructions, plans and memoirs which shall be communicated through the medium of the plenipotentiaries who negotiate the present treaty.

XVIII. England being the only power against which Spain has direct grievances, the present alliance shall not be executed unless against her during the present war, and Spain shall remain neuter with respect to the other powers armed against the Republic.

XIX. The ratifications of the present treaty shall be exchanged within a month from the date of its being signed.

Done at St. Ildephonso, 2d Fructidor, (August 19,) the 4th year of the French Republic, one and indivisible.

(Signed) PERIGNON and the PRINCE OF PEACE.

The Executive Directory resolves on and signs the present offensive and defensive treaty of alliance with His Catholic Majesty, the King of Spain, negotiated in the name of the French Republic by Citizen Dominique Catherine Perignon, General of Division, founded on powers to that effect by a resolution of the Executive Directory, dated 20th Messidor, (September 6,) and charged with its instructions.

Done at the national palace of the executive directory, the 4th year of the French Republic, one and indivisible.

Conformable to the original,
(Signed) REVEILLIERE LEPAUX, President.
By the executive directory,
LAGARDE, Secretaire General.

[illegible], 193, *Roberts v. Withered;* [illegible] 5 T. R. 112, 117, *Wil-*

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threshold of this interesting inquiry,
[illegible]lty presents itself, which is of no incon-
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[illegible]an this court examine the jurisdiction of a
[illegible]oreign tribunal?

The court pronouncing the sentence, of necessity decided in favor of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if **269***] rendered by a self constituted *body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example; in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative.

Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

*Passing from principle to authority, [***270** we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject matter.

This general *dictum* is explained by particular cases.

The case of the *Flad Oyen*, 1 Rob. 114, was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the court.

The Christopher, 2 Rob. 173, was condemned while lying in the port of an ally. The jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal at Bayonne, in favor of its own jurisdiction, was not considered as conclusive on the court of admiralty in England, but that question was treated as being perfectly open, and as depending on the law of nations.

The case of *The Kierlighett*, 3 Rob. 82, is of the same description with that of the *Christopher*, and establishes the same principle.

In the case of *The Henrick and Maria*, 4 Rob. 35, Sir W. Scott determined that a condemnation, by the court of the captor, of a vessel lying in a neutral port, was conformable to the practice of nations, and, therefore, valid; but in that case the right to inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable.

*The case of *The Comet*, 5 Rob. 255, [***271** stands on the same principles.

The Helena, 4 Rob. 3, was a British vessel captured by an Algerine corsair owned by the Day, and transferred to a Spanish purchaser by a public act in solemn manner before the Spanish consul. The transfer was guarantied by the

Dey himself. The vessel was again transferred to a British purchaser under the public sanction of the judge of the vice-admiralty court of Minorca, after that place had surrendered to the British arms. On a claim in the court of admiralty by the original British owner, Sir W. Scott affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry, then, whether the tribunal erected in St. Domingo was acting on a case of which it had jurisdiction when The Sarah was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject on which it acted.

272*] *Admitting that the ordinary tribunal erected in St. Domingo was capable of acting as a prize court, and also of taking cognizance of offenses against regulations purely municipal, it is material to inquire in which character it pronounced the sentence of condemnation in the case now under consideration.

In making this inquiry, the relative situation of St. Domingo and France must necessarily be considered.

The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and St. Domingo. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offenses, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will *decide [*273 whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. Pichon, the French *charge d'affaires* to the American government, which was published in March, 1802, interdicts all manner of intercourse with the ports of St. Domingo, in possession of the revolted negroes, and declares that "cruisers will arrest all foreign vessels attempting to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels," he adds, "shall be confiscated, and the commanders severely punished, as violating the rights of the French republic, and the law of nations."

It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of St. Domingo. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the United States. To its revocation the ordinary rights of sovereignty alone were sufficient. The notification, however, refers to the order of the commander in chief of the French republic in St. Domingo; and that order would of course be examined as exhibiting more perfectly the extent and the nature of the rights which the French republic purposed to exercise.

The particular order which preceded this notification is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the Republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks, and landing places on the coast, or under sail at a less *distance than two leagues from the [*274 coast, and communicating with the land, shall be forfeited."

The next decree is dated the 22d of June, 1802, and the extract which is supposed to regulate this particular subject, is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the Republic anchored in one of the ports of the island not designated by the present decree, or in the bays, coves, or landings of the coast, or under sail at a less distance than two leagues from the coast, and

communicating with the land, shall be arrested and confiscated."

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of St. Domingo, and intended to enforce sovereign rights. Seizure for a breach of this law is to be made only within those limits over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in October, 1802, in an *arrete*, which in part regulates the coasting trade of the island. The 4th, 5th and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation in the cases which are there enumerated.

These are all of the same description with those stated in the *arrete* of the 22d of June; and no seizure is authorized but of vessels found within two leagues of the coast.

The last decree is that which was issued by General Ferrand on the 1st of March, 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation, in the particular case under consideration, and because General 275*] *Ferrand uses expressions which clearly indicate the point of view in which all these *arretes* were contemplated by the government of the island.

The title of this *arrete* is, "An *arrete* relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce in the colony."

In stating the motives for this ordinance, it is said, "That some French agents in the neighboring and allied islands had mistaken the application of the laws and regulations concerning vessels taken in contravention, upon the coasts of St. Domingo occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state."

"Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty as to the rights of neutrality," the commander in chief, after some further recitals, which are not deemed material, ordains the law under which the tribunals have proceeded.

The dictinction between seizures made in right of war, and those which are made for infractions of the commercial regulations established by the sovereign power of the state, is here taken in terms; and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this *ordonnance* is recited in the sentence, as that on which the condemnation is founded. It is in these words:

"The port of Santo Domingo is the only one in the colony of St. Domingo that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbors, and landing places, on the coast occupied by the rebels; those cleared for the ports in their possession coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island, (except that from Cape Raphael to *Ocoa bay,) found at [*276 a distance less than two leagues from the coast, shall be detained by the state vessels and privateers having our letters of marque, who shall conduct them, if possible, into the port of Santo Domingo, that the confiscation of the said vessels and cargoes may be pronounced."

As this article authorizes a seizure of those vessels only which are "sailing within the territorial extent of the island, found within less than two leagues of the coast," it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true, that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an exercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The Sarah was captured more than ten leagues from the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of General Ferrand, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded *by foreign courts. This dis- [*277 tinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject, this court must inquire

whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offense itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all 278*] concerned *are parties to it. But the owners of vessels navigating the high seas, or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and, consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded.

The offense, then, alleged to have been committed by The Sarah could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must, then, be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favor of, the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.

279*] *It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sarah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of *The Helena*, already cited, may at first view be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority of the court is of opinion that this inference is not warranted by it. Several circumstances concurred in producing *the decision which [*280 was made, and those circumstances vary that case materially from this. The captured vessel was carried into port, and while in the power of the sovereign was transferred by his particular authority in solemn form.

In such a case, Sir William Scott conceived that a sentence of confiscation conformably with the laws of Algiers, was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser; and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser. This case is badly reported; the points made by counsel on one side are totally omitted, and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir William Scott. But the seizure was presumed to be made by way of reprisals for some breach of the treaty between the two powers, so that the possession of the captor was considered as legitimately the possession of his sovereign, and from the subsequent conduct of the Dey himself, a condemnation according to the usages of Algiers was presumed.

But in presuming a condemnation, this case

does not, it is thought, dispense with the necessity of one; nor is it supposed, in presuming a legitimate cause of seizure, to declare that a seizure made without authority, by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation was ever pronounced, the property is not changed, and this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired. 281*] *The sentence of condemnation being considered as null and invalid, the property is unchanged, and, therefore, ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

LIVINGSTON, *J.* Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charlestown, South Carolina, whither they had been carried, by and with the consent of the captor.

CUSHING and CHASE, *Justices*, concurred in opinion with Judge Livingston.

JOHNSON, *J.* This cause comes up on appeal from the circuit court of South Carolina, acting in the capacity of an instance court of admiralty. The doctrines which regulated the decision of the circuit court are not overruled by a majority of the bench; but the decree of that court is rescinded, because to three of the five judges who concur in sustaining the appeal, it appears that the property could not be condemned in the court of St. Domingo, while lying in a neutral port; and to the other two, that the capture on the high seas, for a breach of municipal regulation, was contrary to the law of nations, and, therefore, vested no jurisdiction in the court of St. Domingo. On the former doctrine 282*] it is not *necessary to make any observations, because in the case of the *Sea Flower*, argued together with this as one cause, and decided on the same day, that doctrine is expressly overruled. But on the latter point I think it proper briefly to state the reasons upon which I found my disapprobation, both of the doctrine and of its application to this case.

It would have been some relief to us in determining this question, had it been made a point by counsel, either in their argument in this court or in the court below; but it appears to have been wholly unnoticed by them.

Most of the difficulties which have occurred in the investigation of this case, appear to have resulted from an indistinct view of the nature, origin, and object of prize courts. Conducted by the same forms, and very generally blended in the same persons, it is not easy to trace upon the mind the discriminating line between the instance and prize courts; yet the object of the institution of the latter court, when considered, strongly marks the distinguishing point between them. In its ordinary jurisdiction, the admiralty takes cognizance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself, performed through the agency of his officers or subjects. A seizure on the high seas by an unauthorized individual is a mere trespass, and produces no change of right; but such a seizure, made by sovereign authority, vests the thing seized in the sovereign: for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by the courts of other nations. But as this principle might leave the unoffending individual a prey to the rapacity of cruisers, or a victim to the errors of those who even mean well, and as every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under color of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary *object [*283 of their institution is to inquire whether a taking as prize is sanctioned by the authority of their sovereign, or the unauthorized act of an individual. From this it would seem to follow, that the decision of such a court is the only legal organ of communication through which the sanction of a sovereign can be ascertained, and that no other court is at liberty to deny the existence of sovereign authority, for a seizure which a prize court has declared to be the act of its sovereign.

The propriety of such an act may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another. From these considerations I infer, that the capture and continued possession of The Sarah and her cargo, confirmed by the approbatory sentence of a court of the capturing power, vested a title in the claimant, which this court cannot, consistently with the law of nations, interpose its authority to defeat.

Having briefly stated the grounds upon which I originally formed, and now adhere to, an opinion in favor of the claimants, I will consider the objections stated to the jurisdiction of the court, on the ground that the seizure was contrary to the law of nations.

It is admitted, if the court of St. Domingo

had jurisdiction of the subject matter, that the condemnation completed the devestiture of property. But it is contended that the subject, in this case, was not within their jurisdiction, because it was seized for a cause not sanctioned by the law of nations. I am unfortunate enough to think that neither the premises nor the conclusion of this argument are maintainable. The conclusion is subject to this very obvious objection, that it defeats the very end for which such courts were created.

To contend that a violation of the law of nations will take away the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism. The occurrence which gives it jurisdiction takes it away.

284*] *If the object and end of constituting a prize court be to give redress against unlawful capture, and, as the books say, in such case to restore *velis levatis*, how can it make reparation to the injured individual if it loses its jurisdiction; because there has been an injury done to him, the court can give him no redress. The argument admits, that a capture consistent with the law of nations, would give jurisdiction, but how is the legality or illegality of a capture to be determined, unless a court can take jurisdiction of the case. The legality of the capture is the very point to which a court is to direct its inquiries, and yet that inquiry is arrested in its inception. The cause or circumstances of a capture can never be known to a court, without exercising jurisdiction on the subject. To maintain, therefore, that prize courts can only exercise jurisdiction over captures, made consistently with the law of nations is, in effect, to deprive them of all jurisdiction, since it leaves no means of deciding the question on which their jurisdiction rests.

But the premises which lead to this conclusion will be found no less exceptionable than the conclusion itself; and the propriety of taking into consideration the questions which form those premises, very questionable. The opinion of those of my brethren who maintain this doctrine, is founded upon two propositions.

1. That a nation cannot capture, on the high seas, a vessel which has, within her territories, committed a breach of a municipal law.

2. That the condemnation in this case was grounded on an offense against a municipal law.

To me it appears wholly immaterial on what grounds the decision be founded, if the case be within their jurisdiction. Indeed, this is fully admitted by those of the court, who maintain the doctrine that I am considering; but under the idea of examining the jurisdiction of the court, they appear to me to go farther and examine into the correctness of its decision. I do not deny that there are circumstances material to the effect of sentences of foreign prize courts,

285*] into which other courts may *inquire. The authorities quoted on this point relate exclusively to two, viz.:

1. Whether the court is held in the territory of the sovereign who constitutes it.

2. Whether the subject *sub potestate* of the sovereign whose courts condemned it.

These circumstances have an immediate relation to the existence of the court, and of its power of acting upon the subject; but within its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot, in the nature of things, and consistently with the idea of perfect equality and independence, be subjected to the review of other courts.

The decisions of such courts do not derive their effect from their abstract justice; they are in this respect analogous to the acts of sovereignty. They are universally conclusive, because nowhere subject to revision. Among nations they are considered as entitled to the same validity as the decisions of municipal courts, within their respective territories, and preclude the rights of parties, although contrary to every idea of law, reason and evidence.

The court of St. Domingo, being a court of co-ordinate authority with this, was equally competent to decide a question of jurisdiction arising under the law of nations. Had the question, whether a seizure under municipal law, upon the high seas, was contrary to the law of nations, or, if contrary to the law of nations, whether the court could not therefore exercise jurisdiction upon it, been brought to the notice of that court, it is presumed that their decree would not have been void, because they maintained the negative of the proposition. Had it been made a question before that court, whether the laws of France authorized the capture of the Sarah at ten leagues distance from the coast, or whether in fact the vessel was not seized within two leagues of the coast, it is presumed that their decision upon these points would have been conclusive, whatever may be the impression *of this court [*286 from the evidence now before us. It is impossible for this court to pretend to a knowledge of all the facts by which the decree of that court may have been regulated. The decree itself shows that the whole evidence is not before us; but if it were, that court is sole arbiter, both of the effect of testimony, and the credibility of witnesses. A similar observation may be made with regard to the laws of France which much pains has been taken to prove, did not authorize this capture. How can this court be supposed to know all the laws, sovereign orders or received principles which regulate the decisions of foreign courts. Such courts are best acquainted with the laws of their own government, and their decision upon the existence or effect of those laws must, in the nature of things, be conclusive in the eyes of other nations. Suppose that other courts were so far at liberty as to review the grounds upon which such decrees profess to proceed, the insufficiency of those grounds would not be conclusive against the correctness of such decisions, because they may be maintainable upon other grounds, not noticed, or even not known to the judge who pronounces them.

But if we are to look into the grounds upon which a decree is professedly founded, extravagant as that upon the case of the *Sarah* is said to be, there is one view in which it may admit of justification. General Ferrand, in his preamble, declares it to be his leading object to remove the contrariety of opinion which existed among the officers of government relative to existing laws, respecting captures of vessels taken upon the coasts of St. Domingo. If

their judges thought proper to consider this *arrete* as only declaratory of pre-existing laws, and that the words in the first article, "ceux expedié pour les portes en leur possession en sortant avec ou sans chargement," authorized the capture of vessels outward bound, I know no reason that we can have to declare it a misconstruction or incorrect opinion, or, if incorrect, to nullify their decree on that account. The conclusiveness of a foreign sentence appears to be at an end, the moment other courts undertake to look into the cause for which a capture was made. If the possession of the captor is the possession of his sovereign, and his courts have a right therefore to adjudicate property cap-
287*] tured, *or carried into a foreign port, it appears to me to be immaterial on what ground the capture is made. The fact of dispossession by sovereign authority, judicially ascertained, deprives all other courts of the right to act upon the case.

Upon these considerations I have adopted the opinion that we are not at liberty to enter into the inquiry whether the capture of the Sarah was made in pursuance of belligerent or municipal rights. But if we are to enter into the inquiry, I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and, though not so, that the capture may be justified, although for the breach of a municipal law.

In support of my latter position, both principle and the practice of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason, and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self defense in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretense instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo. III. c. 47, is predicated upon these princi-
288*] ples. It subjects vessels to *seizure, which approach with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible, to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws, and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade appear to have been framed in some measure after the model of the English statutes; and the 29th section of the act of 1799, expressly authorizes the seizure of a vessel that has, within the jurisdiction of the United States, committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast. So also the act of 1806, for prohibiting the importation of slaves, authorizes a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expression that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit, would be actually without limitation. Indeed, after passing the jurisdictional limits of a state, a vessel is as much on the high seas as if in the middle of the ocean; and if France could authorize a seizure at the distance of two leagues, she could at the distance of twenty.

But the capture of the Sarah may fairly be considered as an exercise of belligerent right, and strictly analogous to seizure for breach of blockade. The right of one nation to exclude all others from trading with her territories, exists equally in war and in peace. Had the exclusion in this case been merely calculated for the interests of trade, it may have been considered as purely municipal. But there existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French resident, M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here, then, was notice of the existence of war, and an assertion *of the rights consequent upon it. The [*289 object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an enemy. It was therefore not merely municipal, but belligerent in its nature and object. If France had a right to subdue the revolted colony, she had an undoubted right to preclude all nations from supplying them with the means of protracting the war. To confine her to her own jurisdictional limits, in the exercise of those acts of force which were necessary to carry into effect her right of excluding neutrals, would be a mere mockery, when by the very state of things she was herself shut out from those limits. Seizure on the high seas for a breach of the right of blockade, during the whole return voyage, is universally acquiesced in as a reasonable exercise of sovereign power. The principle of blockade has indeed in modern times been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of nations, when confined within the limits of reason and necessity. The right to subdue an enemy, carries with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent, exposes himself to the liability to be treated as an enemy. The belligerent nation can exercise the same acts of violence against him that she

can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.

The argument drawn from the decree of Ferrand, to prove that France had not asserted her belligerent rights, is evidently founded upon a mistranslation. The sentence which authorizes the seizure of vessels when outward bound, after having entered the ports of St. Domingo, is substantive, and totally unaffected by the subsequent sentence, which authorizes a seizure of vessels sailing within two leagues of the coast. The former authorizes capture for the offense of having entered those ports; the latter, for being found in a situation from which an intention to commit that offense shall be inferred. Nor, if the fact were so, that she had limited the right of capture to two leagues 290*] from her coast, would *it follow that this was an exercise of municipal right? Because a nation may restrict her subjects, in the exercise of belligerent rights, to a certain distance from the coast, or even to her jurisdictional limits, and yet the character of the seizure would be in no wise changed. If the object of the seizure is to promote the reduction of an enemy, it is an exercise of the rights of war.

From these considerations I conclude that the capture of The Sarah was justifiable upon principles not at all dependent upon municipal regulation; that it may fairly be considered as having been made in conformity with the law of nations, and, therefore, without acceding to the doctrine that a seizure contrary to the law of nations was a void seizure, and that we have a right to declare that a mere marine trespass which a court of France has declared to be the act of its sovereign, I conclude that the court of St. Domingo had jurisdiction in this case; and if it had jurisdiction, it is admitted that the property was altered, and the libellant ought not to recover.

Let it be observed that this is not an application on behalf of the vendee of the captor for the aid of this court to secure to him the benefit of his purchase. We find him in possession, and the application is for our aid to devest that possession, and restore it to the original owner. This owner was clearly an offender against the rights of France, and his only claim upon the interference of this court is, that he had escaped, with the property thus acquired, beyond two leagues from the shore of the nation that he had offended. In such a case it would be enough, for all the purposes of the defendant, if this court would imitate the state of our nation, and remain neutral between the parties.

Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression has been committed by entering at least two of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprized that he forfeits all claim to the protection of his country, or the inter- 291*] ference of its courts. The peace of *the nation, and the interest of the fair trader, imperiously require that the smuggler, or the violator of neutrality, should be left to his fate.

If I had no other reason to satisfy my mind of the correctness of the doctrines that I have been contending for, a conviction of their importance to the peace and security of the mercantile world would alone induce me to maintain them. The purchase of these goods was made in a Spanish port, under sanction of an agent of the French government, apparently countenanced by the government of the country in which he acted, and is sanctioned by a condemnation. If in the purchase of articles of merchandise in a foreign port, under the sanction of sovereign authority, it is nevertheless necessary, in order to acquire a good property, that a merchant should know whether they were captured by law, or without law, under the law of nations, or under municipal law, the office of a lawyer will be as necessary to his education as the counting house. Articles of commerce passing from hand to hand by mere delivery, often remaining for years in the same packages, distinguished by the same marks, may admit of identification after any length of time, in the remotest countries, and in the hands of the most innocent purchasers. But if a seizure by a sovereign, upon a ground which any court may adjudge unsanctioned by the law of nations, is tantamount to no seizure, and nothing done in pursuance of it can transfer a good property, where is the uncertainty to end? With regard to ships the inconvenience may not be so great. Every merchant knows that a vessel must be accompanied with her document papers, so that the purchaser may come to the knowledge of her having passed through a capture and condemnation, and be put on his guard against so precarious a title. He will know that he is liable to be dispossessed according to the varying construction of the law of nations that may prevail in different countries; yet he knows the full value of a property thus embarrassed. But in the purchase of merchandise he has no security, unless indeed he purchases them immediately from the manufacturer or the planter. It is a subject of curious speculation how far the pursuit or research after merchandise thus situated may be carried; whether the same principle may not extend it into the *hands of the retailer or even [*292 the consumer. In one of the cases arising out of the capture of The Sarah—I mean that against Groning—the property is libeled in the hands of a purchaser without notice, after it was landed in this country. If we can go so far, I see not where we are to stop. Every subsequent purchaser, even the remotest, as far as the article will admit of identification, is in no better situation than the defendant Groning, and liable, upon the same principle, to be dispossessed. After going beyond the fact of seizure by sovereign authority within his own territory, (where he is supreme,) or upon the ocean, (where he is equal to all others,) unaffected by escape, recapture or release, (by which property is restored to its state before seizure,) the approbatory sentence of his own court, (by which alone it can be judicially known to be the act of the sovereign,) beyond these limits every step that a court takes can only be pro-

ductive of doubt, litigation and uncertainty, and involve the commercial world in endless embarrassment, at the same time that it compromits the peace of nations, among whom it is a received and correct opinion, that a want of due deference to the jurisdiction of their maritime courts is a just cause of war.

Sentence of the court, March 2, 1808.

This cause came on to be heard on the transcript of the record, and on sundry exhibits introduced into the case in this court, and was argued by counsel, on consideration whereof, it appearing that The Sarah with her cargo were seized without the territorial jurisdiction claimed by the French government of St. Domingo, for the breach of a municipal regulation, and having never been carried within that jurisdiction, were sold by the captor in a foreign port, and afterwards condemned by the court of St. Domingo, as having violated the laws for regulating the commerce of French and foreign vessels with that colony, which laws authorize a seizure of vessels found within two leagues of the coast; it is the opinion of the court, that the seizure of The Sarah and her cargo is to be considered as a marine trespass, not vesting the possession in the sovereign of 293*] the captor, or *giving jurisdiction to the court which passed the sentence of condemnation, and, therefore, that the said sentence did not change the property in The Sarah and her cargo, which ought to be restored to the plaintiffs, the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, which equitable deductions the defendants are at liberty to show in the circuit court. This court is, therefore, of opinion, that the sentence of the circuit court of South Carolina ought to be reversed, and the cause be remanded to that court, in order that a final decree may be made therein, conformably to this opinion.

HUDSON AND OTHERS *v.* GUESTIER.
and
LAFONT *v.* BIGELOW.

If a vessel, seized by a French privateer, within the territorial jurisdiction of the government of St. Domingo, for breach of the French municipal law prohibiting all intercourse with certain ports in that island, be carried by the captors directly to a Spanish port in the island of Cuba, she may, while lying there, be lawfully proceeded against and condemned by a French tribunal sitting at Guadaloupe. The possession of the sovereign of the captors, gives jurisdiction to his courts. The possession of the captors in a neutral port is the possession of their sovereign. If the possession be lost by recapture, escape, or voluntary discharge, the courts of the captor lose the jurisdiction which they had acquired by the seizure.

The trial of a municipal seizure must be regulated exclusively by municipal law. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.

THESE cases were argued in connection with that of *Rose v. Himely.*

MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows:

This case differs from that of *Rose v. Himely* in one material fact. The vessel and cargo which constitute the subject of controversy were seized within the territorial jurisdiction of the government of St. Domingo, and carried into a Spanish port. While lying in that port, proceedings were regularly instituted in the court for the island of Guadaloupe; the cargo was sold by a provisional order of that court, after which the vessel and cargo were condemned. The single question, therefore, which exists in this case is, did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port?

*The seizure was indisputably a valid [*294 seizure, and vested the lawful possession of the vessel in the sovereign of the captor. The right consequently existed in full force to apply immediately to the proper tribunals for an examination of, and decision on, the offense alleged to have been committed. The jurisdiction of those tribunals had attached, and this right to decide upon the offense was complete.

When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. Recapture, escape, or a voluntary discharge of the captured vessel, would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing, and of his power over it. While this possession remains, the *res* may be either restored or sold, the sentence of the court can be executed, and therefore this possession seems to be the essential fact on which the jurisdiction of the court depends.

The laws of the United States require that a vessel which has been seized for violating them should be tried in the district where the offense is committed, and certainly it would be irregular and illegal for the tribunal of a different district to act upon the case. But of this irregularity, it is believed, no foreign court could take notice. The United States might enable the admiralty courts of one district to decide on captures made for offenses committed in another district. It is an internal regulation to be expounded by our own courts, and of which the law of nations can take no notice. The possession of the thing would be in the sovereign power of the state, and it is competent to that power to give jurisdiction over it to any of its tribunals. There exists a full power over the subject, and an ability to execute the sentence of the court. The sovereign power possessing jurisdiction over the thing must be presumed by foreign tribunals to have exercised that jurisdiction properly. But if the *res* be out of the power of the sovereign, he cannot act upon it, nor delegate authority to act upon it to his courts.

*If these principles be correct, it re- [*295 mains to inquire whether the brig Sea Flower remained in the possession and in the power of the sovereign of the captor after being carried into a Spanish port.

Had this been a prize of war, we have precedents and principles which would guide us. The cases cited from Robinson's Reports, and the regulations made by Louis XVI. in November, 1779, shows that the practice of condemning prizes of war while lying in neutral ports has prevailed in England, and has been adopted in France. The objections to this practice may perhaps be sufficient to induce nations to change it by common consent, but until they change it the practice must be submitted to, and the sentence of condemnation passed under such circumstances will bind the property, unless the legislature of the country in which the captured vessel may be claimed, or the law of nations shall otherwise direct.

The sovereign whose officer has in his name captured a vessel as prize of war, remains in possession of that vessel, and has full power over her, so long as she is in a situation in which that possession cannot be rightfully devested. The fact whether she is an enemy vessel or not ought, however, to be judicially inquired into and decided, and therefore the property in a neutral, captured as an enemy, is never changed until sentence of condemnation has passed; and the practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. In the port of a neutral she is in a place of safety, and the possession of the captor cannot be lawfully devested, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize.

This position is not intended to apply to the case of a sovereign bound by particular treaties to one of the belligerents; it is intended to apply only to those neutrals who are free to act according to the general law of nations. In such case the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports.

A vessel captured as prize of war is, then, while lying in the port of a neutral, still in the 296*] possession of the sovereign *of the captor, and that possession cannot be rightfully devested.

It is objected that his courts can take no jurisdiction of a vessel under such circumstances, because they cannot enforce a sentence of restitution.

But it is to be recollected that the possession of the captor is in principle the possession of his sovereign; he is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that purpose, as one who in the body of a county serves a civil process. He is under the control and direction of the sovereign, and must be considered as ready to obey his commands legally communicated through his courts.

It is true that in point of fact cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may occasion; but in principle they must be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey the legitimate mandate of the sovereign directing a restitution. The property, therefore, may be restored while lying in a neutral port, and whether it may, or may not be sold in the neutral port, the condemnation without a sale may change the property, if such condemnation be valid.

In cases of prize of war, then, the difficulty of executing the sentence does not seem to afford any conclusive argument against the jurisdiction of the court of the captor over a vessel in possession of the captor, but lying in a neutral or friendly port.

Do the same principles apply to a seizure made within the territory of a state for the violation of its municipal laws?

In the solution of this question the court can derive no aid from precedent. The case, perhaps, has only occurred in the wars which have been carried on since the year 1793, and the court in deciding it finds itself reduced to the necessity of reasoning from analogy.

*The seizure, it has been already [*297 observed, vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts. The vessel, when carried into a foreign port, is still in his possession, and he is as capable of restoring it if the offense should not have been committed, as he is of restoring a neutral vessel unjustly captured as an enemy. The sentence in the one case may be executed with as much facility as in the other.

Possession of the *res* by the sovereign has been considered as giving the jurisdiction to his court; the particular mode of introducing the subject into the court, or, in other words, of instituting the particular process which is preliminary to the sentence, is properly of municipal regulation, uncontrolled by the law of nations, and, therefore, is not examinable by a foreign tribunal. It would seem, then, that the principles which have been stated as applicable in this respect to a prize of war, may be applied to a vessel rightfully seized for violating the municipal laws of a nation, if the sovereign of the captor possesses the same right to maintain his possession against the claim of the original owner in the latter as in the former case. If, on a libel filed by the original owner in the courts of the country into which the vessel might be brought, the possession could be defended by alleging that she was seized for the violation of a municipal law, and the right of the court to decide the cause would be thereby defeated, then that possession would seem to be sufficiently firm to maintain the jurisdiction of the courts of the captor.

Upon this point much doubt has been entertained. It is, however, the opinion of a majority of the judges, that a possession thus lawfully acquired, under the authority of a sovereign state, could not be devested by the tribunals of that country into whose ports the captured vessel was brought; at least that it could not be devested unless there should be such obvious delay in proceeding to a condemnation as would justify the opinion that no such measure was intended, and thus convert the seizure into a trespass.

The judgment of the circuit court is to be reversed.

*CHASE and LIVINGSTON, Justices, [*298 dissented from the opinion of the Court in these cases, because the vessel, which was seized for the violation of a French *arrete*, or municipal regulation, was not brought into any port of

France for trial, but was voluntarily carried by the captain of the privateer to St. Jago de Cuba, a Spanish port, and while lying there was, with her cargo, condemned as forfeited by a French tribunal sitting at Guadaloupe.

JOHNSON, *J.* I concur in the reversal of the decision in the court below, but on different grounds from those which influence the opinion of my brethren. I had occasion in the case of *The Sarah* to express my ideas on most of the points arising in this case, and to that opinion I refer for the reasons of my present conclusion.

To me it appears immaterial whether the capture was made in exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or beyond those limits and upon the high seas, where her authority is concurrent with that of every other nation. We find the property in possession of the captor under authority derived from his sovereign, whose conduct cannot be submitted to our jurisdiction.

The modern practice of nations sanctions the condemnation of vessels lying in a foreign port, and that practice is not inconsistent with principle.

The plaintiff below has lost all remedy at law, and must look elsewhere for redress if he has sustained an injury.

NOTE.—The cases of *Palmer and Higgins v. Dutilh*, and *Hargous v. The Brig Ceres*, being imperfectly stated, it not being ascertained whether the seizure was within or without the territorial jurisdiction of St. Domingo, were remanded for further proceedings.

299*] *ALEXANDER
v.
HARRIS, BAILIFF of CRAMMOND.

An averment of a demise for three years is not supported by proof of a lease for one year certain, and two years further possession on the same terms by consent of the landlord.

The plea of no rent arrear, admits the demise as laid in the avowry.

The court is bound to give judgment for double rent under the statute of Virginia.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria, in an action of replevin.

Avowry by the defendant, stating that Crammond was seized in fee of the *locus in quo*, and demised the same to the plaintiff for the term of three years, at a certain rent, and that because 111 dollars and 67 cents of the rent were in arrear and unpaid, he acknowledged the taking as bailiff of Crammond, &c., and prays judgment for double rent.

Plea, ought not to avow, &c., because, he says, that the said sum of 111 dollars and 67 cents of the rent aforesaid, at the time when, &c., was not in arrear and unpaid to the said W. Crammond, nor was any part thereof in arrear, &c., and this he prays may be inquired of by the country, &c.

On the trial the defendant produced a letter from the plaintiff, to the defendant's agent, agreeing to take the house for one year, at the rent of 120 dollars, payable half yearly, and proved by witnesses that the plaintiff took the house upon the terms mentioned in the letter, and remained in possession three years; that at the end of the first year no new express agreement was made, but the plaintiff continued in possession with the consent of the defendant's agent. The letter did not contain any agreement for renewing the lease at the end of the term by consent of the parties; whereupon, at the prayer of the defendant, the court below instructed the jury that if they believed, from the evidence, that the plaintiff took the house for one year, by his letter, and afterwards, with the consent of the defendant's agent, continued to hold the house for two years longer under the letter, and without any new agreement, then the defendant is entitled to recover on his avowry; but that if the terms of the letter were relinquished, and a new agreement made for the two years, the avowry was not supported by the evidence.

*The plaintiff also produced to the [*300 court, after the verdict was rendered for the rent in arrear as stated in the avowry, the replevin bond given by the plaintiff, as evidence to satisfy the court, that the defendant had distrained for more rent than he had avowed for, and more than the jury had found in arrear, and objected to the rendition of judgment for double rent under the statute. But the court overruled the objection, and rendered judgment for double the rent found in arrear by the verdict.

To which opinions of the court the plaintiff excepted, and the verdict and judgment being against him, he brought his writ of error.

E. J. Lee, for the plaintiff in error, contended,

1. That it was necessary that the landlord, on the issue of no rent arrear, should prove his title in fee, according to the averment in the avowry.

2. That he should prove the demise as laid; and that the evidence in the present case did not prove the demise stated in the avowry; and,

3. That the landlord was not entitled to double rent, because it appeared by the penalty of the replevin bond given by the tenant, which was more than double the rent avowed for, that the landlord had distrained for more rent than was actually due. In support of these points he cited Esp. N. P. 358; Doug. 640, *Bristow v. Wright;* and the Virginia Laws, New Rev. Code, 155.

Hiort and Youngs, contra.

A lease for a year, and so from year to year, if the tenant occupies for three years, may be laid as a demise for three years. 1 T. R. 378, *Birch v. Wright;* 4 Bac. Abr. 182.

The bill of exceptions does not state that it contains the whole evidence offered at the trial.

The replevin bond was the act of the plaintiff himself, and he might gratuitously give a bond in a larger penalty *than the law [*301 requires. The act of assembly says it shall be

at least in double the amount of the rent distrained for, but does not say it shall not be in a greater sum. Besides, the bond does not appear in the record.

The plaintiff's plea to the avowry does not deny the avowant's title, nor the demise. It is simply the plea of no rent arrear, which admits the title and the demise, as laid in the avowry. By taking issue upon the rent arrear, the plea admits every other allegation in the avowry of the defendant. But if it does not, it is not competent for the tenant who has enjoyed the land, to dispute the title under which he held. In ejectment, possession alone is a good title against all but the rightful owner. If the plaintiff would deny the demise as laid, he must plead non-tenure. 4 Bac. Abr. 8, 55, 64, 67, 71, 87, 104; 10 Viner, 486.

E. J. Lee, in reply.

If the defendant was not owner of the land, no rent was in arrear to him. The avowant must prove his case as laid. The case of *Birch v. Wright* is not like this, and the opinion of Judge Buller is extrajudicial.

MARSHALL, *Ch. J.* The only doubt is, whether the plea of no rent arrear admits the demise as laid in the avowry.

E. J. Lee. Nothing in arrear is the general issue in an action of debt for rent; and, like the pleas *nil debet, non detinet*, and not guilty, puts the avowant upon the proof of his whole case. Cowp. 588, *Warner v. Theobald;* Buller's N. P. 302.

March 2. MARSHALL, *Ch. J.*, delivered the opinion of the Court as follows, viz.:

In this case two errors are alleged by the plaintiff in error.

1st. That the circuit court misdirected the jury.

302*] *2d. That judgment for double damages ought not to have been rendered on the verdict.

1. The avowry, which sets forth the title under which the distress was made, states a lease for three years certain. The plea to this avowry was, "nothing in arrear," and on this plea issue was joined. At the trial of the cause, the avowant gave in evidence a lease for one year certain, and a subsequent possession for two years. On motion to instruct the jury that this lease did not support the avowry, the court said, that if the jury should be of opinion that the subsequent possession was under the original contract and without any new agreement, then the avowant was entitled to recover, otherwise not. The jury found a verdict for the avowant.

The lease stated in the avowry is obviously a different lease from that which was given in evidence. A lease for three years is not a lease for one year. But it is contended that a subsequent possession, without any new express agreement, amounts to an extension of the original lease, and for this Bacon's Abridgment, and a *dictum* of Judge Buller, in the case of *Birch v. Wright*, 1 Term Rep. 378, have been cited. But those cases do not prove the point they were supposed to establish. In those cases, the original terms of the lease admit of the extension which was afterwards made by consent of parties. The lease was made for one year, and afterwards from year to year, as long as both parties should please. The principle of continuance is introduced into the original contract, and the occupation for three years is evidence that the circumstance had occurred, by force of which the contract should be a lease for three years. But in this case the original contract contains no principle of continuance. It is for a limited time, and can only be extended by a new contract, either express or implied. The lease, therefore, offered in evidence, does not support the avowry. But a question on which the court has felt more difficulty is this: Does the plea admit the demise, or is the avowant bound to prove it? If the plea admits the demise, then, notwithstanding the variance, the verdict is right, and *the court has not erred in that [*303 part of the opinion which is against the party taking the exception.

The issue gives notice to the parties of the point which is to be tried, and which the testimony must support. That which is admitted by the pleadings need not be proved. If the plea in this case controverts the allegation in the avowry, that the tenant held under a lease for three years, reserving the rent stated to be reserved, then the avowant would be bound to prove the demise as laid. But if the plea admits the demise, then the avowant is not bound to prove it. The plea is, that the sum distrained for of the rent aforesaid, (that is, of the rent claimed under the lease stated in the avowry,) was not in arrear and unpaid, nor was any part thereof in arrear and unpaid, at the time when the distress was made, as the avowant in his avowry hath alleged.

This plea avers the single proposition that the rent was not in arrear when the distress was made, and it is this averment alone that the party making the distress is to meet. The averment that the rent claimed in the avowry was not in arrear when the distress was made, admits the contract by which the rent might accrue, and only denies that any thing, at the time of the distress, remained due upon that contract. Upon principle, then, it would seem that the plea had dispensed with proof of the demise laid in the avowry, by admitting it.

No case has been found in which the point has been expressly decided. It is said in Buller's Nisi Prius, p. 59, "If the plaintiff plead *riens arriéré* in bar to an avowry, he cannot, upon such issue, give in evidence non-tenure;" consequently, the defendant cannot be required to show the tenure; for if it was necessary to show it, the tenant would be at liberty to produce opposing testimony.

It is also laid down in Buller, p. 166, that in covenant for non-payment of rent, *riens in arrear*, or payment, at the day, is a good plea; but *riens in arrear* generally, *would [*304 not be a good plea; and the reason appears to be, that *riens in arrear* generally admits the breach laid in the declaration, and that the rent was not paid on the day. This principle is decided in *King v. Saville*, reported by Brownlow. Nothing in arrear on the day on which the rent is stated to have accrued, seems to be considered as equivalent to payment on the day; but nothing in arrear on a subsequent day admits that the covenant was broken, and, consequently, admits the covenant. It is not a good plea, because it admits the right of the plaintiff to recover damages. This furnishes a strong

argument in favor of the opinion that nothing in arrear on the day when the distress was made, admits that the rent accrued as stated in the avowry.

The case of *Warner v. Theobald*, Cowper, 588, was an action of debt for rent, by an assignee against an assignee. The plea of *riens in arrear* was demurred to, and, consequently, the question to be decided by the court was, not what the plea admitted, but whether it was a bar to the action. Mr. Buller objected to this plea, because the plaintiff could not come prepared to know what it would be necessary to prove. The defendant might object to the assignment, or give in evidence payment before or after action brought.

In answer to Buller, Wood said, "The form of the plea is *nil debet*, in the present tense. But in this case *riens in arrere* is a fairer plea than *nil debet;* because *nil debet* puts the whole declaration in issue, whereas this confines the question to the single fact whether such rent was due."

In giving his opinion in support of the plea, Lord Mansfield certainly had not in view the question now under consideration; for he uses expressions which would apply differently to that question. He says, "Saying nothing is due is the same as if he had said *nil debet;*" and immediately adds, "Besides, it is a more favorable plea for the plaintiff. He must then have applied the first assertion solely to the sufficiency of the plea as a bar, for it could not be a more favorable plea for the plaintiff, if it 305*] contested the whole declaration, *and admitted nothing, as is the case with *nil debet.*" He concludes with observing, "If the rent was due, and is not at the time of the plea, it could not have ceased to be due by the plaintiff's accepting it."

This case appears to the court to decide nothing further than that the plea pleaded was a good bar to the declaration in debt for rent, and to leave the question, how far it admits the demise laid in the avowry, open for consideration.

It is thought important in the inquiry, that the law appropriates a different plea, which controverts the demise, if the tenant means to contest it—the plea of *non demisit*.

The court is of opinion that the plea admits the demise; and that there is no error in the instruction given to the jury which is injurious to the party taking the exception.

In the judgment for double damages, there is no error. The law directs it positively.

Judgment affirmed with costs.

306*] *CHAPPEDELAINE, Residuary Legatee, AND CLOSRIVIERRE, Adm'r *de bonis non*, of CHAPPEDELAINE, Complainants,

v.

DECHENAUX, Executor of DUMOUSSAY, Defendant.

If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant shall show it to be erroneous.

ERROR to the circuit court for the district of Georgia, in a suit in equity.

The bill states that the complainants' testator and the defendant's testator, together with three others, viz., Boisfeillet, DuBignon, and Grand Closmesle, became joint purchasers of the islands of Sapelo, Blackbeard, Jekyll and half of St. Catharine, on the coast of Georgia; that Dumoussay was the acting partner, and kept all the accounts, &c. That an account was stated and signed by the two testators, Chappedelaine and Dumoussay, on the 30th of April, 1792, by which the former acknowledged a balance of 667*l.* 10*s.* 1. 3-4*d.* due to the latter; but that the account was erroneous in sundry items particularly set forth in the bill; that there were sundry debits which had accrued since that settlement, and that Chappedelaine had been obliged, by a suit in equity, to refund to Boisfeillet a large sum which Dumoussay had overcharged him. That Dechenaux was the executor of the estate of Chappedelaine as well as of Dumoussay, and, as executor of Chappedelaine, had defended the suit of Boisfeillet. The bill contains a prayer that the defendant may account touching all moneys due on rectifying the errors; and for all other sums due by Dumoussay in his lifetime, not credited nor accounted for, or which have come to the hands of the defendant, and that he pay over such balance as shall appear on settlement of all accounts, and for general relief. The defendant pleaded the settled account in bar of so much of the bill as sought to open the account, and by answer denied all fraud and error.

*Upon hearing, the court below or- [*307 dered a reference to auditors, with directions "to make a general statement of accounts between the parties, rejecting any erroneous charges which may appear in their settlement, and adding such as may have been omitted."

The auditors, on the 23d of April, 1805, instead of stating an account, reported that they found "a balance due from the defendant to the complainants, including interest upon the liquidated account up to this date, fifteen thousand five hundred and eighty-six dollars and twenty-two cents." They stated that they had not taken into consideration a claim of the complainants of 1,000*l.* which the estate of Chappedelaine was condemned to pay to Boisfeillet by decree of the court, nor their claim for indemnity for damages said to have been sustained by sale of lands, conceiving those claims not submitted to them, but reserved for the decision of the court.

NOTE.—An account stated constitutes a good bar to a bill in equity to account, although it will constitute no bar to an action at law for the same subject matter.

2 Story's Eq. Jur. § 1524; Cooper, Eq. Pl. ch. 5, p. 277; Mitford's Eq. Pl. by Jeremy, 259, 260; Dawson v. Dawson, 1 Atk. 1; Taylor v. Haylin; 2 Bro. Ch. R. 310; Johnson v. Curtis, Id. note; S. C. 3 Bro. Ch. R. 266; Burk v. Brown, 2 Atk. 397, 399; Sumner v. Thorpe, 2 Atk. 1; Story's Eq. Pl. § 798 to 802; Shirk's Appeal, 3 Brewst. 119; Fowler v. Platt's Adm'r, Wright 206.

If the matter of defense originates in the transaction out of which the cause of action springs, and affords either a legal or equitable defense to it, and is within the knowledge of the defendant, it should be used as a defense to the original action; and if it is voluntarily omitted, it would seem, on principle, that it can never be the subject of a fresh action, or afford ground for staying the proceedings in the original action.

Willard's Eq. Jur. 355; Foster v. Wood, 6 John. Ch. 90; Duncan v. Lyon, 3 Id. 351; Le Guin v. Gouvernour, 1 John. Cas. 436, and notes, Shepherd's ed.

Exceptions being taken to this report, the court ordered the auditors to "make a statement showing the items of the general account, which they rejected, in whole or in part, and the reasons of their rejections, and also such items as were added as omissions, and their reasons for so doing."

In obedience to this order, the auditors made an explanatory report, whereupon the court decreed that 604*l.* 6*s.* and 579*l.* 8*s.* 1*d.* be deducted from the liquidated account of the 30th of April, 1792; that interest be allowed on the balance at eight per cent. from that date, and that the defendant pay out of the assets that balance and interest, and the further sum of 3,823 dollars, being the amount stated by the auditors as having accrued since the 30th of April, 1792, and costs.

The errors assigned in the record were,

1. That the bill was insufficient in law.

2. That the court had not jurisdiction; because, although the bill states the complainants to be French citizens, and the defendant a citizen of Georgia, yet the two testators were citizens of Georgia.

308*] *3. That I. Trubert, who is stated in the answer to be residuary legatee of Dumoussay, was not made a party; and because the other legatees were not made parties.

4. That the stated account has been partially opened, and abatements made to the injury of the legatee.

5. That the exceptions to the report of the auditors ought to have been sustained.

P. B. Key, for the defendant, on opening the question of jurisdiction, was stopped by the court.

MARSHALL, *Ch. J.* The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court.

Winder, for the complainants.

As to the allegation of want of parties, it can only be noticed on being pleaded. The defendant cannot now take advantage of it.

We are not, in examining the account, confined to the errors stated in the bill. But if the general nature of the errors is stated in the bill, it is sufficient; and if such errors are proved, it is sufficient to set aside the account as a bar, and to have it referred to auditors; who are not confined to the precise errors alleged in the bill.

MARSHALL, *Ch. J.*, said he understood the practice in chancery to be, that the court will notice only those errors in the report of the auditors which appear upon the face of the report, or those expressly set down in the exceptions; and then the evidence on which the items were allowed must appear on the record.

Harper and P. B. Key, for the defendant, contended,

That an account stated and settled by the parties was conclusive, unless the party com-
309*] plaining can show fraud *or error; and upon him lies the burden of proof. That when a defendant relies upon an account stated, he shall never be compelled to go into a general account. The settled account can only be opened to the extent of the items charged as erroneous. 2 Atk. 1, *Summer v. Thorpe;* 2 Vez. 565, *Pitt v. Cholmondely.*

March 4. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The bill in this case is brought to set aside a stated account which was signed by Dumoussay and Chappedelaine, in July, 1792, on the suggestion of fraud on the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account.

The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened, and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have beeen committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this principle, the report of the auditors in this case, and the exceptions to that report, *so far as respects the stated [*310 account, are to be considered.

The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have in fact made any deduction from the stated account which was not warranted by the interlocutory order, an order made on the principles which this court has already declared to be correct.

The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s* 5*d.* is reduced to 333*l.* 0*s.* 8*d.*

The stated account between the parties, marked in the proceedings as the exhibit A. contains this item, and states it to be one-fifth of the expenses for disbursements on the island of Sapelo, which was the joint property of a company consisting of five, of which Dumoussay & Chappedelaine were partners. The items which composed this general account are all contained in exhibit F. stated by Dumoussay on the 3d of May, 1792, and assented to by Chappedelaine on the 23d of July, 1792, when the stated account was signed. The total of those disbursements is 4,224*l.* 3*s.* 8 1-2*d.* and the balance upon the account is 3,021*l.* 12*s.* 1 1-2*d.* the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report the auditors say that they took as the basis of this reduction an account settled by auditors in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose

that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet.

This testimony would of itself be sufficient to convince the court that injustice was done 311*] in the settlement *of July, 1792, but would not show explicitly the amount of that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine, of which Boisfeillet ought not to bear a part.

The court, therefore, sought, in the documents connected with the report, for that more explicit information.

Upon looking into the exhibit F. there are, upon the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine.

The first item on the debit side of this exhibit, is the sum of 3,571*l.* 3*s.* 8 1-2*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2,368*l.* 12*s.* 0 1-2*d.* from his private funds. On this advance made by himself in Georgia, he charges the company 15 per cent., amounting to 354*l.*, on account of the difference of exchange betweeen money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance.

This charge has been rejected in the accounts of all the partners for many obvious reasons. It is sufficient to observe, that as this money was advanced in Georgia by Dumoussay, and repaid to him in Georgia by the partners, there was as much reason for making these charges on the repayment, as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he had previously advanced his portion of this money to Dumoussay, and had allowed him 15 per cent. for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2,368*l.* 12*s.* 0 1-2*d.* This is more than double the real amount of interest.

312*] *There is also in the credit side of the account, an error of 100*l.* in the addition. The errors apparent on the face of the exhibit F. amount to 611*l.* and these errors are of such a description as strongly to characterize the stated account of July, 1792.

In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors, and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court, without engaging in the laborious task of auditors, which is incompatible with their duties. To that account the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July, 1792, signed by Chappedelaine, because Chappedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet in that case the deductions from that account were made which the auditors in this case have taken as the basis of their settlement, and those deductions were made in consequence of double entries, false charges, and charges not admissible against Boisfeillet.

The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed, in a great measure, by inspecting the report in the present case. In that report, the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is, that the auditors reduced the sum of 336*l.* 16*s.* 8*d.* admitted in the stated account, as being one-fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.*, making a difference of 25*l.* 7*s.* 2*d.* *This item in the exhibit A. which [*313 is the stated account, is the result of the exhibit G., which is the account of Jekyll, as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected for the same reasons which were assigned for their rejection in that item of the account.

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.*, assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.*, making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.*, which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due, and the sum actually due from Boisfeillet.

The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.* assumed by Chappedelaine for one of the absent partners, that being considered by mistake as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied, from the evidence, that this payment was made to Dechenaux as the executor of Dumoussay. The assumpsit of Chappedelaine was essentially as security for the absent partner, who still remained a debtor; and when the principal did himself pay what he owed to the original creditor, the assumpsit of Chappedelaine was of

no further obligation. Although this was not an error in the account when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as a charge against Chappedelaine, and 314*] in reforming *their accounts, it must be excluded from them.

There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.* which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties.

These several errors make up the sum of 1,457*l.* 8*s.* 4*d.* from which is to be deducted the sum of 667*l.* 10*s.* 1 3-4*d.*, admitted on the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April, 1792, 789*l.* 18*s.* 2 1-4*d.*

The auditors state this balance at 1,346*l.* 10*s.* 7*d.* But from this balance reported by the auditors is to be taken the sum of 305*l.* 13*s.* allowed by Chappedelaine on the repayment in Georgia of money lent by him to Dumoussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1,030*l.* 17*s.* 7*d.* exceeding the balance which is here supposed, by the sum of 240*l.* 19*s.* 4 3-4*d.*

The greatest part of this excess is produced by one-third of merchandise sold and not entered in the account, and by a credit for continuing interest up to the 30th of April, 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account without any apparent reason, and must, therefore, have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion that the report of the auditors stating that these corrections were made on the inspection of the vouchers and en-315*]tries which *were laid before them ought to be received, unless the person taking the exception had himself required the testimony on any particular point to which he objected to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point.

The balance due to Chappedelaine on the 30th of April, 1792, is so much of the loan made by him to Dumoussay in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six per cent. per annum until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six per cent. per annum.

To the report, so far as it respects the accounts subsequent to the 30th of April, 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if in the opinion of the defendant below the auditors admitted any charge against Dumoussay which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception, which would bring the testimony on the particular point before the court. The only objection which the court can notice, is the allegation in the exception that the auditors have proceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July, 1792. But that balance was entirely changed. The item was fully disproved by the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors without objection, he acquiesced in their considering as correct the items it admitted.

*This bill was brought to correct the [*316 stated account of July, 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts, that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiff to take other measures to substantiate his claim. The auditors say, they "admitted the account presented by the defendant;" but this must be understood with the exception of the balance which he claimed under the settlement of July, 1792. It does not appear, from their report, that the claims of the plaintiff below rested on that account so far as it went; but it is probable that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

THE UNITED STATES *v.* M'DOWELL.

In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum due upon the condition of the bond, and not to the penalty.

ERROR to the district court for the district of Kentucky, in an action of debt for twenty thousand dollars, the penalty of an official bond given by the defendant, as marshal of that district, for the faithful execution of the du-

ties of his office by himself and his deputies. The defendant pleaded performance generally. The United States, in their replication, assigned a special breach of the condition of the bond, in not paying over to the United States the sum of three hundred and twenty-eight 317*] *dollars. The judgment below was against the United States, who sued out the present writ of error.

But this court, without argument, decided that it had no jurisdiction, the matter in dispute being of less value than 2,000 dollars.

THE MAYOR AND COMMONALTY OF ALEXANDRIA.
v.
PATTEN AND OTHERS.

If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may at any time apply it to which account he pleases.

ERROR to the circuit court of the District of Columbia, sitting at Alexandria, in an action of debt brought by the mayor and commonalty of Alexandria, for the use of John G. Ladd, against Thomas Patten and his sureties, on a bond given for the performance of his duty as vendue-master.

The object of the suit was to recover a sum of money alleged to remain in his hands as vendue-master on account of goods sold for Ladd. Patten was also the debtor of Ladd for goods sold by him to Patten, who gave in evidence payments which exceeded the amount due upon the latter account, and which, if applied to the former account, would nearly, if not entirely, discharge that debt. The payments were attended by circumstances which the defendants considered as evidence of a clear intention to apply them to the debt due from Patten as vendue-master; "whereupon the counsel for the plaintiffs prayed the opinion of the court whether, from the manner in which the payments were made as aforesaid, the said John G. Ladd had not a right to apply so much of the money, paid to him as aforesaid, as would discharge the debt due to him as aforesaid, for goods sold as aforesaid, to the said Thomas Patten, to the discharge of the same. Whereupon the court instructed the jury, that if they should be satisfied by the evidence that the payments of the money by the defendant Patten were 318*] *made on account of the goods sold at vendue, and so understood by both parties at the time of the payments, they must be applied to that account.

"If Mr. Patten, at the time of paying the money, did not direct to which account it should be applied, and if it was not understood by the parties at the time of payment, on which account it was made, the plaintiff had a right immediately to make the application to which account he pleased; but such application must have been recent, and before any alteration had taken place in the circumstances of Mr. Patten.

"If neither of the parties made the application as aforesaid, and if the parties did not then understand on which account it was made, then the payments ought in law to be applied to the discharge of the vendue account, the non-payment of which is alleged as the breach of the bond upon which the present suit is brought."

To this opinion the plaintiffs excepted, and, the verdict and judgment being against them, brought their writ of error.

Swann, for the plaintiffs in error, contended, that where there are different debts due by a debtor to his creditor, and a payment be made generally on account, the creditor has a right to apply the payment, whenever he pleases, to which account he pleases, and cited the case of *Goddard v. Cox*, 2 Stra. 1194.

Youngs, contra.

It is admitted that the defendant had the right at the time of payment to direct its application, and that if he did not then exercise that right, it devolved upon the plaintiff. But the question is, when is the plaintiff to exercise the right? Can he, at any indefinite period after the payment, and under any change of circumstances, apply the payment as he pleases? Can he, at the moment of trial, when the defendant produces evidence of payments, say, I choose to apply these payments to the other account? The rules of law are all founded in reason. Some reasonable limit must be supposed to the *exercise of this right. In [*319 the present case the interests of third persons are involved. The sureties may have been lulled into security by the evidence of these payments.

The court below was bound to decide according to the laws of Virginia, which have been adopted by Congress for the government of the county of Alexandria.

The law is conclusively settled in Virginia, by the highest tribunal in that state, in the case of *Braxton v. Southerland*, 1 Wash. 133, where the president of the court of appeals, in delivering the opinion of the court, says, "Although, if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a recent application, by entries in books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest, governed by events, might dictate." And upon this principle the decree of the court in that case was founded. It was not a mere *dictum*, but the very ground of the court's decision. This, then, being the law of Virginia, the court below was bound by it.

If the opinion of the court of appeals of Virginia needed support, it would be found in 2 Pothier on Obligations, 45, who gives it as a rule of the civil law, that "when the debtor in paying makes no application, the creditor, to whom money is due for different causes, may apply it to the discharge of which he pleases." But he goes on to say, "It is necessary, 1st. That this application should have been made at the time; and, 2d. That the application which the creditor makes should be equitable."

NOTE.—*Application of payments*—see notes, 3 L. ed. U. S. 136; 12 L. R. A. 712.

Another rule, in p. 49, is, that "when the application has not been made either by the debtor or the creditor, the application ought to be made to that debt which the debtor had, at the time, most interest to discharge." And as a *corollary*, he says, "The application is made rather to the debt, for which the debtor has given a surety, than to those which he owes alone. The reason is, that in paying the former he discharges himself towards two creditors—his principal creditor, and his surety whom he is bound to indemnify."

320*] *These principles are confirmed by 1 Domat, 287, tit. De Solutione.

The case of *Goddard v. Cox*, cited for the plaintiffs, is a mere *nisi prius* case before Chief Justice Lee, in Middlesex; and it only decides the principle, that where a defendant is indebted to the plaintiff on two simple contracts of equal dignity and of the same nature, and for neither of which is any other person bound, and the payment is made generally on account, without any application having been made by the defendant, the right to make the application devolves on the plaintiff. It does not decide the question now before the court, which is, whether the plaintiff is not bound to make a recent application in cases where the interest of sureties are concerned.

All the cases in which the plaintiff has been permitted at law to make his election, are cases where the debts were of equal dignity and of a similar nature, and where it did not appear to be important to the debtor, or any other person, to which debt the payment should be applied. Esp. N. P. 229.

There is, in truth, no difference in principle between the rule in equity and the rule at law, as to the application of payments.

March 7. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court, as follows:

It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it he is bound by it; but until he makes it he is free to credit either the bond or simple contract.

321*] *Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and, therefore, the court was correct in instructing the jury, that if they should be satisfied that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the plaintiff if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

DAWSON'S LESSEE
v.
GODFREY.

A person born in England before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States.

ERROR to the circuit court of the District of Columbia, sitting at Washington.

Russell Lee, a citizen of the United States, in the year 1793, died seized in fee of a tract of land called Argyle, Cowall and Lorn, situated in that part of the District of Columbia which was ceded to the United States by the state of Maryland. Mrs. Dawson, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in England before the year 1775, always remained a British subject, and was never in the United States.

The court below instructed the jury that she was an alien, and could not take the land by descent from Russell Lee in the year 1793.

The question having been fully argued, but not decided, in the cases of *Lambert's Lessee v. Paine*, (*ante*, vol. *3, p. 97,) and [*322 *M'Ilvaine v. Coxe's Lessee*, (*ante*, vol. 2, p. 280,) the counsel (viz., Morsell and Jones, for the plaintiff in error, and P. B. Key, for the defendant) agreed to submit it to the court without further argument.

JOHNSON, *J.*,[1] delivered the opinion of the court as follows:

This case rests upon the single question, whether a subject of Great Britain, born before the declaration of independence, can now inherit lands in this country? The general doctrine is admitted, that in the state of Maryland, in which the land lies, an alien cannot take by descent; but it is contended, upon the doctrine laid down in *Calvin's Case*, that the rights of the *antenati* of Great Britain formed an exception from the general rule. The point decided in the case of *Calvin* was, that a Scotsman, born after the union, could inherit lands in England. It is evident that this case is not directly in point, for the only objection here to the right of recovery did not exist in Calvin's case, as, whether in England or in Scotland, he was equally bound in allegiance to the King of Great Britain. It would be a contradiction in terms to contend that Dawson or his wife ever owed allegiance to a government which did not exist at their birth. It is upon a supposed analogy, therefore, and the reasoning of the judges in *Calvin's Case*, that the argument for the plaintiff is founded. In the two cases of *Coxe and M'Ilvaine* and *Lambert and Paine*, in this court, this doctrine was very amply discussed, and this case is submitted upon those arguments. The counsel there contended, that the relation of the *postnati* of Scotland (after the union) to the subjects of Great Britain, was identically the same with the *antenati* of Great Britain

1.—The judges present were Chase, Johnson, Livingston and Todd.

NOTE.—*Alien's right to inherit*—see note, 31 L. R. A. 177.

(before our revolution) to the citizens of this country, and that the community of allegiance at the time of birth, and not the existing state of it when the descent is cast, is the principle upon which the right to inherit depends.

The latter proposition presents the weak point of their argument, for the community of 323*] allegiance at the time of *birth and at the time of descent both existed in *Calvin's Case*. And if the court in their argument expressed opinions which appear to go the length contended for by the counsel, they must be considered as mere *obiter* opinions, since the decision of the cause did not depend upon them. We have no doubt that the correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance at the time of the descent cast. And that the idea that it depends upon community of allegiance at the time of birth, is a consequence that follows from the doctrines that a man can never put off his allegiance, or be deprived of the benefits of it but for a crime. Community of allegiance once existing must, upon these principles, exist ever after. Hence it is that the *antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown. But the same reason does not extend to the *antenati* of Great Britain, because they never owed allegiance to our government. This idea will be best elucidated in the following manner. If an action be commenced in England by an *antenatus* of America for the recovery of land, the plea of alien born could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these states avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his civil rights, although it may release him from the obligation of allegiance. But if a suit of the same kind is instituted here by an *antenatus* of Great Britain, the plea of alien born could be maintained, for the plaintiff never owed allegiance to our government. To avoid it he would be put to a special replication, by which he must of necessity acknowledge the truth of the plea, and set forth circumstances which would amount to a recognition of his never having been a party in our social compact. Much of the difficulty in satisfying the mind on this subject vanishes upon a just view of the nature of the right of inheritance. Gentlemen have argued upon it as if it were a natural and perfect right; whereas it has its origin in, and is modified to, infinity by the laws of society, in exercise of the right of territorial jurisdiction. To be entitled to inherit in the state of Maryland, a right should be made out under the laws of that state. As the common law, which is the law of Maryland 324*] on this subject, *deprives an alien generally of the right of inheriting, it is incumbent upon the plaintiff to establish some exception in favor of his case. But I know of no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law.

Judgment affirmed.

Cranch 4.

MOUNTZ AND OTHERS.
v.
HODGSON and THOMPSON.

Quære, whether the mayor of Georgetown, in the District of Columbia, is a justice of peace of the county of Washington?

Whether a writ of error will lie to the refusal of the court below to quash an execution upon motion?

THIS was a writ of error to a supposed judgment of the circuit court of the District of Columbia, for the county of Washington, between Hodgson and Thompson, plaintiffs, and Jacob Mountz, and John Mountz and Henry Knowles, defendants.

Hodgson and Thompson had recovered judgment in the court below, at December term, 1805, against Jacob Mountz and George Reintzel. By the act of assembly of Maryland, 1791, *c.* 67, entitled "An act for regulating the mode of staying execution, and for repealing the acts of assembly therein mentioned," it is enacted, that no execution shall issue upon any judgment, provided the person or persons against whom such judgment is obtained, shall come before two justices of the peace of the county, where such person or persons shall reside, within two months after the rendition of such judgment, and, together with two other persons, such as the said justices shall approve of, confess judgment for his debt and costs of suit adjudged, with stay of execution for six months thereafter; which confession shall be made in manner and form following, that is to say, "You, H. M., A. B., and C. D., do confess judgment to E. F.," which confession shall be signed by the *justices before whom the same [*325 is made, and a certificate thereof shall be procured under the hands of the said justices, and such certificate shall be a sufficient *supersedeas* to the sheriff to forbear serving execution upon the body or goods of the person so obtaining such certificate. And it is further enacted, that the justices shall return the confession of judgment to the clerk of the court, where the first judgment was rendered, by the next court in course, to be entered on record; and after the expiration of the time limited in such confession, it shall be lawful to take out execution thereon, without a *scire facias* or any other delay, against either the principal or the security, or all or either of them for such judgment so confessed.

According to the provisions of this act, the original defendant, Jacob Mountz, (without his co-defendant George Reintzel) went before John Ott and Daniel Reintzel, and, together with Henry Knowles and John Mountz, his sureties, confessed judgment to Hodgson and Thompson, in the form prescribed by the act of assembly. John Ott was admitted to be a justice of peace of the county of Washington, but Daniel Reintzel signed his name as Mayor of Georgetown.

By the act of assembly of Maryland, 1789, c. 23, incorporating the town of Georgetown, it is enacted, "That the mayor, recorder and aldermen" "shall be justices of the peace within the said town, and the precincts thereof," and that each of them "shall have the same jurisdiction as to debts, as any justice of the peace of any county of this state now hath, or shall hereafter have by law."

After the expiration of the six months mentioned in the confession of judgment, a *ca. sa.* was issued thereon against Jacob Mountz, Henry Knowles, and John Mountz, upon which they were all taken, and on the return thereof, they moved to quash the execution;

1. Because the confession of judgment was not before two justices of peace of the county; and,

2. Because the judgment was not confessed by George Reintzel, the co-defendant in the first judgment.

326*] *But the court below overruled both objections, and refused to quash the execution; whereupon the defendants took a bill of exceptions, and brought their writ of error.

F. S. Key, and Morsell, for the plaintiffs in error.

As to the first point, contended, that Daniel Reintzel was not a justice of peace of the county, but only of Georgetown. That he had only the powers necessary for the preservation of the peace in that town. And even if he had power within the town to receive a confession of judgment, it did not appear by the record that this confession was taken in the town, but might have been taken elsewhere, in which case his act would have been void.

On the second point, they contended that all the defendants to the original judgment must join in the *supersedeas*. The words of the act are, "such person or persons," thereby implying that if there were several defendants, all must join. Suppose there should be five solvent defendants and one insolvent, who supersedes the judgment with two sureties; the plaintiff cannot take out execution against the five, until the expiration of the six months. If execution be stayed as to one, it is stayed as to all. The execution on a joint judgment must be against all; it must follow the nature of the judgment.

Jones, contra.

This is an *ex parte* proceeding by the debtor. He chooses the magistrates before whom he will confess the judgment; he is estopped to deny their jurisdiction, after he has had the benefit of the delay. But if this be an error, it is an error of fact which this court cannot correct. It is a question of fact, whether Daniel Reintzel be a justice of the peace of the county. He has signed his name as mayor, yet he may also be a justice of peace of the county. They might as well assert that John Ott is not a justice of peace, because he has not signed his name as such. There is no such office as that of a justice of peace of Georgetown. It is to be 327*] presumed *that the confession was made in Georgetown, as the contrary does not appear, and Mr. Reintzel signed his name in his official character as mayor of that town.

The writ of error complains of the judgment of the two justices, not of that of the circuit court. Or rather the error which they assign is an error in the judgment of the justices, and not in the judgment of the court.

The confession of judgment only stays the service of the execution, it does not prevent its emanation. The words of the act are, that it shall be a sufficient *supersedeas* to the sheriff to forbear serving execution. The execution may issue against all, but shall not be served upon him who has confessed judgment with sureties.

Morsell, in reply.

The judgment confessed before the justices, by being returned to the office of the clerk of the circuit court and there entered of record, becomes a judgment of that court; otherwise no *scire facias* could lie to revive the judgment.

The act of assembly makes the confession of the second judgment a complete *supersedeas* to the first. No execution can issue on the first judgment after confession of the second. The words of the act are positive. "No execution shall issue," &c.

March 8. MARSHALL, *Ch. J.* The majority of the court is of opinion that the writ of error must be quashed, this court not having jurisdiction.

The refusal of the court below to quash the execution on motion, is by some of the judges supposed not to be a judgment to which a writ of error will lie. *Others are of opin- [*328 ion that a writ of error will lie to that decision of the court, but that this writ of error is not to the judgment of the circuit court, but to that of the justices.

Writ of error quashed.

BLAINE
v.
THE SHIP CHARLES CARTER, and DONALD and BURTON and Others, Claimants.

If the obligee of a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien on the ship.

ERROR to the circuit court for the District of Virginia.

Blaine libeled the ship Charles Carter, Bell, master, owned by M'Cawley, upon two bottomry bonds; one executed in London by Bell, the master, on the 14th of July, 1796, and payable ten days after the arrival of the ship in Virginia; the other executed on the 27th of October, 1796, by M'Cawley the owner, in Virginia, where he resided, and payable in thirty days after the arrival of the ship in Europe. The answer of M'Cawley admitted the truth of all the allegations of the libel; but a claim was interposed by Donald & Burton, creditors of M'Cawley, who had, on the 30th of November, 1797, obtained judgment against him, and at

NOTE.—A *bottomry bond* is a loan upon the ship, or ship and accruing freight, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a specific voyage, or a definite period.

A *respondentia bond* is a loan on the pledge of the cargo. Generally it is only a personal obligation, and not a specific lien on the goods, unless there be an express stipulation to that effect in the bond; and it amounts, at most, to an equitable lien on the salvage in case of loss. 3 Kent's Com. 354; 2 Black's Com. 459.

By the foreign laws, the lender on *respondentia* has the pledge of the goods as a security, Pothier, Bynkershoeck and Emerigon. Abbott on shipping, 5th Am. ed., Boston, 1846, p. 197. But this is not the English law. *Respondentia* loans have been disused in England since the statute of 10 Geo. 2, c. 37; 3 Kent's Com. 355, note 7th ed. (Busk v. Fearon, 4 East, 319.)

By the law of Rome, and in those nations which have adopted the civil law as the basis of their ju-

whose suit the marshal, on the 30th of December, in the same year, had seized the ship in execution upon several writs of *fieri facias*, issued on the 7th of the same month, from the circuit court for the District of Virginia, before the warrant of arrest had issued from the district court, upon Blaine's libel. The libel was filed on the 19th of January, 1798, on which day also the warrant to arrest the ship was issued.

It appeared in evidence, that the first bottomry bond was given by the master to Blaine, **329***] upon the first voyage *to London, and that the consideration of that bond consisted of money paid to take up a prior bottomry bond given to one Robertson, and of money paid for seamen's wages, provisions, repairs, and finishing the ship, she having come out from Virginia in a rough, unfinished condition, and badly provided with sails and rigging. The money upon this bond was to be paid within ten days after the arrival of the ship in Virginia. She arrived in Virginia on the 28th of September, in the same year; after which the agent of Blaine called for the discharge of the bond, but on failing to receive the money, did not think it necessary to arrest the vessel. Blaine was a very large creditor of M'Cawley, over and above the amount of the bottomry bonds, and was authorized to receive the freights of the ship, and to apply them to his general account current with M'Cawley. The bond of the 27th of October, 1796, was taken in order to secure advances made by Blaine to M'Cawley to enable him to finish the ship before she sailed on her first voyage in March, 1796, to the time of her sailing, or at any time afterwards, and to secure Blaine for money paid by him to discharge three executions which had been served upon the ship. Between the date of the first bottomry bond, and the filing of the libel, the ship made two voyages from England to America, and one from America to England, and the freights were received by Blaine. The district court decreed in favor of Blaine for the whole amount of the first bottomry bond, and for so much of the other as appeared to have been actually advanced for necessaries for the ship; but the circuit court, on the 6th of December, 1799, reversed the decree, and dismissed the libel with costs. Blaine appealed from the decree of the circuit court to this court, but the appeal was at that time dismissed for want of a statement of facts made in the court below, agreeably to the 19th section of the judiciary act of 1789, c. 20. After the passing of the act of Congress of 3d of March, 1803, vol. 6, p. 315, c. 93, the cause was brought up again by writ of error, and was now argued upon the evidence contained in the record.

C. Lee, for the plaintiff in error.

The hypothecation in London was a legal lien upon the ship, and no circumstance had occurred to deprive *the libellant of its [***330** benefit. Possession of the vessel hypothecated is never delivered to the obligee of a bottomry bond; so that no inference of fraud can be drawn from the fact, that the possession remained with the obligor; nor was there any rule of law which required the obligee to assert his lien in any given time. This lien was prior to that of the judgment creditors.

As to the bond of 27th October, 1797, given by the owner in Virginia, it rests upon the same law as the bond of the master. An owner may borrow money, on bottomry, for fitting out his ship for a voyage, and hypothecate the ship therefor. Cro. Jac. 209, *Sharpley v. Hurrell;* 2 Bl. Com. 458. A master, if part owner, may take up money on bottomry to the value of his own share, in places where the owners reside. 2 Molloy, b. 2, c. 2, s. 14 and 15. Hence it may be inferred that any other owner may do the like. If the master may hypothecate the ship, *a fortiori* may the owner. Park, 410. The executions of Donald and Burton were void, because issued within ten days after the judgments, contrary to the act of Congress. Vol. 1, p. 63, s. 23.

P. B. Key, for the defendants in error, contended.

1. That the bonds were paid off by the receipt of the freights which ought to have been applied to that purpose.

2. That there was no bottomry consideration for the second bond; and,

3. That the bonds were fraudulently held up by Blaine, to give a false credit to M'Cawley, while Blaine was receiving the whole benefit of the vessel.

1st. With regard to the freights, he contend-

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risprudence, every man who had repaired or fitted out a ship, or lent money to be employed on those services, had a right of payment, in preference to other creditors, upon the value of the ship, without any instrument of hypothecation, or any express contract, or agreement, subjecting the ship to such claim. The law of England has not adopted this rule of the civil law on this with regard to repairs and necessaries furnished in England. Abbott on shipping, 142, 143. But the English law allows of such a lien, from the necessity of the case, for repairs and necessaries while the ship is abroad, and to the shipwright who has not parted with the possession. 3 Kent's Com. 169.

The doctrine was examined, and the rule declared, by the Supreme Court of the United States, and the rule of the English common law explicitly adopted, that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien on the ship itself, or its proceeds, in court, under a decree and sale, for the recovery of their demands, with the exception of the shipwright who has possession of the ship. He has a lien so long as he retains possession.

The General Smith, 4 Wheat. 438; The St. Jago de Cuba, 9 Wheat. 459; Peyroux v. Howard, 7 Pet. 324.

But repairs, or necessaries, for a foreign ship, gives the party a lien on the ship itself, and he may maintain a suit *in rem*, in admiralty, to enforce his right. 3 Kent's Com. 170; The Brig Nestor, 1 Sumner, 74, 79; The Schooner Marian, 1 Story, 68; Read v. The Hull of a Brig, Id. 246.

Where seamen save property, in case of shipwreck to the amount of the wages due them, they have a lien on such property, by way of salvage, by the marine law. Giles v. The Cynthia, 2 Pet. adm. 203; Weeks v. The Catharine Maria, Id. 424; Taylor v. The Cato, 1 Id. 48, 58; Clayton v. The Harmony, Id. 70, 79; Abb. on shipping, 5th Am. ed. 632, note.

The owner of a ship, so long as he continues in possession of the ship, and of the goods carried by her, has a lien on them for freight due in respect of them. Abb. on Ship. 288; Lane v. Penniman, 4 Mass. 92; Portland Bk. v. Stubbs, 6 Mass. 422; Cowing v. Snow, 11 Mass. 415; Lander v. Clark, 1 Hall. 355; Jordan v. James, 6 Ham. 88; Palmer v. Gralie, 4 Wash. C. C. 110; S. C. 8 Wheat. 605; Ruggles v. Blacknor, 1 Paine, C. C. 358; Chandler v. Belden, 18 John. 157; Clarkson v. Edes, 4 Cow. 470; Pickman v. Woods, 6 Pick. 248; (Fernandee v. Silver, 1 Miller, 274;) 3 Kent, (5th ed.) 220, 221.

The lien may be enforced by process, *in rem*, in the district courts. The Rebecca, 1 Ware 188; The Schooner Volunteer, 1 Sumner 551.

ed that, as there was no application at the time of the receipt of them, a court ought to apply them to the discharge of the bottomry bonds.

2d. That as Blaine was the correspondent of M'Cawley, and his creditor to a large amount, 331*] and the consideration *of the bonds being charged in account, M'Cawley was at all events personally liable for the moneys advanced, and therefore these moneys did not run the risk of the voyage. That the bottomry bond of 27th October, 1796, was given for moneys long before advanced, and to be advanced, and not for necessaries advanced upon the credit of this security on the ship.

3d. That his suffering the vessel to go several other voyages after the bonds became due, was either evidence of fraud, or of a waiver of the lien on the vessel. It was absurd to suppose that he would risk the money a second and a third time on the vessel without a new premium, or an insurance. It is probable that the second bond was intended to cover the vessel during her winter's stay in Virginia.

If the executions were improperly issued, the remedy was to move to quash them on their return. Perhaps they were voidable, but they were not void.

March 8. CHASE, J.,[1] delivered the opinion of the court.

The libel in this case was filed upon two instruments of writing purporting to be bottomry bonds, the one executed by the master in a foreign port, the other by the owner in a port of the state of Virginia, in which state the libel was filed.

The voyage of the former bond terminated in Virginia, and the vessel has since made two voyages. The latter instrument was on a voyage which terminated in London, and the vessel has since made a voyage to this country. Upon her return here, and before the warrant of the admiralty was served, the executions were levied upon her which form the groundwork of the claim interposed by Donald and Burton.

332*] *The ship has been sold under the order of the court below, and the question is, who has the preferable claim to the money now lying in the marshal's hands. On the validity of the bond of the master there can be no question. It is acknowledged by counsel to possess all the requisites of a good bottomry bond. But it was contended that it was satisfied by the freights, which it appears Blaine was in the receipt of; and if not satisfied, was fraudulently upheld to the prejudice of general creditors. In addition to the objections taken to the first bond, it is further contended against the second, that it wanted a sufficient bottomry consideration in part or in the whole. The court think it unnecessary to give a particular consideration to the several objections above stated. A satisfactory conclusion on the rights of the parties may be drawn from other principles, on the nature and effect of the contract of bottomry.

A bottomry bond made by the master vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficiency of the admiralty process. This rule is expressly laid down in the books, and will be found consistent with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry bond executed by an owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom, for it is in his power to execute an express transfer or mortgage. There is strong reason to contend that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages. But it certainly can extend no further. Had the warrant of the admiralty been first served upon the ship, there might be some ground to contend that this court ought not to devest that possession in favor of executions served at a subsequent day, at least to the prejudice of the bond executed by the master. But as the executions in this case were levied before the service of the warrant, and so long after the bonds became due, the owners of the ship had lost that possession, upon which alone the warrant of the admiralty could operate, after losing the right of preference.

*Some objections have been made to [*333 the validity of these executions, on the ground of their having issued previous to the day on which by law they ought to have issued. On this point the court will give no opinion. If irregular, the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued.

The decree of the circuit court is affirmed, and the money ordered to be paid over to the execution creditors.

1.—MARSHALL, *Ch. J.*, having decided the case in the circuit court, did not give an opinion here. CUSHING, J., was absent.

THE UNITED STATES.
v.
GURNEY AND OTHERS.

B., in Philadelphia, agreed to pay A.'s agent 170,000 guilders in Amsterdam on the 1st of March; and if he should fail so to do, then to repay to A. the value of the said guilders at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at 20 per cent., in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment which may take place after the demand. B. paid the 170,000 guilders in Amsterdam, to the agent of A., on the 13th of May instead of the 1st of March. A. is not entitled to the 20 per cent. damages, but may, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders, from the 1st of March to the 13th of May. It is not a good plea for the defendants to say that they paid the 170,000 guilders to A.'s agent, for the use of A. at Amsterdam, on the 13th of May, without averring it to be the whole sum then due.

THIS case was certified from the circuit court for the district of Pennsylvania, the judges

of that court being divided in opinion upon the question, whether, upon the state of the pleadings, the judgment ought to be rendered for the plaintiffs?

It was an action brought by the United States against *Gurney and others*, upon a bond conditioned to comply with a certain written agreement between them and the Secretary of the Treasury of the United States, of the same date, "to pay the sum of 500,000 guilders at Amsterdam," "in the manner and form, and on or before the particular days and times in the said agreement mentioned; or in case the said sums shall not be paid as aforesaid, at either of the said places, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at 20 per cent., in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned 334*] protested *for non-payment, and lawful interest for any delay of payment which may take place after the demand."

After oyer of the bond and condition, the defendants set forth the written agreement, by which, in consideration of 205,000 dollars, to be immediately advanced to them by the United States, the defendants agree to pay to the bankers of the United States at Amsterdam 500,000 guilders, in manner following, viz., 230,000 guilders on or before the first of February; 170,000 guilders on or before the first of March; and 100,000 guilders on or before the first of June, 1803; and in case the said payment shall not be made at the times and in the manner aforesaid, they will pay to the United States "20 per cent. damages for their non-compliance with this agreement, for the whole of the sum so agreed to be paid, or such parts thereof as they shall not actually pay at the times, place and manner aforesaid, together with interest from the day of demand of repayment on behalf of the United States," "in the same manner as for bills of exchange returned with protest for non-payment."

The defendants then pleaded, that on the 1st of February, 1803, they paid at Amsterdam to Willink & Van Staphorst, bankers of the United States, to and for the use of the United States, the said 230,000 guilders; and on the 13th of May the said 170,000 guilders; and on the 16th of May the said 100,000 guilders, in the said articles of agreement mentioned; "and this they are ready to verify," &c.

To this plea the United States replied, that although the defendants, on the 1st February, 1803, paid to the said Willink & Van Staphorst, bankers of the United States, for the use of the United States, the said sum of 230,000 guilders, in the said articles of agreement mentioned; and although the defendants, on the said 13th of May, at Amsterdam, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United States, the sum of 170,000 guilders; and although the defendants, at Amsterdam, on the said 16th of May, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United 335*] States, the further sum of *100,000 guilders, in the said articles of agreement mentioned; yet the said United States deny that said last-mentioned sum of 170,000 guilders, so as aforesaid paid by the defendants to the said Willink & Van Staphorst, bankers of the United States at Amsterdam, on the said 13th of May, was, by the United States, accepted, received and allowed in payment and satisfaction of the said sum of 170,000 guilders, which, by the said agreement, the defendants were bound to pay on or before the 1st of March, 1803, and this the said United States pray may be inquired of by the country. And the said United States in fact say, that the defendants did not pay, or cause to be paid, to the said Willink & Van Staphorst, bankers of the United States at Amsterdam, to and for the use of the said United States, the said sum of 170,000 guilders, in the said articles of agreement mentioned, on or before the said 1st day of March, 1803, being the time prescribed by the said articles of agreement for payment of the same.

Nor have the defendants at any time since the 1st of March, 1803, paid to the United States 20 per cent. damages for their non-compliance with the said agreement for the payment of the said sum of 170,000 guilders, part of the said sum of 500,000 guilders in the said agreement mentioned, to the said Willink & Van Staphorst, bankers of the said United States at Amsterdam, to and for the use of the said United States, on the 1st of March, 1803, together with interest from the day of demand of repayment on behalf of the United States, in the same manner as for bills of exchange returned with protest for non-payment, although afterwards, viz., on the 14th of June, 1803, at Philadelphia, demand of repayment of the said sum of 170,000 guilders, together with the said 20 per cent. damages, was made on behalf of the said United States, by Albert Gallatin, Secretary of the Treasury of the United States, from the defendants, but to pay the aforesaid sum of 170,000 guilders, together with 20 per cent. damages, and interest on any part or parcel thereof, to the said United States, the defendants have hitherto refused, and still refuse, contrary to the form and effect of the said condition of the said writing obligatory, and the agreement therein referred to, and in the plea set *forth, and this the said United [*336 States are ready to verify, wherefore they pray judgment, &c.

To this replication the defendants demurred specially:

1st. For duplicity.

2d. Because they could not take issue on the replication without a departure from their plea; and,

3d. Because the United States have, by their replication, endeavored to put in issue matters foreign and irrelative to said plea.

This demurrer was joined on the part of the United States.

E.Tilghman, for the defendants, and in support of the demurrer.

The replication is clearly double; it first denies that the 170,000 guilders, paid on the 13th of May, were received by the United States in satisfaction of the 170,000 guilders due on the 1st of March, and then, after concluding to the country, goes on with a new averment that the defendants did not pay the 170,000 guilders on the 1st of March; and again further avers, that the defendants did not pay the United

States the 20 per cent. damages for failing to comply with the agreement; and again, that the defendants did not repay to the United States the 170,000 guilders, with 20 per cent. damages, &c.

A plaintiff cannot reply two separate matters. 5 Bac. Abr. 457. Gwillim's edition.

The replication confesses the payment, but does not avoid it.

Even if the plea were bad in form, which is not admitted, yet as payment is acknowledged by the replication at a time when no more was due than was paid, the United States cannot recover.

337*] *If the defendant pleads a bad plea, and the plaintiff shows in his replication that he has no cause of action, the judgment must be for the defendant. 2 Ld. Raym. 1080; Hob. 128; 8 Co. 120, b. 133, b.

If, then, we show that on the 17th of May the United States were not entitled under the contract to more than 170,000 guilders, they cannot recover in this action.

The object of the United States was to have the money paid in Amsterdam. The 20 per cent. was the stipulated damages for not paying the money in that place. By referring to the law respecting bills of exchange, the parties meant to be governed by that law; and by stipulating for interest in a certain event only, they are to be understood as not claiming it in any other case. By the law of Pennsylvania respecting foreign bills of exchange drawn in that state, and returned under protest, the principal sum is to be repaid in Pennsylvania, with 20 per cent. advance thereon. If the principal sum cannot be claimed, the advance thereon cannot be claimed. It is an incident to the principal, and cannot be demanded without the principal. If a bill be protested for non-payment, but the acceptor afterwards pay it, and the holder receives the money in the place where it ought to be paid, he cannot afterwards come upon the drawer for damages, re-exchange, &c. By receiving the money he waives the objection to the time of payment. The 20 per cent. damages are the price of the risk, trouble and expense of transportation of the money. If the defendants have actually transported the money, and the plaintiffs have received it at the place appointed, they are not entitled to be repaid the expense of the transportation; and to charge the defendants with that expense now, would be to charge them twice.

The meaning of the agreement is, that if the United States are obliged to receive their money in this country, they shall receive the twenty per cent. advance thereon; if, therefore, they have no right to demand repayment of the money in this country, they have no right to the 20 per cent. After having received the principal sum in Amsterdam, they clearly have no right to demand payment of it here. By the 338*] non-payment at the *day, the United States had only an inchoate right to the 20 per cent. They might have refused to receive the 170,000 guilders afterwards in Holland, and insisted on their right to repayment of the money in America. But they did not, and actually received the money in Holland, before any demand on the defendants in America. The liquidated damages can be recovered only in the case specified by the parties in their contract; and this is upon demand of payment in America of the value of the sum remaining unpaid in Europe at the time of the demand. The condition of the bond is "to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent.," &c. The damages could only be demanded, and were only to be paid, "together with" the principal. If the plaintiffs had no right to demand payment of the principal, they had no right to demand payment of the damages. By the terms of the contract, interest could only be demanded from the time of demand of repayment on behalf of the United States, the United States having a right to demand such repayment.

"Advance" and "interest" are relative terms; they must refer to a principal sum. If there be no principal sum due, there can be no advance nor interest thereon.

The liquidated damages were the damages for the entire breach of the contract on the part of the defendants, in failing to pay altogether in Amsterdam; not for a mere delay of payment for a few days. According to the construction which the United States contend for, they would be entitled to 20 per cent. damages, even if they had received the 170,000 guilders on the 2d of March. Such a construction would make the contract highly penal, and therefore is to be avoided, if possible. Doug. 504.

In the case of *Peter Blight*, a bankrupt, his bills on Europe were protested for non-payment; after protest the holder received the principal money, and sent the bills back to Pennsylvania, duly protested, and with legal notice, in order to recover the 20 per cent. damages *out of Blight's estate. But the com- [*339 missioners rejected the claim, after full argument. We consider this as a very respectable authority, as the commissioners were gentlemen of good legal and commercial information, and of sound judgment.

Rodney, (Attorney General,) contra.

The rule upon demurrers is to go back to the first fault. If our replication is bad, their plea is bad also. The defendants could only plead payment at or before the day. This is not a bond within the statute of Anne, the payment of which after the day may be pleaded. It is a bond to conform covenants.

But if payment after the day might be pleaded under the statute, yet it must be pleaded as payment of the principal sum with all interest then due thereon. 2 Bl. 1106, *Perkins v. Kenton;* 1 Atk. 251; Esp. N. P. 264; Pleader's Assistant, 360.

The plea does not aver that Willink & Van Staphorst were agents of the United States to receive the money after the day.

The demurrer admits the truth of the replication, which states that the United States did not receive the 170,000 guilders in satisfaction, &c.

At all events, the United States were entitled to interest on the 170,000 guilders from the 1st of March to the 13th of May.

The agreement does not require notice of non-payment, and all the forms of protest, &c. A demand is only required to entitle the United States to interest on the 20 per cent.

The plea is to be considered as three pleas, and therefore the United States were obliged to make three replications.

The statute of William allows a plaintiff to reply as many breaches as he thinks proper. 1 Tidd's Prac. 637; Bull, N. P. 163; 2 Stra. 994.

340*] *Rawle, in reply.

The question is, whether, on the whole record, the United States are entitled to recover.

The contract is, that the parties should stand in the relation of drawers and payees of a bill of exchange. The contract was made at Philadelphia, and must be governed by the laws of Pennsylvania; and under those laws the 20 per cent. cannot be recovered until the bill be returned. If the defendants had drawn a bill payable on the 1st of March, and it had then been protested, but afterwards, on the 13th of May, taken up by the acceptor, it could never have been returned by the payees; and, consequently, the 20 per cent. damages could not have been recovered.

It was not necessary for the defendants to aver in their plea that Willink & Van Staphorst had authority to receive the money; it is averred by the plea, and admitted by the replication, that the money was paid by the defendants to Willink & Van Staphorst, bankers of the United States, to and for the use of the United States. It is, therefore, admitted to be a payment to the United States as much as if it had been so expressed.

If no interest was due on the 13th of May, it was not necessary in the plea to aver payment of interest.

The bond is virtually for payment of a sum less than the penalty; and, therefore, within the statute which authorizes a plea of payment after the day.

It was not necessary to plead that it was received in satisfaction. That is a fact for the consideration of the jury on the plea of payment. The demurrer does not admit the fact that it was not received in satisfaction, for the demurrer admits nothing but what is well pleaded; and to a plea of payment it is a bad replication to say that the money was not received in satisfaction. Pleader's Assistant, 360; Burr. 945; Stra. 691.

341*] *March 8. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

This case comes on upon a special demurrer to a replication filed by the plaintiffs to a plea of payment after the day. The replication is double, and consequently ill. But it is a known rule that a demurrer brings all the pleadings before the court; in consequence of which judgment must be rendered against him who has committed the first fault; or, which will most generally produce the same result, for him who, upon the whole record, shall appear to be entitled to their judgment. It therefore becomes necessary to examine the plea of the defendants. By their agreement with the Secretary of the Treasury, they were bound to pay to the bankers of the United States, in Amsterdam, the sum of 500,000 guilders in the following manner, viz., 230,000 guilders on or before the first day of February; 170,000 guilders on or before the first day of March; and the remaining 100,000 guilders on or before the first day of June, in the year 1803. The first payment was made on the day, and the last before the day, but the second payment was made on the thirteenth day of May, instead of the first day of March. On the effect of this payment, the whole case depends.

The defendants plead that they did, on the 13th day of May, at Amsterdam, pay to the bankers of the United States, for the use of the United States, the sum of 170,000 guilders. The replication admits this payment as pleaded, but denies that it was accepted, received and allowed by the United States in payment and satisfaction of the same sum which was payable on the first of March. The replication proceeds to aver that the said sum of 170,000 guilders was not paid on the first day of March, nor had the defendants paid the damages of 20 per cent. which were stipulated, in case of failure to pay on the day.

The fact upon these pleadings appears to be, that the payment was received by the United States without any *stipulation respecting the effect of that receipt, upon their agreement with the defendants. [*342 If payment to the bankers of the United States, the persons to whom by agreement the money was to be paid, was not payment to the United States, it would not be a payment to the use of the United States, which the plea avers, and the replication in terms admits. In such case the replication, instead of averring that this sum was not accepted in satisfaction of the same sum payable at an earlier day, would have averred, and ought to have averred, that it was not accepted at all, and was not a payment to the use of the United States, in which case, instead of a special replication, issue might have been tendered on the plea. The court, then, understands the facts as stated in the pleadings to be, that the money was received without any agreement whatever, and the law must determine the effect of such a payment.

The payment made to the bankers in Amsterdam being, then, an actual payment to the United States, the inquiry is, whether it was such a payment, and is so pleaded, as to bar this action.

It is admitted that the statute of Anne, which allows payment after the day to be pleaded, is in force in Pennsylvania, but it is contended that this bond is not within that statute; or, if it is, that this plea is not good under it.

If this be a bond within the statute of Anne, on which the court gives no opinion, yet by that statute, the payment must be of the whole sum actually due, or the action for the penalty is not barred.

In this case the sum due on the first of March was paid on the 13th of May, without interest or damages.

By the United States it is contended, that damages at the rate of 20 per centum on the sum of 170,000 guilders were then due; by the defendants it is contended that no interest was due.

*The words of the contract to which [*343 each party refers, are not precisely the same in the condition of the bond and in the articles of agreement which are referred to by the bond. There is no contradiction between them; but there is a variance in this, that the condition of the bond expresses more fully than the articles the idea of the parties, that in case of failure to perform the contract at Amsterdam, the de-

mand for payment was to be made in Philadelphia. The words of the condition are, "or in case the said sums shall not be paid as aforesaid, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent. in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment that may take place after the demand."

The defendants were merchants residing and carrying on trade in Philadelphia, in which place the contract was made, and by the law of the state, bills of exchange returned unpaid under protest are liable to 20 per cent. damages. It is sufficiently obvious, from these circumstances, and from the words of the condition, that the parties contemplated a repayment in Philadelphia in the event of non-payment in Amsterdam.

It is contended by the plaintiffs that, the instant the failure to pay the 170,000 guilders on the first of March had taken place, a full and complete right to the stipulated damages was vested in the United States, without any further act on their part; and that a payment of the principal sum on the succeeding day would not have relieved the defendants from those damages.

In this opinion the court does not concur with the counsel for the United States.

Contracts are always to be construed with a view to the real intention of the parties. In this contract, the object of the United States was to remit to their bankers in Amsterdam 344*] a sum of money, for which they had *occasion in Europe. The heavy damages to be incurred by the defendants in the event of their failing to make their stipulated payments in Amsterdam, were considered as a compensation for the disappointments produced by the non-payment of the money at that place in such time as to answer the purposes of the contract. Whether payment at the same place on a subsequent day would answer these purposes, was for the United States to determine. They might accept it, or they might reject it, and claim whatever the law of their contract would give them. In the event of non-payment in Amsterdam at the time stipulated, the defendants are to repay to the United States the value of the guilders they shall have failed to pay in Amsterdam, "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent." The fair interpretation of this agreement is, that the demand is to be made in Philadelphia, that the money is to be repaid in Philadelphia, and that the damages are upon the money there to be repaid. Had a part of the sum of 170,000 guilders been paid on the first of March, it will scarcely be contended that damages would have accrued on that part. A repayment of it could not have been demandable in Philadelphia. It appears to the court that the acceptance of any part of the sum due in Amsterdam on a subsequent day, is a waiver of the claim to damages, in Philadelphia, on the sum so accepted, for that sum cannot be demanded in Philadelphia.

This reasoning, to which the majority of the court would strongly incline, from the nature and circumstances of the contract, derives much additional force from the reference to bills of exchange. The repayment of the value of the guilders "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent." is to be made "in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment."

Why is this reference made to bills of exchange?

*The stipulation that damages at the [*345 rate of 20 per centum should be incurred on those sums which the defendants might fail to pay at the time and place mentioned in their contract, did not require it unless the law of bills of exchange was either to explain or to give validity to that stipulation. To a majority of the court it is satisfactory evidence that the parties intended this contract, if not as a complete substitute for bills of exchange, to operate between themselves as if bills had been drawn. The law of Pennsylvania regulating bills of exchange was well understood. If those drawn on any part of Europe are returned back unpaid with a legal protest, the drawers and indorsers are subjected to damages at the rate of 20 per centum. But the right to these damages is not complete until the bill be returned back under protest. Till then they are not demandable. Consequently, payment before the bill returns does away the right to demand them. By receiving payment, the holder waives his right to damages. The express reference to bills which is made in this contract, and the terms in which that reference is made, being considered by the majority of the court as explanatory of the intention of the parties that the right to damages should be put on the same footing as if bills had been drawn, form an additional reason for their opinion that an acceptance in Amsterdam after the day, before a demand in Philadelphia, amounts to a waiver of any right the United States might otherwise, perhaps, have had to demand the stipulated damages.

But whether the sum agreed to be paid as a compensation for a failure to pay at the time and place mentioned in the contract, be considered merely as a penalty, or as stipulated damages, of which the law will coerce the payment, a forfeiture took place on the non-performance of the condition of the bond, and a right to something more than that condition vested immediately in the obligees. If the reservation of damages in the condition of the bond is in law only a double penalty, then interest is the legal compensation for this breach of the covenant contained in the condition of the bond. If it be even of the character given to it by both parties in argument, the amount of damages settled by the parties themselves, the majority of the court *is not satisfied, that in waiving those [*346 damages the obligee has, without any agreement on the subject, relinquished that right to interest which is attached to all contracts for the payment of money, which is only displaced by the agreement to receive a larger sum in damages, and which a mere tacit implied waiver of those stipulated damages might reinstate. The majority of the court, therefore, is of opin-

ion that, under the circumstances which have taken place, the United States ought to receive, under this contract, interest on the sum of 170,000 guilders from the first of March, the day on which that sum ought to have been paid, until the thirteenth of May, the day on which it was actually paid. Judgment, therefore, on the pleadings, must be rendered for the plaintiffs.

By the 26th section of the judicial act, it is directed that, in cases of this description, the court shall render "judgment for so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

In this case it is the opinion of the majority of the court, that judgment ought to be rendered for so much as remains due of the sum of 170,000 guilders, calculating interest thereon from the first of March in the year 1803, and if either of the parties request it, that a jury be impaneled to ascertain the value of this sum in the money of the United States.

PEISCH and OTHERS v. WARE and OTHERS, 347] and THE UNITED STATES v. THE CARGO OF THE SHIP FAVOURITE.

Wine and spirits saved from a wreck and landed, are not liable to forfeiture because unaccompanied with such marks and certificates as are required by law; nor because they were removed without the consent of the collector before the quantity and quality were ascertained, and the duties paid.

The award of arbitrators appointed under a mutual mistake of both parties in supposing themselves bound by law to submit the matter in dispute to arbitration, is not obligatory.

The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed or trusted by him.

One-half allowed for salvage in the Delaware bay.

Quære, whether goods saved are liable for duties?

THESE cases were appeals from the circuit court for the district of Delaware. Peisch and others, owners of the ship Favourite and her cargo, libeled Ware and others in the district court, for the possession of certain goods, part of that cargo, which the latter had saved from the ship, which had been wrecked in the Delaware bay.

The cargo consisted principally of wine, brandy, cordials, olive oil and silks.

On the night of the 26th of October, 1804, the ship Favourite, being at anchor in the Delaware bay, parted both cables, and was driven onto a shoal. The crew cut away all the masts; in the morning she had drifted over the shoal, but the crew not being able to keep her clear with the pumps, and having eleven and a half feet of water in the hold, they quitted the ship, about 9 o'clock, A. M., and went to Cape May for assistance. On the same morning, about 10 o'clock, the ship was seen from the town of Lewis, a small town on the shore of the state of Delaware, but not a port of entry, by Thomas Rodney, an inspector and surveyor of the revenue who resided at that place. The ship was then drifting out to sea, without masts, anchors, cables, or rudder. He collected a number of men and boats, and went on board the ship, and having towed her on to a shoal called the Shears, they began to discharge the cargo into the boats. Rodney, supposing himself authorized by the wreck law, as it is called of the state of Delaware, to take the lead in the business of salvage, *appointed Ware to [*348 superintend the delivery of the cargo from the ship, and went on shore himself to attend to the landing and storage of the goods saved.

On the 29th of October, the mate with three of the crew returned to the ship in a shallop they had procured at Cape May, with intent, as they said, to save what they could of the cargo. They found the ship in possession of Ware and others, who would not suffer the mate to take any thing out of the ship, except his clothes and those of the crew. The mate then left the ship. There were 48 hands and six boats employed 16 days and 12 nights in saving the goods; besides four flats and seven or eight hands hired occasionally to work in the flats.

On the 7th of November Peisch arrived, and on the 9th offered to pay 4,000 dollars for salvage, which the salvors refused, the goods saved being supposed to be worth about 14,000 dollars, and demanded one-half for salvage. Not being able to agree, the parties supposing themselves bound by the law of Delaware, which requires an arbitration in such cases, referred the rate of salvage to three men, who awarded one-half to the salvors. On the 18th of November, the collector of the district of Delaware arrived at Lewis, and on the 19th the salvors offered themselves ready to secure the duties upon their half of the goods saved, and requested that the amount of duties might be ascertained at Lewis. This the collector refused, and ordered the goods to be sent to Wilmington, a port of entry, to have the duties ascertained; and Rodney delivered them into his possession. The salvors then sued out a writ of replevin from the state court of Delaware, and took the possession of the goods from the collector, who thereupon seized them as forfeited to the United States for breach of the revenue laws.

The first count of the libel filed by the United States claimed the wine, brandy and cordials, as being forfeited, because they were unaccompanied with such marks and certificates as are required by law, the duties not having been paid or secured.

*The second count claims them as [*349 forfeited, because they were removed without the consent of the collector before the quantity and quality of the wines and spirits, and the duties thereon, were ascertained according to law; the duties not having been paid or secured.

The third count claims all the goods forfeited, because they were found concealed, the duties not having been paid or secured.

On this libel by the United States, the district court decreed that the goods were not liable to forfeiture, but were subject to the terms of the decree of the court in the suit respecting salvage, by Peisch and others against Ware and others; which decree was affirmed in the circuit court, and the United States appealed to this court.

NOTE.—*Salvage awards in federal courts*—see note, 30 C. C. A. 280.

Reed, United States attorney for the district of Delaware, contended,

1. That the libellants were entitled to damages against the salvors to the whole amount of the goods saved, because, by the improper acts of the salvors, they have been forfeited to the United States, and so wholly lost to the libellants.

2. That the salvage allowed, if any is due, was too high.

1. The goods are forfeited to the United States, first, under the 43d section of the act of Congress regulating the collection of duties on imports and tonnage, vol. 4, p. 350, because found without marks and certificates; second, under the 51st section of the same act, because removed before the proof, quality and quantity thereof were ascertained, and the duties paid or secured; and, thirdly, under the 68th section of the same law, because they were concealed, the duties not having been paid or secured.

The removal of the wines and spirits without marks and certificates, is clearly within the letter of the law. The power to remit or mitigate the forfeiture can only be exercised by the Secretary of the Treasury.

350*] *It is not necessary that Peisch and others should have been privy to the removal. It is wholly unimportant who removes the goods. The United States look only to the thing itself. The proceeding is *in rem*. If the unlawful act be done even by a stranger, the goods are forfeited. The revenue laws are to be construed strictly according to their letter. 4 Dall. 28, *Priestman v. United States*.

There is no difference between a careless and a fraudulent omission of duty. Peters's Rep. 448.

The offer to pay the duties was illusory; the collector could not receive them.

Salvage goods are liable to duties, if intended for importation into this country. The case of *Shepherd v. Gosnold*, Vaughan, 166, was of wreck on shore, not of floating wreck; and the goods saved were not intended for importation. 6 Bac. Abr. 280, 281 (Gwill. ed.); 1 Peters, 45, 47, 62. In the case of *The Blaireau*, in this court, (*ante*, vol. 2, p. 240,) there was no question as to the duties; the goods were not intended for importation.[1]

If, then, the goods are forfeited to the United States by the unlawful acts of the salvors, the court below ought to have decreed restitution in value, and given damages to the libellants. 3 Rob. 108, *The Der Mohr*. Their libel, although it avers an offer to pay salvage, does not preclude them from averring that no salvage is due, nor from claiming damages. The libel contains a prayer for general relief, and the court will pass such a decree as their case, upon proof, deserves, without regard to the specific relief prayed. 3 Dall. 86, 333; 3 Rob. 108; (American ed.)

351*] *But even if the goods are not liable to forfeiture for the improper conduct of the salvors, yet they are not entitled to salvage. By the 52d section of the act before recited, (vol. 4, p. 362,) it is made the duty of the collector, in case of an incomplete entry, to cause the goods to be stored. An incomplete entry of these goods was made, and the revenue officer, Rodney, did no more than his duty in securing the goods. The other persons acted only as his servants or agents. He was paid his daily allowance for his trouble, by the collector. The appellees never had such possession of the goods as entitled them to retain them for salvage. The possession was in the United States, who held a prior lien on them for the duties. Rodney first took possession of them as an officer of the revenue, and held them for the United States, not for the salvors. They never had a rightful possession. The only possession they ever had was under void writs of replevin from the state court, which had no jurisdiction.

The possession upon which the writs of replevin were founded, was at most a possession under a lien for salvage, which is a matter exclusively of admiralty jurisdiction. The writs of replevin being void, they were trespassers in taking possession under them. A tortious act cannot be the foundation of right. They forfeited all right to salvage by resisting the mate and crew; and by the embezzlement of part of the goods saved.

The award does not preclude the libellants from averring that no salvage is due. The arbitration was entered into by mistake. It was supposed by Peisch that he was bound to enter into the reference, by the 7th section of the act of assembly of Delaware, of February 2, 1786. (Delaware Laws, vol. 2, p. 831.) But that law was repealed by the constitution of the United States, which transfers all the admiralty jurisdiction to the courts of the United States exclusively; and by the act of Congress, (the judiciary act of 1789,) which provides for the exclusive exercise of that jurisdiction by the district courts.

*Since this act of Congress, the state [*352 officers have had no right to meddle with property within the admiralty jurisdiction. The question of salvage is exclusively of admiralty jurisdiction, and belongs to the district court; and every provision of the act of assembly of Delaware upon that subject is entirely repealed. Peisch's assent, therefore, to the arbitration, being founded in a mistake of his rights, was a void act; and the award can derive no validity from his assent. If it derives no validity from his assent it is a mere nullity, for it is the judgment of an incompetent tribunal. The arbitrators could derive no authority from the law of Delaware.

A court which has exclusive jurisdiction of the principal subject, has also jurisdiction of the incidents. The common law courts of the state had no jurisdiction in any shape whatever. 1 Peters, 93, *Brevoor v. Ship Fair American*; 3 T. R. 343, *Smart v. Wolfe*.

But even if the act of assembly were in force, the award is not made in conformity with its provisions.

In the first place, no authority can be exercised under that law but by a sheriff, or a justice of peace, or an officer of the customs, and then, only, upon application by the master or owner of the ship. But here, so far from being requested by any person interested in the ship, the salvors drove away the mate and the crew; and, secondly, the persons claiming salvage

1.—JOHNSON, *J*. Do the opposite counsel seriously contend this point?

Van Dyke, for the appellees. We do not think the question important to this case, but we have strong authorities in support of our side of it.

under that law must have been summoned as salvors.

The salvors have resorted to an incompetent tribunal; they ought to have libeled in the district court, which has exclusive cognizance of the case.

2. But if any salvage was due, the amount decreed is exorbitant. The amount offered was a very liberal compensation for their time, risk and labor. There was no danger. The vessel was all the time within the bay; and they had pilot boats constantly alongside. The cargo was in its nature so buoyant, that the ship could not sink.

353*] *In the case in 19 Viner, 275, only one-tenth was given for salvage on the coast. In *The Blaireau* (*ante*, vol, 2, p. 240,) only one-third was given; and that was a case of great risk and merit. 1 Peters, 10, 37; Molloy, b. 5, c. 10.

Broom and Van Dyke, contra.

There are only two questions in this case.

1. Whether the goods are forfeited to the United States; and,

2. Whether the salvage allowed is too high?

1. The inspector had no authority to unlade the ship. No entry had been made, and no permit granted. He could only unlade in the character of a salvor. When the goods were landed, he had a right to direct where they should be deposited until the duties were ascertained, and paid or secured, but his right extended no further. The lien of the salvors was not inconsistent with that of the United States. As to every thing beyond the security of the revenue, the officer was a trustee for the salvors and the owners. He held as much for them as he did for the United States, until he undertook to hold adversely.

The state courts had a right to issue the writs of replevin. Replevin, in Delaware, is a substitute for trover. It is the writ by which they try the question of property; and trover will certainly lie against a revenue officer for an illegal seizure. Esp. N. P. 583; 3 Rob. 178; 4 Rob. 160, 188; Burr. 2657.

It is not denied that salvage is a question of admiralty jurisdiction, and that the court of admiralty has also cognizance of incidents; but not exclusive cognizance. It was never so contended in England. The court of admiralty had a hard struggle to get even a concurrent cognizance of incidental questions.

Salvage goods are not liable to duties, nor, if they are, can the goods be forfeited by any act of the salvors. *Such was never the [*354 intent of the act of Congress. All statutes must have a reasonable construction. Vin. tit. Statute, 519; 1 Bl. Com. 91.

By the revenue laws, goods are liable to forfeiture by landing at any other than a port of delivery, or without permit, or in the night, yet it will not be contended that these provisions apply to goods wrecked and driven on shore. But they are certainly within the letter of the act.

In *Courtney v. Bower*, cited in 1 Lord Raym. 388 and 501, it is not stated that the goods were intended to be imported, and such is not the ground of decision in *Shepherd v. Gosnold*, Vaugh, 159. But the true ground of decision is, that the goods were not imported as merchandise, but were driven in by stress of weather; that it was not a voluntary importation. 6 Gwillim's Bac. Abr. 280. Although the words of the British navigation act, 12 Car. II. c. 18, are, "imported as merchandise," yet those statutes which use only the word "imported," have received the same construction. Reeve's Law of Shipping, 203; 2 Wils. 257.

The act of Congress means a voluntary importation. It is in many respects similar to the British statute.

There is no importation until bulk is broken. Until then there is no forfeiture of the goods, although the vessel depart with them. There is only a penalty of 400 dollars on the master. Collection Law, s. 29, 31, 32, 33, 36, 45; *Hallet & Bowne v. Jenks*, (*ante*, vol. 3, p. 219.) The statute of 5 Geo. I. makes stranded goods liable to duty; hence it may be inferred that they would not have been so liable but for the statute. Bac. Abr. tit. Smuggling, 274; Hard, 360; Hargrave's Law Tracts, 215, 225; Reeve, 24, 66, 85, 207, 208, 212, &c.; 1 Plowd. 1, *Reneger v. Fagossa;* Cro. Eliz. 538; Coll. Jurid. 72, 75, 79; Reeve, 200; Loft, 200; 1 Hawk. c. 17, s. 83; Raym. 377. The King has no remedy for his subsidy, unless the goods be landed.

There must be fraud or negligence. No act of the salvors forfeited the goods. If they are trespassers, as *is contended, no act of [*355 theirs could forfeit them. It must be an act done by the owners, or with their privity, or by some person acting under their authority.

In the case of *The Blaireau*, Judge Winchester decided that salvage goods were not liable to duties; and the decision on that point was not questioned on the appeal.[1]

*Misconduct is charged against the [*356

1.—The counsel for the appellees were permitted in this court to read the following letter from Judge Winchester to Judge Bedford, stating the grounds of that decision:

Shaware, Baltimore County, March 9, 1808.

Dear Sir:

It seems that the full statement of the arguments and opinion made by me in the case of duties on wreck and salvage goods, has been lost or mislaid. I can, therefore, only furnish you with the state of the case, the points and authorities.

The ship Le Blaireau, on a voyage from the West Indies to France, and wholly owned by foreign subjects, was run down at night by a Spanish ship of war, and abandoned by the crew, who were taken off by the Spanish vessel. The next morning The Blaireau was discovered by the British ship Firm, taken up as a wreck, and salvage; and conducted to the port of Baltimore.

The cargo was very valuable, containing sugars, coffee, liquors, lace, and diamonds. The two latter articles were in very small boxes, and the facility of their concealment had tempted the British captain to conceal some of the boxes; but the fact was discovered, in consequence of a quarrel between him and another person, relative to a division of the booty.

An action was instituted against the captain for the penalty imposed by the revenue law, on concealing these articles of lace and jewelry, upon the ground that they were chargeable with duties.

Mr. Martin argued for the defendant, that the case was not within any statute, that it was not an importation, within the revenue laws, which go only to ordinary cases of trade, with the exception of the single case of distress, provided for by the 60th section of the act. He commented on the 23d, 29th, 30th, 60th, 68th, and 69th sections, to show that the whole of the provisions of the law applied only to voluntary importations; that they did not apply to salvage goods, which could not be

salvors, because they prevented the mate and three of the crew from taking away part of the cargo.

357*] *But the salvors had a right so to do. They were in possession and had saved a considerable part of the cargo, and were in the act of saving the residue; they had a lien upon the whole for salvage. There is no evidence of any embezzlement by the salvors; that charge is not supported. Nor is there the least evidence that any part of the goods were concealed to evade payment of the duties.

2. The award is conclusive as to the rate of salvage.

It is immaterial whether the law of Delaware be in force or not. But Delaware is a sovereign independent state, and has all the rights of sovereignty not given up to the United States by the constitution. The United States admiralty court is bound by the laws of Delaware, so far as they are consistent with those of the United States. The jurisdiction is given to the courts of the United States by the constitution and laws of the United States, but the state laws are rules of decision in those courts in cases where they apply.

It is said the award was not made agreeably to the act, and that the parties were not bound to submit to the arbitration.

That act is like that which gives power to the commissioners of the *cinque ports* to decide the question of salvage; and if the parties submit to the jurisdiction, it is fit they should abide by the award; although the arbitrators had no jurisdiction otherwise than by consent. 3 Rob. 261, *The American Hero.*

The libellants objected to the amount, not to the jurisdiction. Whether it be an award under the act of Delaware, or by consent of parties, it is equally binding; and the court cannot look into the reasonableness of it.

As to the amount of salvage, the counsel cited 1 Rob. 263; 3 Rob. 286, and 5 Rob. 289, *The Jonge Bastiaan,* where two-thirds were given for salvage, in a case of derelict.

358*] *Rodney, (Attorney General,) in reply.

There was not much risk to the owners of the cargo; it was not in great danger; and there was no danger in saving the goods. The salvors, at most, can only claim a compensation for their time and labor. But they are not entitled to any thing. They resisted the officer of the ship, when, by the very law of Delaware, under which they pretend to have acted, they ought to have obeyed his orders.

The goods were subject to duty, and forfeiture. There is no reason why goods having paid salvage should not be liable to duties. The decision of Judge Winchester, in the case of *The Blaireau,* is not admitted to be law. Even wearing apparel would be liable, but for the exception in the act. The exception proves the general rule.

The British statute differs in its language from ours, and, therefore, the English authorities do not apply.

The misfortune only exempts the owners from the penalties of the act, but does not exempt the goods from forfeiture.

March 9. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In these cases two questions are to be decided by the court.

1st. Is the cargo of the Favourite, or any part of it, forfeited to the United States?

2d. Are Ware and others entitled to any, and if to any, to what salvage?

The first count in the first libel filed on the part of the United States claims the brandies, wines and cordials therein mentioned, in consequence of their being found in the possession of certain persons therein named, unaccompanied *with such marks and certifi- [*359 cates as are required by law, the duties thereon not having been paid, or secured to be paid.

The second count claims them as forfeited because they were removed, without the consent of the collector, before the quantity and quality of the said wines and spirits, and the duties thereon, were ascertained according to law; the duties thereon not having been paid or secured.

The third count claims them because they were found concealed, the duties not having been paid or secured according to law.

The second libel claims certain other goods, which were parcel of the cargo of the Favourite, as forfeited, by being found unlawfully con-

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accompanied by the manifests, bills of lading, &c., required in ordinary cases; nor could the oaths imposed by law be taken in the case of salvage. He then argued that no misconduct whatever of the salvors can create a forfeiture of goods of which they had taken possession as salvors, and referred to 6 Bac. Abr. 280, (Gwill edit.) on the general question, relying on the cases there cited, and 1 Ld. Raym. 388, 501; Reeve's Law of Shipping, 201; Bunbury, 236; Stat. 5 Geo. I. c. 11, s. 13; 26 Geo. II. c. 19, s. 5.

The district attorney argued that the importation meant a bringing in. That the privity of owners was not necessary. Seamen forfeit the ship by running the goods, and by the 111th section of the revenue law, which provides for an entry where particulars are unknown, salvage goods might be entered.

The court decided that salvage goods were not dutiable; and referred to the following authorities, in addition to those mentioned at the bar. The case of *Dyson v. Lord Villars,* (a very strong case); Collect. Juridica, 79, 80; Strange, 943; Hardres, 362; Parker, 212; Cro. Eliz. 534. The court relied on the 61st and 62d sections of the revenue law to show that the duties were not due on importation, and to bring the case within Sir J. Marriot's opinion, Collect. Juridica, 88. Two decisions of Judge Paca were also referred to by the court; one of which decided that prize goods were not operated upon by the ordinary revenue laws; and that brandy (brought) in as prize by a French privateer, (before the prohibition to sell their prize goods in our ports,) though in vessels of less capacity than allowed in the ordinary course of trade, were not forfeitable. The other, under the statute of the United States which prohibited the exportation of arms, &c. Judge Paca held, that the exportation of arms, &c., constituting the equipment of the vessel, was not an exportation within the statute.

The court (in the case of The Blaireau) intimated a strong opinion that importation implied a bringing in voluntarily; and referred to the decisions under the non-intercourse law with France, where it was holden that commercing after an involuntary going into French dominions, was not a commercing prohibited by law, and also relied strongly on *O'Callion's Case,* 1 Hawkins, c. 17, s. 83, upon the statute 27 Eliz. c. 2.

The above contains the substance of the arguments and opinions, and all the authorities referred to in the case of The Blaireau. It will afford me pleasure if you shall be able to derive any assistance from them.

I am very respectfully,

Your obedient servant,

J. WINCHESTER.

Hon. Judge Bedford.

cealed, the duties thereon not having been paid or secured.

The facts of the case are these: The ship Favourite, belonging to Mr. Peisch, of Philadelphia, was discovered, about the last of October, adrift in the bay of Delaware, with her mast gone by the board, and without anchors, cables or rudder, and in danger of being carried out to sea. A company was formed to save the vessel and cargo; and with considerable labor, in the course of several days, the cargo was unladen and landed at Lewis, a small town on the bay, not a port of delivery, where it was, with the approbation of the collector, left under the care and in the custody of a revenue officer residing at that place, who was one of the party that had originally taken possession of the vessel, and under whose direction the whole business had been in a great measure conducted. On the 3d of November, while the salvors were unlading the vessel and landing the cargo, an imperfect entry was made by the owners or consignees, after which an award was made between the owners and salvors, by which the salvors were allowed one-half the cargo. The owners were dissatisfied with this award, and refused to acquiesce under it. The collector ordered the goods, which had been in the custody of a revenue officer, to be carried to Wil-
360*] mington for the purpose of *ascertaining the amount of duties. The salvors objected to this, and requested that the duties might be ascertained at Lewis, offering at the same time to pay the duties on the moiety of the cargo claimed by them under the award. The collector persisting in his determination to remove the goods to Wilmington, the salvors sued out a writ of replevin from the state court, and by force of that writ took the goods out of the possession of the revenue officer. This act is the foundation of the forfeiture alleged in the libels.

The forfeiture said to be occasioned by the goods being found without the marks and certificates required by law, depends upon the 43d section of the act for collecting duties, and on other sections of the same act, which are explanatory of the 43d section. The particular clause giving the forfeiture is in these words: "And if any casks, chests, vessels or cases, containing distilled spirits, wines, or teas, which by the foregoing provisions ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture." The law then authorizes a seizure, and subjects such distilled spirits, &c., to forfeiture, unless it be proved at the trial that they were imported according to law, and that the duties were paid or secured.

The objects of this clause are those vessels only which, "by the foregoing provisions," ought to be marked and accompanied with certificates. To determine its extent, the "foregoing provisions" must be looked into.

This subject is first taken up in the 37th section of the act. That section directs particular and additional entries to be made of distilled spirits, wines and teas, which provisions are adapted to regular importation, not to those articles when saved from a wreck.

The entry is to be made by the importer or consignee, and specifications are required which can only be given by the owner or consignee, when in possession of the papers relative to the vessel and cargo. If a vessel be *wrecked [*361 on the coast, the cargo must be lost, or brought on shore without the knowledge of the owner or consignee, so as to put it in his power to make the entry, and the salvors are not only not the persons designated by the law to make, but they will often not possess the information which would enable them to make it.

The act proceeds to require that this entry shall be transmitted to the surveyor of the port where the delivery of the cargo is to commence, to whom also every permit for unlading or landing any part of the cargo must be previously produced, who shall record the same, and indorse thereon the word "inspected," the time when, and his own name. Goods landed previous to these formalities are to be forfeited.

These regulations obviously respect a regular importation, where all these prerequisites to landing may be performed; not cases where a landing must take place without them. To suppose them applicable to salvage goods, would be to suppose that the legislature designed to prohibit salvage entirely, or to forfeit the cargoes of all vessels which might be wrecked on the coast.

The 38th section requires that all distilled spirits, wines and teas, shall be landed under the inspection of the surveyor, or other officer acting as inspector of the revenue for the port, and, therefore, can relate only to cases of regular importation at the port of delivery, where the revenue officer may superintend the landing. He is directed to attend at all reasonable times, not at all places.

The 39th section prescribes the duty of the officer of inspection of the port where the spirits, &c. may be landed. He is to ascertain the duties, and mark the casks.

The 40th section directs the surveyor, or chief officer of inspection of the port or district in which the said spirits, wines or teas shall be landed, to give the proprietor, importer or consignee a general certificate; and the 41st section directs him to give a particular certificate *for each vessel, which certificate passes [*362 with the vessel to the purchaser.

These sections are connected with those which precede them, and relate to regular importations, where the spirits, &c., are landed under a permit at a port of delivery, and there is a proprietor, importer or consignee, or an agent to whom the certificates may be granted; not to spirits, &c., which may, from the nature of things, lawfully get into the possession of individuals without the knowledge of a revenue officer.

The 42d section only directs that blank certificates shall be provided.

These are the sections which precede that which is supposed to give the forfeiture claimed under this count of the libel.

The first part of the 43d section directs the proprietor, importer or consignee, who may receive the said certificates, to deliver them with the vessels to the purchaser; and then comes the clause which subjects to forfeiture all vessels containing spirits, &c., which may be found unmarked and not accompanied by certificates, which by the foregoing provisions ought to be marked and accompanied by certificates.

In the foregoing provisions the legislature, in the opinion of this court, did not intend to comprehend wrecked goods, or goods found under circumstances like those in the Favourite, where the vessel was deserted by her crew, and where it might be necessary, for the preservation of the goods, to take them to the nearest accessible part of the coast. Either these spirits and wines would have been liable to forfeiture if brought to land under the most pressing circumstances, where inevitable loss must attend any delay, if a revenue officer should not be present to take possession of them, or the single circumstance of their being found unmarked and unaccompanied with certificates, is not in itself sufficient to forfeit them. The opinion of the court that it was not the intention of the legislature to subject goods, under such circumstances, to 363*] forfeiture, is not formed exclusively *on the extreme severity of such a regulation. It is formed also on what is deemed a fair construction of the language of the several sections of the law, which seems not adapted to cases like the present.

The second count in the libel claims the goods as forfeited, because they were, without the consent of the proper officer, removed from the place where they were deposited, before the amount of duties was ascertained, the duties at that time not being paid or secured.

Neither this count, nor the first, supposes any forfeiture to have been incurred by the landing of the goods, or the unlading of the vessel. The spirits and wines are presumed to have been legally brought on shore, and it is the removal only which gives title to the United States. The court, therefore, is to inquire, whether these goods were under such circumstances that a removal, such as has taken place in this case, will produce a forfeiture. This depends on the 51st section of the law, in expounding which it becomes proper to notice the 50th also. This section prohibits the unlading of any vessel, or the landing of any goods, without a permit granted by the proper officers, and subjects the master or other person having the command of such vessel, and all those who shall be concerned in unlading, removing, or storing such goods, to heavy penalties, and the goods themselves to forfeiture.

It was well observed that the application of this section to cases where the goods must perish, if not immediately brought on shore, and to cases in which a permit cannot regularly be granted, would be not only to prohibit, but to punish every attempt to save a cargo about to be lost on the coast. This construction of the law could only be made where the words would admit of no other. But it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means prescribed to save the forfeiture given in the 50th section cannot be employed where a vessel is deserted by her crew, or cannot be brought into port. The permit cannot be obtained, nor can those steps which must precede the attainment 364*] *of a permit be taken. Upon just legal construction, then, the landing of these goods without a permit did not subject them to the forfeiture of the 50th section. This act is not within the law. The 50th section is calculated for cases in which the general requisites of the law can be complied with, not for salvage goods, in cases where those general requisites cannot be complied with.

The 51st section relates to the removal of goods from the wharf or place on which they may have been landed in conformity with the directions of the 50th section. It presupposes a permit, and that they were landed under the inspection of a revenue officer, in the manner prescribed by the 38th section.

It presupposes a case in which the gauging and marking may be done, and the other means prescribed for the ascertainment of the duties and security of the revenue may be taken, at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted, without extreme peril, to remain at the place of landing until these measures should be taken.

The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him.

If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. In the 52d section, therefore, to which the revenue officers seem to have intended to conform, so far as the case would admit, which directs them in the case of an incomplete entry to store the goods at the risk and expense of the owner or consignee, no forfeiture is annexed to their removal, unless the penalties of the 51st section, or of the 43d section, be applied to the 52d.

The court is of opinion that those penalties cannot be so applied in this case, not only because, from the whole *tenor of the [*365 law, its provisions appear not to be adapted to goods saved from a vessel under the circumstances in which the Favourite was found, but because, also, the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control.

It has been urged on the part of the United States, that although the property of the owner should not be forfeited, yet that moiety which is claimed by the salvors has justly incurred the penalties of the law. But if the award rendered in this case be not binding, the salvors could have only a general claim for salvage, such as a court might allow; and if it be binding, still they acquired no title to any specific property. Their claim was in the nature of a general lien, and any irregular proceeding on their part would rather furnish motives for diminishing their salvage, if that be not absolutely fixed by the award, than ground of forfeiture. The irregularity, too, if any, which has been committed by them, being merely an attempt to assert, in a course of law, a title they supposed themselves to possess, and with no view to defraud the revenue, this court

would not be inclined to put a strained construction on the act of Congress, in order to create a forfeiture.

The third count in the first libel, and the second libel, claim a forfeiture on the allegation that the goods were concealed. The fact does not support this allegation. There was no concealment in the case.

Taking all the circumstances into consideration, it is the unanimous opinion of the court, that no forfeiture has been incurred, and that the libels filed on the part of the United States were properly dismissed.

The next question to be considered is, to what amount of salvage are the salvors entitled? That their claim is good for something, is the opinion of all the judges; but on the amount to be allowed the same unanimity does not prevail.

366*] *For the *quantum* of salvage to be allowed no positive rules are fixed. It depends on the merit of salvors, in estimating which, a variety of considerations have their influence.

In the case before the court, the opinion of the majority is, that the sentence of the circuit court ought to be affirmed. This opinion, however, is made up on different grounds. Two of the judges are of opinion that the award was fairly entered into, and although both parties might be mistaken with respect to the obligation created by the law of Delaware, yet there is no reason to suppose any imposition on either part; nor is there any other ground on which the award can be impeached or set aside. Two other judges, who do not think the award obligatory, view it as the opinion of fair and intelligent men, on the spot, of the real merit of the salvors, and connecting it with the testimony in the cause, are in favor of the salvage which has been awarded, and which has been allowed by the sentences of the district and circuit courts. Three judges are of opinion that the award is of no validity, and ought to have no influence. They think the conduct of the salvors, in taking the goods out of the possession of the revenue officer, though by legal process, is improper, and that the salvage allowed is too great.

They acquiesce, however, cheerfully in the opinion of the majority of the court, and express their dissent from that opinion, solely for the purpose of preventing this sentence from having more than its due influence on future cases of salvage.

The sentence of the circuit court is affirmed, without costs.

367*] *SHEARMAN
v.
IRVINE'S LESSEE.

The act of limitations of Georgia does not acquire an entry into lands within 7 years after the title accrued, unless there be some adverse possession or title to be defeated by such entry.

Cranch 4.

ERROR to the circuit court for the district of Georgia, in an action of ejectment, brought (on the 15th of October, 1804,) by Irvine's lessee against Shearman, for a tract of land in Camden county, in the state of Georgia.

The defendant below took a bill of exceptions to the refusal of the court to nonsuit the plaintiff on the trial, because he had not proved "an entry within seven years after the title of the grantees accrued, or any entry by either of the heirs or persons claiming under the grantees within seven years after their titles respectively accrued."

The lessor of the plaintiff had produced in evidence two grants from the province of Georgia, in 1766, to Alexander Baillie, under whom he claimed title by descent, and whose heir at law he had proved himself to be.

There was no evidence of title, or even of adverse possession, on the part of the defendant, before the bringing of the suit, other than the averment of ouster in the declaration, which was laid on the 10th of September, 1804; nor any evidence of title out of the lessor of the plaintiff.

In support of his motion for a nonsuit, the defendant relied on the act of limitations of Georgia, passed in the year 1767, by which it enacted, "That all writs of *formedon in descender*, remainder and reverter of any lands, &c., or any other writ, suit or action whatsoever, hereafter to be sued or brought, by occasion, or means of any title heretofore accrued, happened, or fallen, or which may hereafter descend, happen, or fall, shall be sued or taken within seven years next after the passing of this act, or after the title and cause of action shall or *may descend or accrue to the [*368 same, and at no time after the said seven years. And that no person or persons that now hath, or have any right or title of entry into any lands, &c., shall at any time hereafter make any entry, but within seven years next after the passing of this act, or after his or their right or title shall or may descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."

The verdict and judgment below being against the defendant, he sued out his writ of error.

There being no appearance in this court for the plaintiff in error.

P. B. Key, for the defendant in error, opened the record, and prayed an affirmance of the judgment.

1. Because, from the facts disclosed, after the descent had been cast nearly thirty years, and no adverse possession at any time proved, the jury had a right to presume and find an actual entry within seven years; if such actual entry was necessary.

2. Because, in this case, on the facts disclosed, no entry was necessary. Two things only must concur to complete a title. Possession, and the right of property. The right of property is proved to be in the plaintiff as heir of the patentee; and possession by operation of law accompanies the title, unless the contrary is shown; and until it is shown.

If possession is taken by a wrongdoer, and

severed from the title, (of which there is no evidence in this case,) then such naked possession, so acquired, may be defeated, either by entry of the owner, which is an act *in pais*, revesting the possession, and again uniting it with the right; or by ejectment, which is an act of law, to recover the possession with damages, &c.

If a wrongdoer, after taking possession, dies in possession, and a descent is cast, this, under 369*] some circumstances, *changes the title to a right of entry, or rather makes an actual entry necessary to give effect to the title. There are many cases in which actual entry is necessary to reunite the title with the possession, and for these cases the law of Georgia was made. But it cannot apply to a case where the title and the possession have not been separated.

That law requires two things:

1st. When the right is changed to a mere right of entry, or where an entry is indispensable to complete the title, then such entry must be within seven years from the accruing of such right of entry. But this does not apply to the case on the record. No disseizin, discontinuance, dissent, or adverse possession existed to make an actual entry necessary on the part of the plaintiff. The title and the possession were both in him.

2d. The statute gives remedy by ejectment within seven years after the cause of action accrued. In this case no cause of action accrued till the 10th of September, 1804, when the plaintiff's possession was disturbed. So long as it remained undisturbed he could not bring suit.

MARSHALL, *Ch. J.* The error alleged is founded on a construction of the act of Georgia, which this court thinks is totally inadmissible. How such an opinion could have been entertained is unaccountable. There is no foundation for it.

Judgment affirmed, with costs.

370*] *MORGAN
v.
CALLENDER.

An appeal lies from the district court of the United States, for the territory of Orleans, to this court.

APPEAL from the district court of the United States for the territory of Orleans, in a suit in equity.

That court was established by the act of Congress, of 26th March, 1804, vol. 7, p. 117, s. 8, and has a jurisdiction similar to that given to the district court of the United States for the District of Kentucky.

This court was of opinion that an appeal lies from that court to this: but that in this case, the court below had not jurisdiction, because it did not appear that the parties were citizens of different states, nor aliens, &c., so as to give them a right to litigate in the courts of the United States.

ALEXANDER
v.
THE BALTIMORE INSURANCE COMPANY.

A policy upon a ship is an insurance of the ship for the voyage, not an insurance on the ship and the voyage. The underwriters undertake for the ability of the ship to perform the voyage, not that she shall perform it at all events.

The loss of the voyage as to the cargo is not a loss of the voyage as to the ship.

If at the time of the offer to abandon, the ship be in possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover as for a total loss of the vessel.

ERROR to the circuit court for the district of Maryland.

The Chief Justice, in delivering the opinion of the court, stated the material facts, found by the special verdict, to be as follows, viz.:

This action was brought against the underwriters to recover the amount of a policy insuring the ship John and Henry, from Charleston to Port Republican, or one other port in the Bite of Leogane. On the 2d of October, 1803, the John and Henry, while prosecuting her voyage, was seized by a French privateer, and carried into the port of Mole St. Nicholas, where the cargo *was taken by M. de [*371 Noailles, the French commandant, for the use of the garrison. On the same day the master of the vessel received a written engagement from M. de Noailles to pay for the cargo in coffee, after which the vessel was unladen. The captain remained at the Mole in expectation of receiving payment, until the 29th of October, when he sailed in the John and Henry for Cape Francois, with an order on that place for payment in coffee. On the 4th of November she was seized by a British squadron then blockading Cape Francois, and condemned as prize. Cape Francois, is not in the route to Port Republican, nor to any port in the Bite of Leogane; nor in the route to return from Mole St. Nicholas to the United States. The abandonment was made in December, on account of the capture by the French privateer. The declaration claims the amount of the policy in consequence of that capture. The judgment of the court below was for the defendant.

The only question decided by this court was, whether the plaintiff had a right to abandon and recover as for a total loss.

Harper, for the plaintiff.

It was settled by this court in *Rhinelander's Case*, at the last term, (*ante*, p. 29,) that a loss by capture is a total loss, unless the restoration be complete and without encumbrance. It must be a restoration of the vessel in safety. There is a physical and a legal safety. A vessel may be restored in good order, and in safety, but under such circumstances that the party can make no use of her. It may be in a blockaded port, or in a place where mariners cannot be obtained to navigate the vessel; or where the party has no funds to provide a cargo, &c. In these cases he loses the beneficial use of his property, as much as if it were actually withholden from him by force.

If the ship or the voyage be lost, it is a total loss within the policy. Here the voyage was completely broken up; the object of the voy-

age, the speculation, was destroyed. The restoration ought to be a restoration of the voyage, a reinstatement of the enterprise, or it is 372*] not *a restoration which will prevent the loss from being total.

In *Cazalet v. St. Barbe*, 1 T. R. 191, Judge Buller says, "If either the ship or the voyage be lost, that is a total loss."

So in *Mitchell v. Edie*, 1 T. R. 615, he says, "A total loss is of two sorts, one, where in fact the whole of the property perishes; the other, where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it."

So in *Goss v. Withers*, 2 Burr. 696, Lord Mansfield said, "The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter party was dissolved. The freight was lost." These he gives as reasons why it continued a total loss of the ship, notwithstanding the restoration.

So in *Hamilton v. Mendez*, 2 Burr. 1209, he says, "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success; under these, and many other like circumstances, the insured may disentangle himself, and abandon, notwithstanding there has been a recapture."

So in *Miles v. Fletcher*, Doug. 233, he says, "The voyage was abandoned, the cargo sold, and the ship left to be sold." "There was no crew belonging to her, and she had no cargo." These are reasons given by him why the loss of the ship was total.

The same doctrine is supported by the cases of *The Sarah Galley, Storey v. Brown*, Trin. 18, 19 Geo. II. anno 1746, B. R. Weskett, 416; *The Anna Hanbury v. King*, Mich. 19 Geo. II. 1746, B. R. Weskett, 417; And the Dispatch Galley, *Whitehead v. Bance*, Mich. 23 Geo. II. 1749, B. R. Weskett, 417; *Kulen Kemp v. Vigne*, 1 T. R. 310; *Rotch v. Edie*, 6 T. R. 413, 373*] *424, 425, Millar, 284, and *Wheeler v. Valejo*, Cowper, 147; *Schmidt v. United Ins. Co.* 1 Johns. Rep. 249; and *Goold v. Shaw*, Lex Merc. Americana, 295.

Martin, contra.

The loss of the cargo has nothing to do with the question of the loss of the ship. This policy is merely on the ship for the voyage. She might have proceeded and completed the voyage insured. The loss of the voyage as to the cargo is not a loss of the voyage as to the ship. This is not an insurance upon the freight. That was insured by another policy. It is merely a policy upon the bulk of the ship.

March 11. MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court, as follows, viz.:

It has been decided in this court, that during the existence of such a detention as amounts to a technical total loss, the assured may abandon; but it has also been decided that the state of the fact must concur with the state of information to make this abandonment effectual. The technical total loss, therefore, occasioned by the capture and detention at Mole St. Nicholas, must have existed in point of fact in December, when this abandonment was tendered, or the plaintiff cannot succeed in this action.

Previous to that time the vessel had been restored to the captain; all actual restraint had been taken off; and it does not appear that her ability to prosecute her voyage was in any degree impaired. But her cargo had been taken by Monsieur de Noailles, the commandant at Mole St. Nicholas, and had not been paid for. The restoration of the vessel, without the cargo, is said not to terminate the technical total loss of the vessel.

The policy is upon the vessel alone, and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The *underwriters [*374 insure against the loss or any damage to the vessel, not against the loss or any damage to the cargo. They insure her ability to perform her voyage, not that she shall perform it.

If, in such a case, a partial damage had been sustained by the cargo, no person would have considered the underwriters as liable for that partial damage; why, then, are they responsible for the total destruction of the cargo? It is said that by taking out the cargo the voyage is broken up. But the voyage of the vessel is not broken up; nor is the mercantile adventure destroyed from any default in the vessel. By this construction the underwriter of the vessel, who undertakes for the vessel only, is connected with the cargo, and made to undertake that the cargo shall reach the port of destination in a condition to answer the purposes of the assured. Yet of the cargo he knows nothing, nor does he make any inquiry respecting it.

If it be true that the technical total loss was not terminated until the cargo was paid for, because the voyage was broken up, then the underwriters would have been compellable to pay the amount of the policy, although the vessel had returned in safety to the United States. To prosecute the voyage, it is said, had become useless, and, therefore, the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, it would not be less true if, instead of proceeding to Cape Francois, the Henry and John had returned from Mole St. Nicholas to the port of Charleston. The contract, then, instead of being an insurance on the ability of the ship to perform her voyage, an insurance against the loss of the ship upon the voyage, would be a contract to purchase the vessel at the sum mentioned in the policy, if circumstances, not produced by any fault or disability in the vessel, should induce the captain or the assured to discontinue the voyage after it had been undertaken.

This is termed pushing a principle to an absurdity, and, therefore, no test of the truth of the principle. But if it be a case which would occur as frequently as that which has occurred, and if the result which has been *stated [*375 flows inevitably from the principle insisted on, the case supposed merely presents that principle in its true point of view, deprived of the advantages it derives from its being adapted to the particular and single case under argument. Either the technical total loss of the ship did or did not terminate when she was restored to the master uninjured, and as capable of prose-

cuting her voyage as when she sailed from the port of Charleston. If it was then terminated, this action cannot be sustained. If it was not then terminated, on what circumstance did its continuance depend? At one time it is said to depend on the ability or inability of the owner to employ her to advantage. But this position requires a very slight examination to be discarded entirely. So far as respected the vessel herself, and her crew, she was as capable of being employed to advantage as she had ever been. Only the funds were wanted to enable her to purchase a return cargo on the spot, or to proceed to her port of destination, and there purchase one. Or she might have returned immediately to the United States, and if any direct loss to the vessel was sustained, by being turned out of her way, that, after restoration, would be a partial not a total loss. Besides, what *dictum* in the books will authorize this position? And what rule is afforded to ascertain the degree of inconvenience which, when in point of fact the vessel is in safety, in full possession of the master, and capable of prosecuting her voyage, shall warrant an abandonment?

No total loss of the vessel, then, existed after her restoration, so far as that total loss depended on the incapacity of the owner to employ his vessel to advantage. If the total loss continued after the restoration, that continuance was produced singly by the non-payment for the cargo, which is said to have broken up the voyage. If, then, the vessel had returned to a port in the United States, the voyage would still have been broken up, and the right to abandon would have been the same as it was while she was on the ocean, in full possession of her captain.

376*] *But it is apparent that the captain had terminated the voyage on which the vessel was insured. Had his contract with De Noailles been complied with at Mole St. Nicholas, or at Cape Francois, he would not have proceeded to the Bite of Leogane. Had it not been complied with, he would have had no more inducement to go to a port in the Bite of Leogane from Cape Francois, than from Mole St. Nicholas. The voyage to Port Republican, then, which was the voyage insured, was completely terminated at Mole St. Nicholas; the voyage to Cape Francois, in making which she was captured was a new voyage undertaken, not for the benefit of the underwriters of the vessel, but for the benefit of the owners and underwriters of the cargo. Consequently, so far as respects the underwriters of the vessel, who insured only the voyage to the Bite of Leogane, the capture at Cape Francois is an immaterial circumstance, and the technical total loss produced by carrying the vessel into Mole St. Nicholas, was either terminated when she was restored without her cargo, or would have continued had she returned to an American port without her cargo.

Upon principle, then, independent of authority, it is very clear that the underwriter of the vessel does not undertake for the cargo, but engages only for the ability of the vessel to perform her voyage, and to bear any damage which the vessel may sustain in making that voyage.

But it is contended that adjudged cases have settled this question otherwise.

The case has frequently occurred, and a direct decision might be expected on it, if a construction so foreign from the contract had really been made. It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged.

Not an instance is recollected in which the right to abandon in such a case, after the vessel was restored, has been claimed. Yet, if the loss of the cargo amounted to a destruction of the voyage, so far as respected the vessel, and thereby created a total loss of the vessel herself, *notwithstanding her restoration to [*377 the captain uninjured, and in a full capacity to prosecute her voyage, such claims would be frequently asserted, and vessels would be valued high in the policy, for the purpose of selling them on a contingency which so often occurs. It would be strange, indeed, to admit, that if this cargo had been condemned in Mole St. Nicholas, and the vessel had been liberated, the right to abandon would not have been produced by the loss of the cargo, and yet to contend that non-payment for the cargo does produce that right.

In recurring to precedent, no direct decision by a court on the point, no direct affirmance of the principle has been adduced; but the counsel for the plaintiff relies on general *dicta* in the books which are used in reference to other principles. Thus, in 1 Term Rep. 191, Judge Buller says, "It is an assurance on the ship for the voyage. If either the ship or the voyage be lost, it is a total loss."

In that case, the counsel for the plaintiff contended that the insurance was on the ship, and on the voyage, and insisted, that as the vessel returned unfit for use, it was a total loss. The counsel for the defendants was stopped, and Judge Buller said, "Allowing total loss to be a technical expression, the manner in which the plaintiff's counsel have stated it is rather too broad." Why too broad? Judge Buller answers, "It has been said that the insurance must be taken to be on the ship as well as on the voyage, but the true way of considering it is this; it is an insurance on the ship for the voyage. If either the ship or the voyage be lost, that is a total loss."

In what consists the difference between an insurance on the ship and the voyage, which is laying down the principle too broad, and an insurance on the ship for the voyage, which is the true way of considering it? If the destruction of the voyage by the loss of the cargo is a loss of the ship, then it is an insurance on the ship and the voyage. But this, according to Judge Buller, is not the true principle. The true principle is, that " it is an insurance on the ship for the voyage," *that is, that [*378 the voyage shall not be destroyed by the fault of the ship, or, in other words, that the ship shall be capable of making her voyage. And when he says that if either be lost it is a total loss, he must be understood to mean, if the voyage be lost by the happening to the ship of any of the perils insured against. To understand Judge Buller otherwise, would be to make him inconsistent with himself; to illustrate a proposition by cases incompatible with that proposition; and to support a distinction by cases which confound the principles intended to be distinguished from each other. But these

expressions are used in a case in which the whole contest respected the damage actually sustained by the ship insured, and must be understood in reference to such a case.

So in 1 Term Rep. 615, *Mitchell v. Edie*, Buller, *J.*, says, "A total loss is of two sorts. One where in fact the whole of the property perishes;" (that is, the property insured;) "the other where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it."

This was a case in which the cargo, which was the thing insured, was, by one of the perils insured against, prevented from reaching its destined port, and was greatly damaged. The expressions must be explained by the case, for the case itself is in view when the expressions are used.

A *dictum* of Judge Buller, in 1 Term Rep. 310, is more applicable to this case than either of those before quoted. He says, "If the ship had arrived, and the goods had been lost, the assured could not have recovered." That was an insurance on the arrival of the ship. It is said that *dictum* was founded on its being a wagering policy; but it appears to be a construction of the terms of the policy. He proceeds to say, that "in policies on interest, if the voyage be lost, it is not necessary to proceed on with the hulk of the ship." But to what case does this apply? To an insurance on goods or on the ship? To a loss of the voyage by default of the thing insured and abandoned, or by default of the thing not insured? The *dictum* is too vague and too unsatisfactory **379***] to form the basis of a great *legal principle of infinite importance in commercial transactions. If that case be read throughout, *dicta* may be found interspersed through it which militate against the doctrine this single sentence is supposed to support.

In the case of *Goss v. Withers*, there were two policies, one on the ship and the other on the cargo. The language of Lord Mansfield, in delivering the opinion of the court with respect to the ship, does not even insinuate the idea that any damage sustained by the cargo would have affected the policy on the ship.

In deciding on the claim for the cargo, his language is to be considered with reference to the case itself. It does not appear whether, in the passage quoted from *Le Guidon*, the author of that work was treating of an abandonment as to the ship or cargo, or both. Nor does it in any degree tend to establish the principle contended for, that after stating the actual total loss of the goods, Lord Mansfield mentions, as an additional circumstance, showing the complete destruction of the voyage, that the ship was lost also.

In the case of *Hamilton v. Mendez*, neither the ship nor cargo was lost. Lord Mansfield puts cases in which there might be a total loss, but those cases are not stated with such precision as to throw any light on the present question. He says it does not absolutely follow that, because there is a recapture, the loss ceases to be total. "If the voyage is absolutely lost, or not worth pursuing," and in many other instances, the owner may disentangle himself, and abandon notwithstanding there has been a recapture.

It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best inexplicitly stated, as establishing important law principles. Let the *dictum* in the present case be examined. Suppose the ship and cargo to be owned by different persons, and insured by different underwriters. If the voyage be lost by the infirmity of the ship, the abandonment might unquestionably be made. If the goods be damaged or injured, so as to occasion a technical *total loss, so as to render the voyage [***380** not worth pursuing, the owner of the cargo may abandon; but now does this render the voyage not worth pursuing by the owner of the vessel? The value of the cargo does not affect him, or injure the vessel. With respect to him, the voyage is not destroyed. These *dicta* of Lord Mansfield are uttered in terms which demonstrate, that no case like the present was in his view at the time, and they are not adapted to such a case.

The cases from Weskett are upon a peculiar kind of policy. They are in the nature of wager policies, and the nature of the undertaking is said to be, that the ship shall perform her voyage in a reasonable time. "In these two last kinds of policies," says Weskett, "valued free from average" and "interest or no interest, it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship and cargo, is the object of the insurance." This remark applies only to policies of the particular specified description; and even with respect to them it would not appear that the fate of the ship depended on that of the cargo. In illustration of this principle he states the case of *The Ludlow Castle* insured from Jamaica to England. She was compelled by one of the perils insured against, to put into Antigua, where she was stopped from proceeding on her voyage, and her cargo was sent to England in another vessel. At the time of the abandonment, and even at the time of the trial, the vessel had not arrived in England, and was not restored to the owner. In this case the voyage was lost by the inability of the vessel to prosecute it.

The case of *The Sarah Galley* bears a much stronger resemblance to that under consideration, but is not so fully stated as to give the court all its circumstances. It does not precisely appear what damage was sustained by the seizure at Gibraltar, nor what effect that loss might have on the jury. Nor are we informed at what time and for what cause the abandonment was made.

But the great objection to that case is, that it was the verdict of the jury, not the solemn decision of a court, *which verdict was [***381** rendered at a time when the law of insurance was not settled, and most probably on a point which has since been overruled in England and in this country. The loss of the ship on a voyage from Gibraltar to Dunkirk could not be the fact on which the plaintiff recovered, because that was a voyage not within the policy. The seizure at Gibraltar was the fact on which the jury founded their verdict. The defendant contended that this total loss was terminated by the restoration of the ship; "yet as the taking at Gibraltar was a taking whereby the return voyage was prevented, a special jury gave the plaintiff a verdict for a total loss." The ver-

dict, then, is found not on the subsequent actual loss of the vessel, but on the technical loss occasioned by the seizure. This verdict was rendered in the reign of George II. At that time it was doubtful whether a technical total loss occasioned by capture did not vest in the assured a right to abandon, which right was not devested by restoration. In the case of *Hamilton v. Mendez*, which came on afterwards, this point was perseveringly maintained at the bar, and settled by the court. Had the case of *The Sarah Galley* been decided after the case of *Hamilton v. Mendez*, a different verdict must have been rendered. But this decision was given exclusively on the circumstances which had befallen the ship, without a view, so far as is stated, to any loss of the cargo, and is considered by Miller (288) as not being law.

The case of *The Anna* turned entirely on the inability of the ship to prosecute her voyage.

The case of *The Dispatch Galley* is a case in which we are not informed of the amount of loss occasioned by capture and recapture; and is also a case decided before *Hamilton v. Mendez*, most obviously upon the principle that the right to abandon, which was vested by the capture, was not devested by the restoration of the vessel. This case serves to show that the verdict in the case of *The Sarah Galley* did not turn on the subsequent loss of the vessel, for this vessel was not lost. There is in it no allusion to any influence which the loss of a cargo might have on the insurance of a vessel.

382*] *The principles laid down by Millar do not militate against those which are contained in this opinion. When he speaks of a loss which defeats the voyage, he alludes to a loss which has befallen the thing insured.

The court can find in the books no case which would justify the establishment of the principle, that the loss of the cargo constitutes a technical loss of the vessel, and must, therefore, construe this contract according to its obvious import. It is an insurance on the ship for the voyage, not an insurance on the ship and the voyage. It is an undertaking for the ability of the ship to prosecute her voyage, and to bear any damage which she may sustain during the voyage, not an undertaking that she shall, in any event, perform the voyage.

It is the unanimous opinion of the court that the judgment must be affirmed, with costs.

Judgment affirmed.

MATTHEWS *v.* ZANE.

If two citizens of the same state, in a suit in a court of their state, claim title under the same act of Congress, this court has an appellate jurisdiction to revise and correct the judgment of that court in such case.

ERROR to the state court of the state of Ohio, under the 25th section of the judiciary act, vol. 1, p. 63.

The plaintiff in error claimed title to land in the state of Ohio, under the act of Congress passed in 1800, and the decision of the state court was against him.

The defendant in error also claimed title to the same land under the same act of Congress.

The question was, whether in such a case this court had an appellate jurisdiction to revise the judgment of a state court.

*Harper, for the defendant in error, [*383 contended, that the reason of bestowing upon this court the power of revising the decisions of the state courts, upon points arising under the laws of the United States, was merely to maintain the authority of the laws of the United States, against the encroachments of the state authorities. But that it was not intended to give this court the power to revise the decision of a state court, in a controversy between two of her own citizens, claiming under the same act of Congress; for whether the one or the other recovered, the authority of the laws of the United States was equally supported. The power was given merely to prevent the laws of the United States from being frittered away by state jealousies and state powers.

P. B. Key, contra, contended, that the intention was to give a uniform construction to the laws of the United States; and that whenever a state court of the highest grade shall have given a false construction to an act of Congress, to the prejudice of a right claimed under such act of Congress, this court is empowered to correct the decision; and that it is altogether immaterial whether both parties are citizens of the same state, or whether both claim under the same act of Congress.

The court at first hesitated as to the jurisdiction, but upon consultation together and deliberation,

MARSHALL, *Ch. J.*, declared it to be the opinion of a majority of the judges, that this court has jurisdiction.

That the third article of the constitution of the United States, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive.

It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws.

NOTE.—The ground of the jurisdiction of the court in this case is the statute of the United States, which provides, that, "A *final judgment* or decree in any suit in the highest *court of a state*, in which a decision in the suit could be had, where is drawn in question the validity of a treaty *or statute of*, or an authority exercised under, *the United States*, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Acts of 24th September, 1789, ch. 20, § 25; 5th Feb. 1867, ch. 28, § 2; Rev.St. of U. S. § 709.

This jurisdiction is irrespective of, and does not depend upon, the residence of the parties.

What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note, 62 L. R. A. 513.

384*] *YOUNG
v.
THE BANK OF ALEXANDRIA.

An appeal or writ of error lies from the judgments of the circuit court of the District of Columbia, to this court, in cases where the bank of Alexandria is plaintiff, and the judgments below are in its favor, notwithstanding the clause in its charter to the contrary.

The right of Virginia to legislate for that part of the District of Columbia which was ceded by her to the United States, continued until the 27th of February, 1801.

The act of Virginia incorporating the bank of Alexandria is a public law.

Quære, whether private acts of assembly of Virginia printed by the public printer of that state, under the authority of law, may be read in evidence without other authentication?

ERROR to the circuit court for the District of Columbia, sitting at Alexandria.

C. Simms, for the defendant in error, having obtained a rule on the plaintiff in error to show cause why the writ of error should not be quashed.

Youngs, E. J. Lee and Jones, now showed cause; and read a printed paper produced by the other side purporting to be the act of assembly of Virginia, of 1792, incorporating the bank, and giving them a right to obtain judgments against their debtors at the first term, without appeal or writ of error; another printed paper, also produced by the other side, purporting to be the act of assembly of Virginia, of the 21st of January, 1801, continuing the act of 1792 until the year 1811, which would otherwise have expired in the year 1803; the act of Congress of the 27th of February, 1801, erecting the circuit court for the District of Columbia, and providing for an appeal or writ of error to this court, in all cases where the matter in dispute shall exceed the value of one hundred dollars, with a proviso that nothing in that act should impair the rights granted by, or derived from, the acts of incorporation of any body corporate within the district; the act of assembly of Virginia, of 1789, ceding to the United States a territory for the seat of their government, and the act of Congress of 1790, accepting the cession.

They contended.

1. That when the legislature of Virginia passed the act of 21st of January, 1801, continuing the act of 1792, which incorporated the bank, the state of Virginia had no power to legislate for the District of Columbia, and, therefore, could not give continuance to the act of 1792, as a law in that district. The con-385*] sequence of *which is, that there is now no law in the District of Columbia which gives to the bank any exclusive privileges.

2. That the act of Virginia, of 21st of January, 1801, was not adopted as the law for the District of Columbia, by the act of Congress of 27th of February, 1801.

3. That if the act of 21st of January, 1801, was adopted as to its general provisions, yet so much of it as takes away the right of appeal was not adopted, because inconsistent with that part of the adopting law which gives an appeal or writ of error, in all cases where the matter in dispute exceeds the value of one hundred dollars.

4. That the acts of 1792, and 21st of January, 1801, were private acts, and that the papers read, purporting to be those acts, were not sufficiently authenticated, and could not be noticed by the court.

The points being opened, the court requested to hear the counsel on the other side.

C. Simms, for the bank.

The first question is, whether the right of Virginia to legislate for the District of Columbia ceased on the 1st Monday in December, 1800, when the district became the seat of the national government, or on the 27th of February, 1801, when Congress first provided by law for the government of the district under their jurisdiction? By the act of assembly of Virginia, passed on the 3d of December, 1789, for the cession of a territory for the permanent seat of the general government, (*Revised Code, p.* 52,) it is enacted, "That a tract of country, not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof as Congress may by law direct, shall be, and the same is hereby, forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the 8th section of the 1st article of the constitution of government of the United States."

*"Provided, that the jurisdiction of [*386 the laws of this commonwealth, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited."

By the act of Congress of 16th of July, 1790, for establishing the temporary and permanent seat of the government of the United States, vol. 1, p. 132, it is enacted, "That a district of territory, not exceeding ten miles square, to be located as hereafter directed, on the river Potomac, at some place between the mouths of the Eastern Branch, and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States; provided nevertheless, that the operation of the laws of the state, within such district, shall not be affected by this acceptance until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.

The time for the removal of the government to the district was, by the same act, fixed to be the first Monday in December, 1800.

The government having been on that day removed to the district, Congress did not by law provide for the government thereof, under their jurisdiction, until the 27th of February, 1801: until which day, we contend, the jurisdiction of the laws of Virginia, or, in other words, the right of Virginia to legislate for the district, did not cease to determine. Virginia had, therefore, a right to pass the act of 21st of January, 1801, which was, consequently, one of the existing laws of Virginia, in the District of Columbia, on the 27th of February, 1801, when Congress enacted. "That the laws of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said state to the United

States, and by them accepted for the permanent seat of the government."

387] *There are only two instances in which Congress have referred to the 1st Monday of December, 1800, as the period of separation, viz., in the act of 3d March, 1801, s. 7, vol. 5, p. 290, authorizing the sheriffs of the adjoining counties in Maryland and Virginia to proceed to collect taxes and officers' fees, due before that day; and in the act of May 3d, 1802, s. 13, vol. 6, p. 183, which refers to the militia laws of the states of Maryland and Virginia, as they stood in force in the district, on the 1st Monday of December, 1800.

The right of the bank to obtain judgment against their debtors at the first term without appeal, is a right granted to them by their act of incorporation, and is, therefore, saved by the proviso of the statute of 27th February, 1801, and is, therefore, an exception to the general clause, which gives a right of appeal in all cases.

But it is contended that the acts of Virginia, incorporating the bank of Alexandria, are private acts, and that the printed papers now produced ought not to be regarded by the court as evidence of the existence of such acts. The acts which we read to the court are found printed with, and bound up among, the public acts of the commonwealth. The title page declares the book to contain the acts of assembly of the commonwealth of Virginia, and to be printed by Augustine Davis, who, we are ready to prove, was the public printer for the years when those laws were passed. By the act of assembly of Virginia, of 22d January, 1798, the public printer is to be appointed annually, by the joint ballot of both houses, and it is made his duty to publish all laws passed during the session. (New Rev. Code, 382.) The executive is also bound by law to send copies of all the laws, when printed, to the clerks of the courts, &c., and by another statute, private acts of assembly may be given in evidence, without pleading them specially. (New Rev. Code, 59, 112.)

There is a difference between the laws of Virginia and those of England, respecting the authentication of private acts. In England they are never printed nor promulgated, but remain with the clerk of parliament. But in Virginia they are printed and promulgated by the 388*] *authority of the legislature, and are as well authenticated as public acts.

But this is a public act.

CHASE, *J.* The act makes it felony to counterfeit the notes of this bank. Does not that make it a public act?

MARSHALL, *Ch. J.*, said, that the opinion of the court was very strong that this is a public act; and that if it were not, it being printed by the public printer, by order of the legislature, agreeably to a general act of assembly for that purpose, it must be considered as sufficiently authenticated. But that the court would not prevent counsel from arguing the point, if they thought they could support the contrary opinion; which the counsel declined attempting.

At the opening of the court, on the next morning,

Youngs, for the plaintiff in error, being about to reply,

MARSHALL, *Ch. J.*, said, the court is so much of opinion that the point is decided by the case of *Wilson and Mason*, (*ante*, vol. 1, p. 91.) that they are inclined to hear the other side.

By the Virginia land law, no appeal or writ of error is allowed in caveats; and by the compact between Virginia and Kentucky, that law was immutable; yet this court, in *Wilson and Mason*, decided that the act of Congress which gives a writ of error in all cases, so far repealed the state law, as to prevent it from operating upon the United States court for the District of Kentucky.

JOHNSON, *J.* Perhaps a distinction may be drawn between that case and this. If the bank of Alexandria had a vested right under the act of incorporation, it is saved by the proviso in the act of 27th of February, 1801.

*The court thereupon directed [*389 Youngs to proceed in his argument.

Youngs, for the plaintiff in error.

By the 8th section of the 1st article of the constitution of the United States, power is given to Congress, "To exercise exclusive legislation over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States." The moment the district became the seat of government, Congress had the right of exclusive legislation over it. There could be no concurrent rights of exclusive legislation. The idea is absurd and impossible. There can be but one right of exclusive legislation, and by the constitution of the United States, it was vested in Congress. It is not necessary that Congress should have exercised the right in order to vest it in themselves. It must have vested in them before they could exercise it. The District of Columbia, both in law and in fact, became the seat of government of the United States on the 1st Monday of December, 1800. From that moment the right of the state of Virginia to legislate over the district ceased. It could make no law to affect the property or persons within it. Virginia did not attempt it. She knew she had no power, and, therefore, she has used language appropriate only to her own territory. She has authorized the stockholders to choose their directors in the state of Virginia out of the district. She speaks of the town of Alexandria as being "in that part of the District of Columbia which heretofore formed a part of this commonwealth."

Three things only were necessary to vest the exclusive power of legislation in Congress. A cession of territory by some of the states; an acceptance by Congress; and the ceded territory being actually the seat of the government of the United States. These events had all happened on the first Monday of December, 1800. No further act was necessary. The right to legislate was complete and exclusive whether Congress exercised it or not.

*But it is said that if Virginia could [*390 not legislate for the District of Columbia, yet she could legislate for herself; and Congress by the act of 27th February, 1801, adopted all her laws as they then existed.

As they existed where? we say as they then existed in the District of Columbia; that was the territory over which Congress was legislating, and their object was merely to continue in force the laws then existing in the district.

If Virginia had no right to legislate for the District of Columbia, when she passed the act of the 21st of January, 1801, that act was not in force, and did not exist as a law, in the District of Columbia, on the 27th of February, 1801; and if it did not then exist as a law in the district, it could not be continued in force by the act of Congress. The words of the act of Congress are, "The laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the district," &c.

The legislatures of Virginia, and of the United States, both began their sessions on the same first Monday of December, 1800. It is not possible that Congress, when they passed the act of the 27th of February, 1801, should know what acts Virginia had passed at that session. The laws of that session were not then promulgated; and it cannot be supposed that Congress meant, blindfold, to adopt whatever Virginia should choose to enact. It cannot be presumed that Congress would have adopted the act of 21st of January, 1801, if they had known it, because it was equivalent to giving the bank of Alexandria a new charter; and to give any bank a charter by a law of the United States, prior to the 4th of March, 1811, is to violate the public faith pledged to the bank of the United States. If, therefore, a doubt can be raised as to the intention of the United States, this court will not give the law such a construction as would violate the public faith.

There is another objection to that part of the act of Virginia which gives exclusive privileges to the bank of Alexandria.

391*] *It is directly repugnant to the bill of rights of Virginia, the fourth article of which declares, "That no man, or set of men, are entitled to exclusive or separate emoluments, or privileges from the community, but in consideration of public services."

MARSHALL, *Ch. J.* We will consider that point when we come to the general merits of the case.

Youngs. But if the court should quash the writ of error, they will never hear the merits.

CHASE, *J.* But if it be contrary to the constitution of Virginia, are we to decide upon its unconstitutionality? I must say I think we cannot.

E. J. Lee, on the same side.

We do not contend that the bank has no charter; we admit that the bank still exists as a corporate body in Virginia, and may there exercise all its functions, choose its officers, keep its banking house, and transact its business. But we say it has no peculiar privileges in the courts of the United States. We deny it has existence as a corporate body in the District of Columbia, and that the court below is bound by any of the remedies which the bank is entitled to in the courts of Virginia, by virtue of any law of Virginia, passed since the first Monday in December, 1800. It never had a right to its summary remedy in the courts of the United States, and, therefore, no such right could be saved by the proviso in the act of the 27th of February, 1801. We consider the case of *Wilson and Mason* as decisive.

Swann, contra.

There is a distinction to be taken between this case and that of *Wilson and Mason*. There the right of appeal was a constitutional right. It grew out of the constitution of the United States, which gave to the courts of the United States jurisdiction between citizens of different states, and to this court its appellate power. This is the ground taken by the court in delivering its opinion in that case.

*But the right of appeal in this dis- [*392 trict is not a constitutional right. The courts of this district are of legislative, not of constitutional creation. The power of this court to hear appeals from the circuit court of this district, is a power not derived from the constitution. This district is like a state, and Congress legislates for it as a state legislature would for a state.

The act of the 21st of January, 1801, was an existing law operating upon this part of the district on the 27th of February, 1801. On the 21st of January, 1801, the jurisdiction of Virginia, in all respects whatever, existed over this district, and continued until Congress, by an act, assumed the jurisdiction. Congress had power to exercise exclusive legislation, but was not bound to exercise it. Until they chose to exercise it by providing for the government of the district, the jurisdiction of the laws of Virginia was not to cease. What is the jurisdiction of the laws, but the jurisdiction of the commonwealth? The jurisdiction of the laws comprehends the whole jurisdiction. If not the whole jurisdiction, what part does it comprehend? It was intended that there should be no *interregnum*, no time in which the inhabitants of the district should be without laws, and without the means of enforcing them. The jurisdiction of the courts and officers was to continue, as well as of the laws, considered as mere rules of conduct.

It is evident by the act of February 27, 1801, that Congress considered the district as remaining under the jurisdiction of Virginia until that day.

The legislature of Virginia had the same understanding. The act of the 21st of January, 1801, says, the charter of the bank is hereby continued; which they could not do, unless they had jurisdiction. The court of hustings of Alexandria was also holden in January and February, 1801, by the justices holding their offices under Virginia.

Here, then, was the concurrent understanding of the Congress, of the legislature of Virginia, and of the courts of that part of the district.

*But even if the power of Virginia [*393 to legislate for the district had ceased, the act of 21st of January was a law in Virginia on the 27th of February, 1801, and as such was adopted by the act of Congress of that date.

It is said that Congress cannot be supposed to intend to adopt the laws of the session of Virginia, which began on the first Monday of December, 1801, because Congress cannot be presumed to have had knowledge of them. But Congress cannot be presumed to have had knowledge of all the laws which were in existence in Maryland and Virginia before that period. Yet they adopted them. They took them upon trust; and they had as much reason to adopt those of the session of 1800–1801, as those of any former period.

C. Simms, on the same side.

It is admitted that the jurisdiction of Virginia did not cease by the act of cession of 1789,

nor by the act of acceptance of 1790; why should it cease on the first Monday of December, 1800? We say four things were necessary to devest the jurisdiction of Virginia, 1. The cession; 2. The acceptance; 3. The removal of the seat of government to the district; and, 4. The actual providing by Congress for the government of the district under their jurisdiction. Only three of these four events had happened on the first Monday of December, 1800.

What reason is there for supposing that Virginia retained an executive and a judicial jurisdiction over the district, and not a legislative jurisdiction also? If she could legislate for the district, after the cession and acceptance, she retained that power until Congress provided for the government of the district.

By the act of the cession of 1789, individual rights were not to be impaired by the change of jurisdiction whenever it should take place. This provision applied not to rights then existing, but to any which might be acquired under the laws of Virginia before the actual transfer of the jurisdiction; so that there was a pledge of the public faith in favor of the bank 394*] of Alexandria, prior to *that in favor of the bank of the United States. Before the transfer of jurisdiction, also, the bank of Alexandria had acquired a right to the summary remedy without appeal.

The plaintiff in error had no right to complain of the exercise of that summary remedy in his case. He knew the rights of the bank before he obtained their credit, and became their debtor.

The decision of this court in *Wilson and Mason* was predicated upon the principle that no act of a state legislature could deprive the courts of the United States of their jurisdiction; but here the act taking away the right of appeal has been adopted by Congress, and therefore it is in fact a law of the United States.

Jones, in reply.

If the decision be against the bank, it will only go to deprive them of an odious and oppressive prerogative which they have assumed. They may still enjoy the benefits of their charter in Virginia.

The distinction attempted to be drawn between this case and that of *Wilson and Mason*, is not founded in fact. The constitution of the United States gives to this court appellate jurisdiction in all cases arising under the constitution and laws of the United States, with such exceptions and under such regulations as Congress shall make.

The cases which occur in the District of Columbia, under the exclusive legislation of Congress, are all cases which arise under the constitution and laws of the United States. Congress has not only not excepted them from the jurisdiction of this court, but has regulated the mode by which they may be brought before it.

The circuit court of the District of Columbia is a branch of the judiciary of the United States. It holds by the same tenure as every other court of the United States, and exercises a part of the judicial power of the United States, and this court exercises its appellate 395*] jurisdiction *as much under the constitution in these cases as in any other.

It cannot be supposed that the constitution intended Congress should create judges and courts, independent of the constitution.

The same general question, therefore, occurs in this case as in that of *Wilson and Mason;* and is to be decided by the same principles.

If it was intended to say that the general jurisdiction of Virginia should continue until Congress should legislate for the district, the legislature of Virginia, and Congress, would have said so expressly, and not used the limited expressions, "jurisdiction of the laws," and "operation of the laws." The power of legislation may cease, and yet the jurisdiction of the laws remain, and the officers of justice still continue to exercise their functions by virtue of the compact. Such is the case in conquered and ceded countries. They generally, by treaty, remain under the jurisdiction of the old laws and old officers until new laws are enacted and new officers appointed; and yet it is not contended that the old sovereign can legislate for them.

The act of Congress accepting the territory, either explains or restricts the act of cession. It uses the expression, "operation of the laws" instead of "jurisdiction of the laws."

We contend they mean the same thing; *i. e.*, that the laws shall remain as the rule of conduct until altered or repealed by Congress. Virginia and the United States were two sovereigns treating respecting a cession of territory. They agree that the cession shall take effect upon a certain event, and that the laws then existing in the ceded territory shall continue until the new government shall otherwise provide.

This cession took effect on the 1st Monday of December, 1800, and by the terms of the cession and acceptance the laws then in force in the district were to continue in operation until Congress should provide for the *gov- [*396 ernment thereof. The laws, then, which were in force in the district on the 27th of February, 1801, were those only which were in force on the first Monday of December, 1800. By the act of 27th of February, Congress declares that the laws of Virginia, *as* they *now exist*, shall be and continue in force, &c. The expression is not, *which* now exist, but *as* they now exist, which is descriptive of the manner in which they existed; that is, by virtue of the cession and acceptance.

March 12. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

This is a motion to quash a writ of error which has issued to a judgment obtained by the bank of Alexandria in the circuit court for the District of Columbia sitting in Alexandria. In support of the motion, it is contended that no writ of error lies to such a judgment.

The words of the act of Congress of February, 1801, by which the circuit court for the District of Columbia was erected, are these: "Any final judgment, order or decree in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, by writ of error or appeal."

Upon the operation of this clause in the "Act concerning the District of Columbia," no

doubt could be entertained, were it not produced by the last section, which enacts that nothing in that act contained, "shall in any wise alter, impeach or impair the right granted by or derived from the acts of incorporation of Alexandria and Georgetown, or of any other body corporate or politic within the district."

The state of Virginia had, in November, 1792, passed an act for establishing a bank in the town of Alexandria, which act incorporated the bank, and, in addition to the privilege of sum- 397*] mary process for the recovery *of debts, deprived their debtors of the right of appeal.

In January, 1801, the legislature of Virginia passed an act continuing the charter of the bank to the 4th of March, in the year 1811, and authorizing them to transact business in the county of Fairfax.

It is the opinion of the majority of the court, under the terms of the cession and acceptance of the district, that the power of legislation remained in Virginia until it was exercised by Congress.

But the question recurs, whether that part of the act of Virginia which takes away the right of appeal, taken in connection with the act of Congress passed in February, 1801, is now in operation.

The words of the act of Congress being as explicit as language can furnish, must comprehend every case not completely excepted from them. The saving clause in the last section only saves existing rights; it does not extend those rights or give new ones. The act incorporating the bank professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other state.

There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it.

The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate. The act of incorporation, then, conferred on the bank of Alexandria a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States, not belonging to it as a corporation. Those privileges do not exist, unless conferred by an act of Congress.

398*] *The mere saving in an act of Congress which expressly renders all judgments of the circuit court, for a larger sum than one hundred dollars, re-examinable by writ of error in this court, cannot be considered as exempting judgments rendered in favor of the bank, from the operation of this general enacting clause respecting writs of error. If the act of March, 1801, be considered as giving the bank a right to proceed in the circuit court for Alexandria in the same manner as by the act of incorporation, it might proceed in Virginia, yet that act does not affect the writ of error as given in the act of the 27th of February.

The motion is, therefore, overruled.

Cranch 4.

SPIERS v. WILLISON.

By the act of assembly of Virginia of 1758, no gift of a slave was valid unless in writing and recorded; but parol evidence may be given of the existence of a deed of gift to show the nature of possession which accompanied the deed.

ERROR to the district court for the district of Kentucky, in an action of *detinue* for certain slaves.

The plaintiff below, Rebecca Willison, claimed title to the slaves under her grandmother, and at the trial offered parol proof that the grandmother, while Kentucky was a part of Virginia, had given them to her by a deed, which was lost. To this testimony the defendant below (the plaintiff in error) objected, and prayed the court to instruct the jury that the said deposition was not legal evidence in this cause; and that at the time this gift was supposed to be made, no gift of a slave in Virginia was valid unless made in writing, which writing was afterwards reduced to record; which motion was overruled by the court, and the defendant excepted.

P. B. Key, for the plaintiff in error, contended, that as there could be no valid gift of a slave but by deed in writing and recorded, no parol evidence could be given of the existence of such a deed and of its contents, unless it were first proved not only that the deed itself was *lost, but that it had been duly re- [*399 corded, and the record also destroyed.

The next best evidence to the deed itself is the copy from the record, and unless the loss of this better evidence be proved, an inferior grade of evidence ought not to be admitted.

The court ought also to have instructed the jury that a parol gift of a slave in Virginia was not valid. 1 Wash. 139, *Turner v. Turner*.

Jones and Harper, contra.

It is not stated in the bill of exceptions that this was the whole evidence. It was good as far as it went. If there was evidence that the deed had been duly recorded, and that the record had been lost, it would have been complete evidence of a title. But it appears by the depositions that before the expiration of the time limited for the recording of the deed the plaintiff and the slave removed from the state of Virginia to South Carolina. It was a good deed at that time, and vested a title in the plaintiff until the expiration of the time for recording. Before that time arrived the plaintiff and slave were both out of the jurisdiction of the laws of Virginia.

But by the laws both of Virginia and South Carolina, possession for a certain time gives a good title. Evidence of the deed was evidence of the claim under which the plaintiff held the possession.

It was not necessary for the plaintiff to prove a special title, for possession alone was sufficient to support the action.

The prayer to instruct the jury that a parol gift was not valid, was a prayer for an abstract opinion, and in its terms not applicable to the case. The court merely refused to give the instruction. It might be because the question was put to the court in such a manner as not to connect it with the case; it might be that the court thought the question irrelevant.

400*] *Key, in reply.

The fact of removal does not appear in the bill of exceptions, and we cannot seek for facts elsewhere.

March 14. MARSHALL, *Ch. J.* The error assigned consists in both the admission and the operation of the testimony. So far as evidence of the existence of a deed went to show the nature of the possession which accompanied the deed, so far it was admissible; but it was not in itself evidence of any title in the plaintiff. There was no error, therefore, in admitting the testimony as to the deed.

But in overruling the prayer to instruct the jury, "that at the time the gift was said to be made, no gift of a slave was valid unless made in writing, which writing was afterwards reduced to record," the court below is to be considered as having given an opinion that a parol gift was good. This court is, therefore, of opinion, that the court below erred in refusing to give the latter part of the instruction prayed by the defendant.

This court gives no opinion as to the validity of title acquired by possession.

Judgment reversed and the cause remanded.

401*] *RAMSAY *v.* LEE.

In Virginia, in 1784, no gift of a slave was valid unless in writing and recorded, although possession accompanied the gift.

Quære, whether 5 years' possession is alone a good title to enable a plaintiff to recover in *detinue?*

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of *detinue* brought by Lee against Ramsay, for a slave named Frederick.

The material facts appearing by the bill of exceptions taken by the defendant below, were, that Lee claimed as trustee for Kennedy, under a deed from Wilson duly acknowledged and recorded, and dated the 1st of December, 1804. The question was whether, at the date of that deed, Wilson had a good title to the slave.

Mrs. Gordon, being the owner of the slave in 1784, made a verbal gift of him to the defendant Ramsay, who was then only eight years old, and possession accompanied the gift; the slave remained with the defendant and his mother, Mrs. Ramsay, in the family of Wilson, until the year 1790, when Mrs. Ramsay, (claiming the slave as residuary legatee under the will of Mrs. Gordon, under the idea that the parol gift to her son was void,) by deed of bargain and sale conveyed the slave to Wilson, in consideration of five shillings "and divers other good causes." Wilson held possession of the slave under that deed until the year 1805, when the defendant took him away, and has ever since detained him. The defendant and his mother and the slave had continued to live in the family of Wilson from the year 1784 till the year 1805.

The court below, upon the plaintiff's motion, instructed the jury, "that if such a verbal gift was made to the defendant of the said slave, and such possession given to him as aforesaid, the gift is void in law, and opposes no bar to the recovery of the plaintiff."

The verdict and judgment in the court below being against the defendant, he brought his writ of error.

*Youngs, for the plaintiff in error. [*402

Did not contend that the verbal gift of a slave could, under the laws of Virginia, give a good title, but that such a gift and five years' possession was a good title for a defendant in *detinue,* but not for a plaintiff, if his possession was wrongfully acquired. He contended that the defendant's title was confirmed by the operation of the act of assembly of Virginia, passed in 1787.

E. J. Lee, contra.

If five years' possession is a good title to Ramsay, fifteen years' possession must be a good title in Wilson; and his possession, being posterior to Ramsay's, must give him a better title.

The case of *Turner v. Turner,* 1 Wash. 139, is decisive that such a parol gift cannot be given in evidence.

Youngs, in reply.

The possession of Wilson, in order to create a title, must at all events have been adverse: but his possession was the possession of Ramsay. They all lived in the same family.

In the case of *Jourdan v. Murray,* 3 Call. 85, it is decided by the court of appeals in Virginia, that a parol gift of slaves prior to 1787, may be given in evidence to prove five years' possession, so as to bar the plaintiff's recovery.

MARSHALL, *Ch. J.* There is no question that five years' adverse possession, with or without right, gives a good title.

March 14. MARSHALL, *Ch. J.,* delivered the opinion of the court to the effect following:

The case is the same as that of *Willison v. Spiers,* just decided, except that in this case the court below gave the *instruction which [*403 the court in Kentucky ought to have given.

The opinion of the court was only that a parol gift to the defendant, accompanied by possession, did not bar the plaintiff's right to recover.

This court gives no opinion as to the title acquired by the possession.

Judgment affirmed.

STEAD'S EXECUTORS *v.* COURSE.

A collector, selling land for taxes, must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted.

It is incumbent on the vendee to prove the authority to sell.

By the tax laws of Georgia, for 1790 and 1791, the collector was authorized to sell land only on the deficiency of personal estate; and then to sell only so much as was necessary to pay the taxes in arrear.

Under those laws the sale of a whole tract, when a small part would have been sufficient to pay the taxes, was void.

ERROR to the circuit court for the district of Georgia, as a court of equity.

Stead's executors brought their bill in equity against Elizabeth Course, the widow, and Caroline Course, the infant daughter of Daniel Course, deceased, to set aside, as fraudulent, a deed of land made by Courvoisie, a collector of taxes for Chatham county, to Daniel Course, and to charge the land for payment of a debt due from the late firm of Rae & Somerville to the complainant's testator, according to a former decree of the court. The bill charges

NOTE.—*Sale of lands for taxes; strict compliance with statute necessary*—see note, 4 L. ed. U. S. 518.

the land as being still the estate of John Rae, deceased, formerly one of the partners in the firm of Rae & Somerville, and that all the joint funds were exhausted.

There was no appearance for the defendant Caroline; but the defendant Elizabeth appeared, and pleaded, that her late husband, Daniel Course, purchased the land fairly and bona fide at public sale from the tax gatherer, for the sum of 552 dollars and 89 cents, without notice of any claim, title or interest of the complainants in the said land, if any they have. The plea avers that the consideration money was paid to 404*] the tax gatherer; that *he had a right to sell the land for default in payment of taxes; that the taxes were not paid at the time of sale, which was publicly made, after legal notice; that Daniel Course took immediate possession, and died seized thereof, and at his death it descended to his heirs, of whom the defendant Elizabeth is one. The deed exhibited was dated May 5th, 1792.

The defendant Elizabeth also answered the bill, denying fraud, &c.

To the plea there was a replication, denying that the tax gatherer had a right to sell the land; that the sale was publicly made after legal notice, and that Daniel Course was a fair and bona fide purchaser, for a valuable consideration, without notice; and averring that the pretended sale and conveyance were unfair, fraudulent and void.

On the 17th of May, 1805, the circuit court sustained the plea, and dismissed the bill with costs.

The evidence and facts stated in the record are as follows:

1. The advertisement of the sale, in these words:

"SALE FOR TAXES.

"Will be sold, on Saturday, the 5th day of May, at the court house in the city of Savannah, between the hours of twelve and one, 450 acres of land, lying and being on Pipemaker's Creek, county of Chatham. Also, part of the lot No. 6, Percival ward, together with the house thereon, seized for the payment of the taxes of 1790 and 1791. "FRANCIS COURVOISIE,

"T. C. C. C."

2. The original grant from the province of Georgia to John Rae, dated November 2d, 1762, describing the land as follows: "All that tract of land, containing 450 acres, situate and being in the parish of Christ's Church, in our province 405*] *of Georgia, bounded on the northeast by the river Savannah, on the southeast by land of James Edward Powell, Esq., on the southwest by land of Isaac Young, and land of the said John Rae, and on the northwest by Pipemaker's Creek."

3. A certificate of a return of taxable property belonging to the estate of Robert Rae, made by Samuel Hammond, Esq., for the year 1791, viz., Chatham county, 282 acres tide swamp on Hutchinson Island; 450 acres pine barren, opposite the above, on Pipemaker's Creek; Richmond and Franklin county, 1,400 acres oak and hickory land; 56 negroes; one four-wheeled carriage.

4. The following letter from Hammond to the collector, viz.:

"Sir, As you are compelling me to pay the taxes due by the estate of Robert Rae, deceased, for the years 1790 and 1791, and as I have no moneys in my hands of the estate, or able to raise the sum due out of my own resources, and the law allowing me the privilege of pointing to property of the estate, you are hereby noted to levy on 450 acres of land in Chatham county, laying and being on Pipemaker's Creek.

"I am your obedient servant,

"SAMUEL HAMMOND.

"F. Courvoisie, Tax Collector,

"2d April, 1792."

There was also evidence that the land came by descent or devise from John Rae, the original grantee, to Robert Rae, whose widow (the mother of the defendant, Elizabeth Course) afterwards married Samuel Hammond.

It was also stated as a fact, that "the relationship between the wife of Daniel Course and the wife of Samuel Hammond, appeared to the court the only evidence from *which [*406 it could be inferred that Course participated in the fraud, or had a knowledge of it."

By the tax laws of Georgia for 1790 and 1791, tide swamps of the first quality are valued at 97 shillings per acre, second quality at 60 shillings, and third quality at 37 shillings; pine barrens adjoining tide swamps, and within three miles of tide water, at 15 shillings per acre; oak and hickory lands of the first quality at 15 shillings per acre, second quality 7 shillings, third quality 4 shillings. The tax for 1790 was ten shillings, and for 1791 six shillings, on every hundred pounds' value of the lands. The taxes were to be paid by the 15th of December, and it was enacted, that "in case of default, the collector of the county where such defaulter shall happen, shall immediately proceed against such defaulter by distress and sale of the goods and chattels, if any be found, otherwise on the land of such defaulter, or so much thereof as will pay the amount of taxes due, with costs; and in all such cases to make title to purchasers of the property sold as aforesaid."

The collectors were required to close their accounts by the 1st of March and deliver the same to the treasurer, and, after deducting two and a half per cent. on all such taxes as they shall receive, pay the remainder to the treasurer.

P. B. Key, for the plaintiffs in error.

1. The plea is substantially defective.

1st. In not averring a seizin in some person who was liable for taxes.

2d. In not averring that there was no personal property which might be distrained for the taxes, for it was only in default of personal property that the collector was authorized by law to sell the land; and,

3d. In not averring that Daniel Course had not notice of the complainants' claim before he paid the purchase money.

*A purchase consists of a number of [*407 separate acts, such as the agreement, the deed, the payment, &c. If, before the last act be done, he obtains notice, he gains no title in equity. Even if he has paid the money but not received the deed at the time of notice, he is not a purchaser without notice.

The same strictness is required in pleading in equity as at common law. A plea in equity must of itself constitute a complete defense. It can derive no aid from the answer. The answer cannot come into view until the plea be disposed of. If the plea be good, the answer is

unnecessary; and in considering the validity of the plea, every allegation of the bill, not answered by the plea, is to be taken to be true. Mitford, 15, 177; 2 Atk. 630, *Story v. Windsor.*

2. But if these defects of the plea should be considered as cured by the replication, yet it appears upon the whole record that the facts of the plea are not true, and that the sale of the collector transferred no right in the land to Daniel Course.

1st. The sale and conveyance were fraudulent and void.

2d. The collector had no authority, under the circumstances of the case, to sell; and if he had authority, he has not executed it legally.

1. The sale was fraudulent. The circumstances indicating fraud are, that the lands were liable in equity to the debts of John Rae. That the taxes were not paid for 1790 and 1791, although there was personal estate enough in the hands of the representatives of Robert Rae, in whose occupation the lands were, to pay them. This appears by Hammond's return of property, in which he has returned 56 negroes as the property of Robert Rae. That notwithstanding his personal property was in his hands, Hammond, who had married Robert Rae's widow, the mother of the defendant Elizabeth Course, not only permitted the land to be sold for taxes, but requested it might be sold, and pointed out this very land as the object of sale. The adver- [*408] tisement described the land *by its least notorious appellation. It mentions neither the name of the owner of the land, nor the amount of taxes due. Hammond's son-in-law, the husband of the defendant, became the purchaser. There can be no doubt that he must have known the situation of the estate. He knew it was liable for the debts of John Rae. He knew that there was personal estate sufficient to pay the taxes. He knew that his father-in-law ought to have paid them; and he knew that he had directed the collector to sell the land. He knew the price which he gave for the land was far below its value; for the bill states it was sold in 1799 for 2,386 dollars, and the defendant, in her answer, says that it was then sold far below its value. He and his father-in-law and their wives were the representatives of Robert Rae, and were the only persons, except creditors, who were interested in the lands. These circumstances go strongly to show that the sale by the collector was only the means used to defeat the creditors of their just debts.

2. The collector had no authority to sell these lands for taxes.

1st. Because there was sufficient personal property, of which he had notice by the return of Hammond.

2d. Because he was not authorized in any case to sell more land than was sufficient to pay the taxes. The price which Daniel Course gave at this pretended sale was 552 dollars; the same lands, in 1799, sold, under the decree of the court, for 2,386 dollars, which the defendant in her answer says was far below their value, and yet the utmost amount of taxes which could be claimed, even supposing that all the taxes for 1790 and 1791, due from the estate of Robert Rae, for property wherever situated in Georgia, could be charged upon this one tract of land, would not exceed 150 dollars; and if, as we contend, this tract is liable for its own taxes only, the amount could not exceed 10 or 12 dollars. All special authorities are to be rigidly pursued and strictly construed. Cowp. 26.

3d. Because the collector could not sell after the first of March in any year for taxes due in a preceding year. *The 15th of Decem- [*409] ber was the time limited for the debtors to pay their taxes, and from that time till the 1st of March was allowed to the collector to enforce payment by distress and sale; and on that day he was bound to close his accounts, and pay over the moneys collected to the treasurer. Whether he had collected or not, he was bound to pay; and the law did not give him this summary remedy to indemnify himself for any taxes he might advance. If it did, it must give him a lien for an indefinite time, which cannot be supposed to have been the intention of the legislature. It is a special power of an extrajudicial nature, to perform a duty in a certain time, and he is bound to pursue his authority strictly. If he paid the taxes which he had not collected, the power to distrain did not continue for his benefit. It is to be presumed that he did his duty, unless the contrary appears, and that he did pay the taxes which he was bound to collect, and had failed to collect, at the time when he was bound to close his accounts.

4th. Because the advertisement did not sufficiently describe the land. It is simply called 450 acres of land lying on Pipemaker's Creek, without mentioning the Savannah River, on which it was also bounded, and which was a more notorious object. It neither mentions the person from whom the taxes were due, nor their amount, nor the name of the owner of the land. The advertisement has no date, nor is it stated what notice was given, nor how it was published.

There is no evidence of the amount of the taxes due, nor of the amount demanded; nor of the amount of taxes for the non-payment of which the land was sold.

It does not appear that Courvoisie was collector for the years 1790 and 1791.

Martin, contra.

The purchaser from a collector of taxes has a good title without deed. Upon the payment of the purchase money, the title vests by operation of law, in the same *manner as it does [*410] in the case of a sale of lands under a *fieri facias.*

There is no fact stated in the bill to show the sale to be fraudulent. No advertisement is required by law in the proceedings of the collector. There is no replication to the answer, and, therefore, all the facts it contains are to be taken to be true, so far as it is responsive to the bill.

It was not necessary to state in the plea that any person was seized of the land, nor who was liable for the taxes. The property was liable for taxes whoever might be its owner.

When sales are made by a public officer, he is presumed to do his duty, and to have complied with all the requisites of the law, until the contrary is proved. Every presumption is in favor of the purchaser. The purchaser is not bound to know whether the taxes have been paid or not.

There is no evidence that there was personal property at the time the taxes were payable. The certificate of Hammond was a year pre-

eeding that time; and the personal property might have been sold; but if there was, the purchaser of the real estate is not to be prejudiced thereby; it is a matter between the person liable for taxes and the officer who sold the land when he might have sold the personal estate.

If an executor have power by will to sell land for payment of debts, in case of a deficiency of personal assets, and he sells, although the personal assets were sufficient, yet the purchaser of the land will be protected. 1 Eq. Ca. Abr. 358, 359; 2 P. Wms. 148; 2 Cha. Ca. 115.

The collector had a right to sell this land to pay all the taxes due from Robert Rae's estate wherever situated; and it is immaterial at what price Daniel Course purchased the land, if the sale was fairly made.

411*] *Hammond was not bound to pay the taxes on this land, if he knew that it was liable to the claim of the complainants. It would have been a waste of the estate of Robert Rae.

The imperfect description of the land is no evidence of fraud in the collector; he advertised it by the name stated in the return of Hammond. He was not obliged to describe it as lying on the Savannah. The law did not require him to name the person who had title to, or was in possession of, the land, nor the name of the person liable for the taxes, nor their amount. There is no proof of fraud but what arises from those circumstances, and the relationship between Mrs. Hammond and Mrs. Course; and these are only circumstances which at most may excite a suspicion. The presumption of law is always against fraud. It must always be proved. And unless it be not only proved, but brought home to the purchaser, the sale cannot be set aside.

P. B. Key, in reply.

The plea admits everything in the bill not denied by the plea, and although there be also an answer, and no replication to that answer, yet the facts stated in the answer cannot be brought in aid of the plea. It must stand on its own foundation.

The answer cannot be brought into view until the question upon the plea be decided.

It was not necessary for the bill to state all the facts which may be given in evidence of fraud. It is sufficient if fraud be positively charged in general terms.

The rule of law is not that everything is to be presumed in favor of the purchaser; but that a purchaser who claims title under a special limited authority, a power naked and without interest, must show that the power has been strictly pursued.

The doctrine advanced on the other side, that whether the taxes were due or not, the purchaser is protected in his title, is hazardous in 412*] the extreme; it *would subject all our estates to the control of a collector of taxes.

The cases cited do not support the doctrine. They only show that where lands are devised for the payment of debts generally, the purchaser is not bound to see to the application of the money; or to inquire whether there be personal estate sufficient to pay the debts; but if lands are devised to pay certain debts specified in a schedule, there the purchaser must see to the application of the money. The case cited from 2 P. Wms. 148, was a case of a term for years only, which the executor had a right to sell as personal estate.

The sound rule of law is, that no man shall be permitted to sell the estate of another without an express delegated authority; and he who claims under such an authority must show that it has been strictly pursued. *Caveat emptor*, when he buys property from a man who is not the owner of it.

Property in one county could not be liable for taxes on property in another county. There were different collectors in different counties, who had separate and independent powers.

March 14. MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows:

The plaintiffs, who were the creditors of Rae & Somerville, brought this bill to subject a tract of land in the possession of the defendants to the payment of a debt for which they had obtained a decree against Rae & Somerville.

The defendants plead that Daniel Course, under whom they claim by descent, is a fair purchaser, for a valuable consideration, of the premises in question, at a sale thereof, by the collector of taxes for the county in which they lie, made for taxes in arrear. The defendant also answered, denying fraud.

*A replication was filed to this plea, [*413 and, on a hearing, it was sustained, and the bill dismissed.

In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded.

On the first point, the counsel for the plaintiff has adduced authority which would certainly apply strongly, if not conclusively, in his favor, if a special demurrer had been filed to the plea. But as issue has been taken on it, the court thinks it sufficient, since it contains, in substance, matter which, if true, would bar the action.

The replication puts the matter of the plea in issue, and it is incumbent on the defendants to support it. They prove a sale by the collector on account of taxes, and adduce a deed conveying the premises to the purchaser. But this testimony alone is not sufficient to support the plea. The validity of the sale is the subject of controversy, and its validity depends on the authority of the collector to sell, and on the fairness of the transaction. It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is true that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may establish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, will be exercised. But it is incumbent on the vendee to prove the authority to sell, and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged.

414*] *In examining the law under which this sale was made, the court perceives that the collector is authorized to sell land only on the deficiency of personal estate; and then to sell only so much as is necessary to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it.

Had this fact been established, the court is inclined to think that the circumstances of the case as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed on the question whether the sale was fraudulent or not. But if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained.

It is, therefore, the opinion of the court, that there is error in the decree of the circuit court for the district of Georgia, in sustaining the plea of the defendants, and dismissing the bill of the plaintiffs, and that the said decree ought to be reversed and annulled, and the cause remanded, with directions that the defendants shall answer over, and that further proceedings be had in the said cause, according to equity.

Decree reversed.

415*] *HIGGINSON *v.* MEIN.

The act of Georgia confiscating the estate of the mortgageor, is no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war. The estate of the mortgageor only was confiscated, not that of the mortgagee.

The act of limitations of Georgia does not apply to mortgagees. The possession of the mortgageor is not adverse.

Quære, whether a presumption of payment of the debt does not arise from the circumstances of this case?

THIS was an appeal from a decree of the circuit court for the district of Georgia, which dismissed the complainant's bill brought to foreclose a mortgage.

The facts, as stated by MARSHALL, *Ch. J.*, in delivering the opinion of the court, were as follows:

In November, 1769, Alexander Wylly, then residing in Georgia, executed his bond to Greenwood & Higginson, merchants of London, for the sum of 2,108*l.* 4*s.* sterling, conditioned to pay 1,054*l.* 2*s.* like money, on or before the 1st of January, 1773; and also executed a deed of mortgage, (which was admitted to record in the secretary's office,) to secure the payment of the bond. Alexander Wylly took part with the British in the war of our revolution, in consequence of which his estate was confiscated, and commissioners were appointed to take possession of it and to sell it. In 1784, the mortgaged premises were sold and conveyed by the commissioners to certain persons in Savannah, who sold and conveyed them to James Houston, who retained peaceable possession of them until his death. In 1796 these lands were sold under execution by the marshal, to satisfy a judgment obtained against James Mossman, as executor of James Houston. The purchaser at the marshal's sale had notice of the mortgage deed to Greenwood & Higginson.

This suit is brought against the agent of the purchaser, (to whom notice was given, and to whom the purchaser has since conveyed his right,) in order to obtain payment of the debt due from Wylly, and to foreclose all equity of redemption in the mortgaged premises. The bill was filed on the 4th of November, 1802.

*P. B. Key, for the appellant. [*416

The treaty of peace of 1783 removed all legal impediments to the recovery of debts. By the fourth article, "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." And by the 5th article, "It is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." At the time of the treaty, this land was not sold, but holden by the state under the confiscation act. After the treaty the state held it subject to the mortgage, and could sell only such right as it had. It could at most sell Wylly's right of redemption.

Harper, contra.

The estate both of the mortgageor and mortgagees in this land was confiscated, and vested in the state of Georgia. If the treaty is to set up the title, no estate of a British subject indebted to a British subject could ever be confiscated; for the land may be the only fund out of which the creditor can get payment.

The impediments intended to be removed by the treaty were only legal impediments, not everything which went to impair the security;

NOTE.—As between mortgageor and mortgagee the relation exists that operates as an estoppel to the mortgageor's claiming possession adverse to the mortgage. The principle of estoppel arises where the action is between mortgagee and mortgageor, their privies or assigns.

Tyler on Ejectment, 543, 166, 169.

Doe v. Maisey, 8 Barn & Cres. 767.

Carroll v. Ballance, 26 Ill. 9; Fuller v. Wadsworth, 2 Ired. 263; Den v. Stockton, 7 Halst. 322; Ely v. McGuire, 2 Ham. 223; Rockwell v. Bradley, 2 Conn. 1; Wakeman v. Banks, Id. 445; Smith v. Shuler, 12 Serg. & R. 240; Alsop v. Peck, 2 Root, 224; Bank v. Bates, 11 Conn. 519; Doe v. Roll, 7 Ham. part 2, 70; Brown v. Mace, 7 Blackf. 2; Lyman v. Mower, 6 Vt. 345; Wilson v. Hooper, 13 Id. 653; Keech v. Hall, Doug. 21; Thunder v. Belcher, 3 East. 449; Jackson v. Linghead, 2 John. 75; Jackson v. Chase, Id. 74; Jackson v. Greene, 4 Id. 186; Jackson v. Fuller, Id. 215; Jackson v. Stackhouse, 1 Cow. 122; Jackson v. Colden, 4 Cow. 266; Rogers v. Eagle Co. 9 Wend. 611; Den v. Van Ness, 5 Halst. 102; Right v. Bucknell, 2 Barn. & Ad. 278; Jackson v. Marsh, 5 Wend. 44; Doe v. Vickers, 4 Adolph. & Ell. 782; Conner v. Whitmore, 52 Me. 185; Pauling v. Barron, 32 Ala. 9; Cram v. Bailey, 10 Gray, 87; Wheelock v. Henshaw, 19 Pick. 341.

not that which merely rendered the debtor less able to pay. Confiscations were not included under the expression legal impediments, because there is a separate provision for the case of confiscations. If confiscations were meant to be included in the expression, it might as well be extended to any general acts of the legislature by which the debtor's means of payment may be diminished. This being a particular lien, does not differ the case from that of a general lien. Every judgment creditor had a lien upon all the lands of his debtor, and if all these liens are saved by the treaty, there were very few confiscations which it would not annul.

417*] *The fifth article of the treaty extends no further than the fourth.

MARSHALL, *Ch. J.* The decisions of this court have been uniform, that the acts of the states, confiscating debts, are repealed by the treaty; and if, in this case, the debt remains, does not the security remain also? Is not the remedy as much protected by the treaty as the debt itself?

Harper. We contend not.

The lapse of 30 years induces a presumption that the bond is satisfied. We do not rely upon the statute of limitations, but the general presumption. In England, it is decided that the presumption arises by the lapse of 20 years without a demand of payment of interest.

MARSHALL, *Ch. J.* The period of 20 years is fixed upon in case of a bond, because in that time the interest at five per cent. equals the principal; and no further interest is covered by the penalty of the bond.

Harper. That is not the reason stated in the English books.

But the reason is, that a man is presumed to depend upon the interest of his money as a revenue.

The fact of the plaintiff's being beyond seas does not remove the presumption, because both parties were equally beyond seas, and probably both within one jurisdiction.

P. B. Key, in reply.

The fifth article of the treaty expressly provides for the case. How can a man have an interest, by debt, in confiscated lands, unless it be by mortgage, or other lien. The practice in Maryland has always been to protect such liens.

LIVINGSTON, *J.* I have never heard that confiscated property has been restored by force of 418*] the treaty. The *treaty only provides that Congress shall recommend such restitution.

Key. Debts due to British subjects were not confiscated by the act of Georgia. They were only sequestered.

March 14. MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court, as follows:

It is contended, on the part of the purchaser,

1st. That the lands are exonerated from the mortgage by the confiscation and sale thereof made by the state of Georgia.

2d. That they are exonerated by the length of time which has intervened since that confiscation and sale, during which an adverse possession had been held.

3d. That payment of the mortgage is to be presumed.

Several acts of confiscation were passed during the war by the state of Georgia, in which the name of Alexander Wylly is to be found. That under which the defendants in this case claim, was made in the month of May, in the year 1782. That act contains also a clause confiscating generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered. The debt due to Greenwood & Higginson came within this exception, and the majority of the court is of opinion, that the lien given by the mortgage on the land of Wylly, for the security of that debt, was not confiscated.

The estate of Wylly, not the interest of Greenwood & Higginson in that estate, being confiscated, it is not to be inferred that the lien of Greenwood & Higginson on that estate was discharged. The treaty of peace *was [*419 made while the estate remained unsold. The fifth article of the treaty, after discovering much solicitude on the part of Great Britain for the entire restoration of confiscated estates, concludes with this clause: "And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article applies to those cases where an actual confiscation has taken place, and stipulates expressly, that in such cases the interest of all persons having a lien upon such lands shall be preserved. Neither the confiscation, nor any act in consequence of the confiscation, can constitute a legal impediment to the prosecution of their just rights. The preceding part of the article had contemplated sales of the confiscated property, and, consequently, this clause must have been intended to charge the lands, even in the hands of a purchaser. But respecting its application to this particular case, the court cannot conceive a doubt. The lands, at the time of the treaty, remained unsold, and the government claiming them as confiscated, stipulates through the proper constituted authorities for their liabilty to this mortgage. If, then, the act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force, and the subsequent sale of the property could only pass it with the burden imposed upon it.

2d. Is this remedy barred by the act of limitations?

Upon an attentive consideration of that act, it appears to be intended for suits at law, claiming the lands themselves, not to suits in equity for the purpose of subjecting the lands to the payment of debts for which they are mortgaged. The words of the law would lead to that opinion, and it is confirmed by the consideration that, in such cases, the possession of the mortgageor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee. Unless, therefore, this statute has been otherwise construed *in Georgia, it would not be considered [*420 as applicable to such a case as this. But this point must be decided in favor of the plaintiffs, because there is a saving in the act of the rights of persons beyond sea.

3. Is payment in this case to be presumed?

The length of time which elapsed between the day when this bond and mortgage became payable, and that on which the suit was instituted, is certainly sufficient to warrant a presumption of payment. But this presumption may be met by circumstances which account for the delay in bringing this suit. In this case, the war, and those events which succeeded the war, have not the same influence as in ordinary cases of British debts, because the debtor was within the reach of his creditor from the date of his banishment, in the year 1778, and might have been sued. It does not sufficiently appear in the proceedings where he was, nor what was his situation, to enable the court to judge whether the long delay in bringing this suit is or is not sufficiently acounted for. Neither is it shown satisfactorily that Alexander Wylly has left no personal representative who might show payment of this debt. If there be a personal representative of Alexander Wylly in existence, such person ought to be a party to this suit; if there be no personal representative, some evidence that there is none ought to be adduced. In any event, under all the circumstances of this case, enough does not appear to enable the court to decide whether payment ought to be presumed, or whether the delay in instituting this suit can be accounted for, and the court is, therefore, of opinion that an issue ought to have been directed by the circuit court for the purpose of ascertaining the fact of payment. The decree of the circuit court is, therefore, to be reversed, and the cause remanded to that court, with instructions to direct an issue to determine whether the bond in the bill mentioned has been paid, and with liberty to the plaintiff to amend his bill, and make new parties, if he shall desire it.

LIVINGSTON, *J.*, dissented from this opinion, but did not state his reasons.

421*] *POLLARD AND PICKETT *v.* DWIGHT *et al.*

The appearance of the defendants to a foreign attachment in a circuit court of the United States, waives all objection to the non-service of process.

The district judge may alone hold a circuit court, although there be no judge of the Supreme Court allotted to that circuit.

An action may be supported on a covenant of seizin, although the plaintiff has never been evicted; and the declaration need not aver an eviction.

Under the foreign attachment law of Connecticut, an absent person, who is liable for damages for breach of his covenant, is an absent debtor.

The official certificate of survey returned by a legal sworn surveyor in Virginia, cannot be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey.

On the trial of an action in Connecticut for breach of a covenant of seizin of lands in Virginia, the question whether a patent from the state of Virginia for the lands, be voidable, is not examinable.

Parol testimony is not admissible, in an action on the covenant of seizin, to prove prior claims upon the land.

ERROR to the circuit court for the district of Connecticut.

Dwight and others brought a foreign attachment against Pollard and Pickett, in the county court of Hartford, and declared in an action of covenant upon a deed of bargain and sale, in fee-simple, of certain lands in the county of Wythe, and commonwealth of Virginia, by which the defendants below covenanted that they were "lawfully seized of the lands and premises, with their appurtenances, and had good right and lawful authority to sell and convey the same, in manner and form aforesaid;" and the breach assigned was, "that they were not, nor were any or either of them, lawfully seized and possessed of any estate whatever in the said land and premises, nor in any part thereof, nor had the said Pollard and Pickett, or either of them, good right and lawful authority to sell and convey the said land and premises as aforesaid."

The defendants appeared, and removed the cause to the circuit court of the United States for the district of Connecticut, and there pleaded to the jurisdiction of the court, and prayed "judgment whether the honorable Pierpont Edwards, district judge of the district of Connecticut holding said court, there being no justice of the Supreme Court of the United States present in court, will have cognizance of the said cause, because, they say that, by the law of the United States, the circuit court of the second circuit in the district of Connecticut, shall consist of the justice of the Supreme Court residing in the third circuit, and the district judge of the district of Connecticut; and that when the said law was enacted, viz., on the 3d of March, 1803, the honorable William Paterson was the only justice of the Supreme Court residing in the said third circuit, and that he died on or about the 10th of September last past, *and that there is not now, nor hath [*422 there been, since the death of the said Paterson, any justice of the Supreme Court residing in the said third circuit; and there hath not been by the Supreme Court of the United States, or by the President of the United States, any allotment of a chief justice, or an associate justice of the Supreme Court of the United States, to the said second circuit, and this they are ready to verify," &c.; which plea, upon general demurrer was overruled, and a *respondeas ouster* awarded: whereupon the defendants pleaded that they were, at the date of the deed, "well seized and possessed of the said land, and had good right to bargain and sell the same, in manner as is alleged in the said deed, and so they have kept and performed their said covenants, and of this put themselves on the country;" and the plaintiffs likewise."

The verdict was for the plaintiffs, and damages assessed to 27,497 dollars. The defendants moved in arrest of judgment, because it appears, by the declaration, that the said deed was executed, and the lands lie in the state of Virginia; and because the declaration is insufficient, and will not support any judgment; but the motion was overruled and judgment rendered on the verdict.

On the trial a bill of exceptions was taken, which stated that the defendants claimed to be seized under a patent to them from the Governor of Virginia, dated March 20, 1795, and grounded on a survey in favor of David Patterson, by virtue of an entry, dated September 1, 1794, on sundry treasury warrants, to the amount of 150,000 acres, and completed on the 8th day of September, 1794, which survey had

been assigned to the defendant, Pollard; whereupon the plaintiffs offered to read in evidence copies of two surveys made for one Wilson Carey Nicholas, by virtue of two entries made on the same 1st of September, 1794, in the office of the same surveyor, one to the amount of 500,000 acres, and the other to the amount of 480,000 acres, the greater part of which laid in the county of Wythe, and bounding on the land surveyed for Patterson; and that the said survey for 500,000 acres purported to be completed on the 9th of September, 1794, and 423*] *that for 480,000 on the 10th of the same month, and that the extent of all the lines of the said surveys was more than 320 miles; and offered to prove by Erastus Granger, that the nearest part of the said lands to the office of the surveyor of Wythe county, was distant therefrom two days' journey; and that a surveyor could not, in that county, survey a line longer than seven miles in a day; and that he (Erastus Granger) had surveyed the land surveyed for Patterson, and found marked trees only for about three or four miles from the starting point of the survey, and two or three only of the first corners mentioned in the survey, and that the streams ran in opposite directions to those laid down in the plot; which testimony of the said Granger was offered to prove that Patterson's survey was fraudulent, and not made conformably to the laws of Virginia; and the plaintiffs further offered to prove, by the testimony of the said Granger, that there were prior claims upon the land in question to the amount of upwards of 90,000 acres. It was admitted that Granger was not a sworn surveyor. The defendants objected to the above evidence, but the court overruled the objection, and suffered it to go to the jury.

The defendants sued out their writ of error to this court, and the errors assigned were,

1. That the plea to the jurisdiction ought to have been allowed.

2. That the evidence stated in the bill of exceptions ought not to have been admitted.

3. That the declaration is insufficient.

4. That the title of the land could not be tried in Connecticut.

5. That the circuit court had not jurisdiction, the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants citizens of Virginia, not found in the district of Connecticut.

424*] *6. That the judgment ought to have been rendered for the defendants.

C. Lee, for the plaintiffs in error.

This is a prosecution against an absentee for breach of covenant.

The act of Connecticut only authorizes such process against a debtor, not against a man who may be liable for unliquidated damages on a breach of covenant. The words of the Connecticut law, fol. 35, are, "absent or absconding debtors," and the defendants are so called in the declaration. It could never be the intention of the legislature of Connecticut to try the title to land in Virginia by the process of foreign attachment in Connecticut.

Two questions arise in this cause.

1. Whether the circuit court had jurisdiction; and,

2. Whether the evidence stated in the bill of exceptions was admissible.

1. The law is the same in this case on the point of jurisdiction, as if the suit had been originally commenced in the circuit court. Laws U. S. vol. 1, p. 56, s. 12, and by the 11th section of the same act, the circuit court has no jurisdiction but over inhabitants of the state, or over persons found therein and served with process. Vol. 1, p. 55. Process by attachment on effects of persons not inhabitants, cannot be maintained in the circuit courts of the United States. 2 Dall. 396, *Hollingsworth v. Adams.*

A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Capron v. Van Noorden,* (*ante,* vol. 2, p. 126,) *Beecher's Case,* 8 Co. 59; *Bernard v. Bernard,* 1 Lev. 289. And in the case of *Diggs and Keith v. Wolcott,* in this court, at last term, (*ante,* p. 179,) the appellants had removed the cause from the state court to the circuit court, who decreed against them, and on their appeal to this court *the decree [*425 was reversed for want of jurisdiction in the circuit court.

Where the court has a limited jurisdiction, the facts which bring the case within that jurisdiction must appear on the record. 9 Mod. 95; 3 Dal. 382, *Bingham v. Cabot;* 2 Cranch, *Wood v. Wagnon.*

Upon the demurrer to the plea to the jurisdiction, the whole record is open to examination; and the defendant may avail himself of every substantial objection to the declaration, or to the writ, as it is made a part of the record. The declaration itself shows that the lands which are the subject of the covenant are in the state of Virginia; that the deed was there executed; and that the title of those lands is drawn in question. It appears, then, upon the face of the declaration, that the action is local, and can be tried only in Virginia. The declaration also states Pollard and Pickett to be "of the county of Henrico and state of Virginia," and that they are "absent and absconding debtors;" and, therefore, the circuit court was excluded from the cognizance of the case by the 11th section of the judiciary act of 1789, vol. 1, p. 55.

The declaration is also defective in not averring an eviction, or a better title out of the plaintiffs in error. 1 Williams's Massachusetts Reports, 464; *Emerson v. Proprietors of Minot,* 4 T. R. 620.

But the plea in abatement ought to have been allowed. The act of Congress of March 3, 1803, (vol. 6, p. 315,) enacts, "that the circuit court of the second circuit shall consist of the justice of the Supreme Court residing within the third circuit, and the district judge of the district where such court shall be holden;" and by the act of 29th of April, 1802, vol. 6, p. 88, it is "provided, that when only one of the judges, hereby directed to hold the circuit courts, shall attend, such court may be held by the judge so attending." The 5th section of the same act provides for the allotment of the judges among the circuits, in case of a new appointment of a judge; but makes no provision in case of a vacancy.

*There can be no circuit court in the [*426 second circuit unless there be a justice of the Supreme court allotted to that circuit. If the circuit court is to consist of a particular justice of the Supreme Court, and a district judge,

it cannot exist without such a justice of the Supreme Court. A whole consists of all its parts. If any part be wanting it is not a whole. A session of the court may be holden by one judge, but the court must be in existence.

Whenever there are not two judges of the court in existence, its functions are suspended.

2. As to the bill of exceptions.

The papers said to be copies of surveys for Nicholas, ought not to have been admitted in evidence. Nicholas was no party to this suit, and even if there had been evidence that such surveys were ever made, and that these were true copies, they could not be evidence in this cause.

The testimony of Erastus Granger was inadmissible. He was allowed to testify that he had surveyed the land, and that there were prior claims upon it to the amount of 90,000 acres. If he ever made such survey, it was *ex parte*, and as the agent of the appellees. *Ex parte* surveys are inadmissible evidence as to boundaries. 2 Lord Raym. 734, *Bridgemore v. Jennings*.

Illegal or improper evidence, however unimportant or irrelevant, should not be confided to a jury, because it may mislead them. 2 Wash. 281, *Lee v. Tapscott*.

Parol testimony is incompetent to invalidate a title to lands in Virginia, which is to be decided according to the laws of that state.

Unless the prior claims were founded upon deeds or writings they could not be set up against a patent from the state; and if they were founded upon deeds or writings, they ought to be produced.

No lands in Virginia can pass or be conveyed but by deed in writing, acknowledged or proved and recorded.

427*] *Martin, on the same side, in support of the objection that the declaration did not aver an eviction, cited 1 Mod. 292; 1 Saund. 58; 3 Wentworth, 440; 2 Mod. Intrandi, 206, 207; 1 Harris's Entries, 526, 531.

Harper, contra.

According to the decision of the courts in Connecticut, a foreign attachment will lie for damages on a breach of covenant. The distinction is only taken between debts and torts. What is not a tort is a debt, within the meaning of their act of assembly. 2 Swift, 177.

According to the mode of surveying lands in Virginia, by the 23d section of their land law, it is impossible to execute the surveys in the time which intervenes between the dates of the entry and of the survey. The evidence offered was to show that the survey was fraudulent. It was to show that surveys, said to be made in eight days, could not have been made in eight weeks.

The bill of exceptions states the papers to be copies of the surveys, and *ex vi termini*, a copy means a true copy; for if it be not a true copy, it is no copy. The objection was not that they were not copies, but that copies of such papers were not admissible evidence.

The testimony of Granger was to show that the land was included in prior surveys. It was a necessary link in the chain of proof to show title out of the plaintiffs in error.

It was not necessary to aver or to prove an eviction. The case in Williams's Reports is upon a covenant to warrant; which is, in effect, a covenant for quiet enjoyment. So was the case in 1 Mod. 292. In the case from *Saunders*, the covenant was that he was seized. It is true that proof of eviction is one mode of showing a want of title, but it is not the only mode. In *Horsford v. Aggard*, Kirby's Rep. 3, it is decided that eviction is not necessary to recover on a covenant of seizin. If the plaintiff can show that the defendant had a defective *title, it is sufficient. What use would [*428 there be in a covenant of seizin, in addition to the covenant of warranty, if the former requires the same evidence as the latter?

Martin, in reply.

If the papers offered were copies, it does not appear that the originals could not be had.

After Pollard and Pickett had produced a grant under the state of Virginia, the plaintiffs below must have shown a better title in some other person. (Cro. Jac. 304, *Salman v. Bagshaw*,) but they only attempted to prove irregularity in the survey.

The patent gave a good title, even if there had been no survey. The surveyor himself could not have been permitted to contradict his certificate. It does not appear how long the surveyor was employed in making the survey. It could only bear date on one day, and whether that was the day on which he began or finished it, does not appear. It is no evidence of fraud.

Mr. Martin declined arguing the points respecting the jurisdiction, and the form of the declaration, as the court seemed strongly inclined against him; but he thought it a fatal objection to the declaration that it did not aver an eviction; and that the action was local, and not transitory.

March 15. MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows, viz.:

In this case objections have been made to the jurisdiction of the circuit court, and to the proceedings in that court.

The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which *they [*429 would have stood, had process been served upon them, and, consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding. As little foundation is there for the exception taken to the manner in which the circuit court was constituted. That court consists of two judges, any one of whom is capable of performing judicial duties. So this court consists of seven judges, any four of whom may act. It has never been supposed that the death of three of the judges would disqualify the remaining four from discharging their official duties until the vacant seats of their departed brethren should be filled. There is nothing in the peculiar phraseology of that part of the judicial act which establishes the circuit courts, that requires a different construction of the words authorizing a single judge to hold those courts, from what is usually given in other cases, to

clauses authorizing a specified number of justices to constitute a court.

The exceptions taken to the proceedings of the circuit court are more serious. These are,

1. To the pleadings.

2. To the opinions of that court, admitting certain testimony in support of the action.

The objections to the pleadings are,

That the different parts of the declaration are repugnant to each other; and that the declaration is itself insufficient, as the foundation of a judgment.

In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that state to its own statute; and, if it was indispensably necessary now to decide that question, the evidence in favor of the construction maintained by the defendants in error would seem to preponderate.

430*] *Another objection taken to the declaration is, that it ought to have alleged a disseizin of the plaintiffs below, in order to enable them to maintain their action.

On this part of the case, the court can only consider whether the declaration in itself, unconnected with the testimony which was adduced to support it, is so radically defective that a judgment cannot be rendered on it. This leads to the inquiry, whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place; and the court is of opinion that it may be so broken. 9 Co. 60.

The covenant is, that the vendor is seized in fee of the premises which he sells and conveys. Suppose the fact to be that he had no title, nor pretense of title, to those premises; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said that his covenant that he was seized in fee remained unbroken until the real proprietor should think proper to eject the vendee? This question, in the opinion of the court, must be answered in the negative. The testimony which would be sufficient to establish the breach assigned, may be a subject for serious consideration, but on the sufficiency of the breach, as assigned to support a judgment, there is no doubt.

The exceptions to the testimony admitted in the circuit court consists of two parts.

1st. To the admission of certain copies of surveys made for Wilson Carey Nicholas, connected with the testimony of Erastus Granger, describing the face of the country on which the surveys purported to be made.

2d. To the admission of parol testimony to prove prior titles to the lands conveyed in the deed on which this suit was instituted.

1. The surveys of Wilson Carey Nicholas, and the explanatory testimony of Granger, were introduced for the purpose of showing that the patent for the lands sold by Pollard & Pickett 431*] was void, because it issued on a *plat representing a survey which, in point of fact, could not have been made.

In examining this exception, it becomes proper to inquire what was the real issue between the parties.

The plaintiffs below averred in their declaration, that the defendants were not seized and possessed of any estate whatever in the land and premises, nor in any part thereof, nor had they or either of them good right and lawful authority to sell and convey the same. The defendants, in their plea, do not set forth their title, but say, generally, that they were seized of the lands sold and conveyed by them, and had good right to sell and convey the same, as is expressed by their deed. On this plea an issue is tendered, which is joined by the plaintiffs.

To prove that the survey on which the patent granting the lands to the defendants was issued could not have been made, the plaintiffs produced two other surveys made by the same person for Wilson Carey Nicholas, which were said to be completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they are alleged to have been completed, whence the jury might conclude that the survey of Pollard & Pickett was not made.

The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the court, and with which the parties to this controversy have no connection. Had it even appeared that the copies offered in evidence were authenticated, they would, on this account, have been inadmissible.

This whole testimony is inadmissible on other ground. Were it even true that this patent is voidable, if the surveyor had not run round all the lines of the land, a *point not yet [*432 established, it cannot be deemed absolutely void; it cannot be deemed a mere nullity. While it remains in force it is a valid title, and vests the fee-simple estate in the patentee. In this action, and on the trial of this issue, the question whether the patent be voidable by Virginia or not, is not properly examinable. Testimony, therefore, tending to establish that point, is irrelevant and inadmissible.

2. But had the court entertained any doubt on this point, the second part of the exception would be clearly decisive with regard to this judgment.

Parol testimony is admitted to show prior claims to the land in controversy. The defendants in error attempt to defend the admission of this testimony, by supposing it auxiliary to other testimony which had previously established the validity of those claims, and that this witness was only adduced to show that those claims covered this land. Had the fact supported the argument, a private *ex parte* survey would have been a very improper mode of establishing it; but the language of the exception excludes that construction of the opinion which the counsel for the defendants in error would put upon it. The proof offered and admitted is, not that those particular titles which were exhibited and proved to the court covered the land conveyed by Pollard & Pickett, but "that there were prior claims upon it to the amount of upwards of ninety thousand acres." The prior claims rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle; if they were mere claims, not good titles, they ought not to

have been stated to the jury. They were irrelevant to the point in issue.

Upon the whole, the court is unanimously of opinion that the circuit court erred in permitting the copies of surveys made for Wilson Carey Nicholas, and the testimony of Erastus Granger, to go to the jury for the purposes mentioned in the bill of exceptions, and 433*] *that the judgment of the circuit court must, on that account, be reversed, and the cause remanded for a new trial.[1]

Judgment reversed.

EX PARTE LEWIS AND OTHERS.

The jurors in civil cases, attending the circuit of the United States, for the Pennsylvania district, are entitled to one dollar and twenty-five cents each for each day's attendance.

IN the circuit court for the district of Pennsylvania, at November term, 1806, a motion was made by Rawle, in behalf of Lewis and others, (the jurors in civil cases who had attended the court at that session,) that the marshall be ordered to pay each of the jurors one dollar and twenty-five cents for each day's attendance.

But the judges of that court being divided in opinion upon the question, it was certified to this court.

This court ordered it to be certified that the jurors were entitled to the fee of one dollar and twenty-five cents per diem for their attendance.

434*] *CROUDSON AND OTHERS *v.* LEONARD.

The sentence of a foreign court of admiralty condemning a vessel for breach of blockade, is conclusive evidence of that fact in an action on the policy of insurance.

ERROR to the circuit court of the District of Columbia, in an action on a policy of insurance on the cargo of the brig Fame, on a voyage from Alexandria, to, at, and from Barbadoes and four other ports in the West Indies, and back to Alexandria, the vessel and cargo warranted American property. The vessel arrived at Barbadoes, and sailed from thence for Antigua, but on her voyage to that island was captured by a British vessel and carried into Barbadoes, and there condemned in the vice-admiralty court for attempting to break the blockade of Martinique.

The jury found a special verdict, upon which the judgment below was in favor of the plaintiffs.

The only question arising upon this special verdict was, whether the sentence of the court of vice-admiralty was conclusive evidence of an attempt to violate the blockade of Martinique.

This question having been several times, argued (but not decided,) in the case of *Fitzsimsons v. The Newport Insurance Company*, at this term, (*ante*, p. 185,) the counsel submitted it to the court without further argument.

March 15. JOHNSON, *J.* The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of *the act may be substantiated. A [*435 sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of Fitzsimmons, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations; the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law, and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes v. Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the law of policies at the time when they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was *too much blended with the law of [*436 policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law

1.—After the opinion of the court was delivered, Lee prayed that the cause might be remanded, with leave for the defendants below to amend their pleadings.

The court said, that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect.

courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes v. Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes v. Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule, or its applicability to actions on policies, is nowhere controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offense for which the vessel was condemned, and as that offense was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, *J*. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig Fame and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in re-
437*] spect to domestic *judgments, to the judgments and sentences of foreign courts.

It is a well-established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence.

The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question, which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty, of late years, have induced even English judges to doubt of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which the same *charge is made by all neutral [*438
nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question the validity of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes v. Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured, is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy property. Can the parties to that sentence be bound by so much of *it [*439
as works a loss of the property, because it was declared to be enemy property, and yet be left free to litigate anew, in some other form the very point decided from which this consequence flowed? Or upon what just principle let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted, in another court of concurrent jurisdiction, and, in a dif-

ferent form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes v. Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters; men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian v. Henderson*, 3 Bos. & Pull. 499, Chambre, J., speaking upon this point, says, that the sentence of the French court was in that case conclusive against the claim of the assured, "agreeable to all the decisions upon the subject, beginning with the case of *Hughes v. Cornelius*, (confirmed as that was by the opinion of Lord Holt in two subsequent cases,) and pursuing them down to the present period. It is true," he observes, "that in *Hughes v. Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover." Le Blanc, J., says, "that these sentences are admissible and conclusive evidence of the fact they decide it seems not safe now to question: from the time of Car. II. to this day, they have been received as such, without being questioned. In the discussion of the nature of **440*]** such evidence before this house, in *1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases, the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal." Lawrence, J., also speaking of the legal effect of a foreign sentence upon this point, says, "as to which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first." Rooke, J., Lord Eldon, and Lord Alvanley, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudications in the courts of Westminster Hall.

I cite this case for no other purpose but to prove, by the most respectable testimony, that the case of *Hughes v. Cornelius*, decided in the reign of Car. II. had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured prior to the revolution, except that of *Fernandez v. Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes v. Cornelius*, spoken of by the judges in the case of *Lothian v. Henderson*, had been made at *Nisi Prius*, it *would not, [*441 in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of *Fernandez v. Da Costa* receives additional weight, when it is recollected that the judge who decided it was Lord Mansfield, and when, upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge Buller, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred from the case of *Bernardi v. Motteux*, decided in that year. Lord Mansfield speaks of it as he would of any other well-established principle of law, declaring, in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that as between him and the insurer, the sentence is prima facie evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as prima facie evidence. Certainly no case was referred *to, and I have not met with [*442 one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive, except in

the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is prima facie evidence. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be prima facie evidence, if not conclusive, upon the facts directly decided. A domestic judgment is not even prima facie evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided, this principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig Fame and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the con-
443*] trol *of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.[1]

THE UNITED STATES
v.
THE SCHOONER BETSY AND CHARLOTTE, and Her Cargo.

All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried without a jury.

Quære, whether the answer of the claimant to the libel ought not always to be upon oath if required; and whether he is not bound to submit to answer interrogatories upon oath, *viva voce* in open court.

Whether, on the trial of a vessel for violation of the law prohibiting intercourse with certain ports in St. Domingo, evidence be admissible that other vessels belonging to the same owner were at the same prohibited port at the same time; as a circumstance tending to discredit the evidence of distress set up as an excuse for going to such prohibited port?

THIS was an appeal from the sentence of the circuit court of the district of Columbia, reversing that of the district court, which condemned the schooner Betsy and Charlotte, and her cargo, as forfeited, for a violation of the act of Congress of the 28th of February, 1806, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo." Laws U. S. vol. 8, p. 11.

The libel being filed, and the monition returned executed, the claimant appeared, and having given *fide-jussory* caution, to respond the costs, offered a plea admitting all the facts charged in the libel, excepting the voluntary carrying of the vessel into the port of Cape Francois, the prohibited port mentioned in the libel, which he denied, and "thereof put himself on the country." But the district judge rejected the plea, and ordered the claimant to answer on oath: whereupon the claimant offered the same denial on oath, by way of answer; to the receiving of which the attorney for the United States objected, unless the claimant would make oath to answer truly all interrogatories which might be *put to him [*444 relative to the cause; but the judge overruled the objection, and received the answer, saying that the United States might except to the answer, in the same manner as to an answer in chancery; or, might reply, setting forth new facts not inconsistent with the libel, and put interrogatories thereupon, as upon the allegations in a bill in chancery, which, if proper and pertinent, must be answered; as was done in the case of *Maley v. Shattuck*, (*ante*, vol. 3, p. 458.)

The attorney for the United States filed a replication, and propounded interrogatories, which he prayed might be answered by the claimant *viva voce*, in open court. To this the claimant objected, but the judge overruled the objection.

The Betsy and Charlotte sailed from Alexandria in September, 1806, with a clearance for St. Jago de Cuba.

Upon the trial, the attorney for the United States produced and offered evidence, that during the months of August and September in the same year, two other vessels, owned in whole or in part by the claimant, sailed from Alexandria, with clearances for St. Jago de Cuba, and, as well as the Betsy and Charlotte, arrived at Cape Francois. To this evidence the claimant objected, but the judge overruled the objection and heard the evidence.

From the sentence of condemnation by the district judge, the claimant appealed to the circuit court, and new evidence being admitted, the sentence was reversed, and restoration awarded. From this sentence the United States appealed to this court, where witnesses were examined *viva voce*, both on the part of the United States and on that of the claimant.

C. Lee, for the claimant, stated that he should contend,

1. That the proceedings ought to have been

1.—Judges Chase and Livingston dissented; and Judge Todd, not having been present at the argument, gave no opinion. So that this judgment is reversed by the opinions of Marshall, Ch. J., Cushing, Washington, and Johnson, Justices.

according to the course of the common law, and the facts ought to have been tried by a jury.

445*] *2. That the judge ought not to have compelled the claimant to answer upon oath; and,

3. That the vessel ought to be acquitted upon the facts of the case.

Jones, for the United States, was stopped by the court, who expressed a wish to hear the other side. He wished, however, to be heard upon the question of putting the claimant to answer upon oath, and was indulged.

He observed that this was not a proceeding *in personam*, but *in rem*. The United States did not bring in the claimant by process, and compel him to answer upon oath, as is done in chancery cases; but the claimant comes in voluntarily to support his interest, and submits to the jurisdiction of the court. He ought to come with clean hands and a pure heart. If this be a case of admiralty jurisdiction, the proceedings must be according to the course of the civil law, where the practice universally has been to try cases without a jury. Wood's Inst. Civ. Law, 133; 2 Browne's Civ. Law, 248, 249, 413, 415, 416; 1 Browne, 472, 474; *Maley v. Shattuck*, (*ante*, vol. 3, p. 458); 1 Domat, 460, s. 4. Such also was the understanding of the legislature, when they established a fee for the drawing of the interrogatories. Laws U. S. vol. 2, p. 222.

The exception in the English statutes applies only to the ecclesiastical courts, and to those interrogatories the answers to which might subject the party to ecclesiastical censures.

But the act of Congress upon which this libel is founded, does not make it criminal in the person to trade to St. Domingo. It only subjects to forfeiture the property, and renders the party liable upon his bond.

Youngs, contra.

There can be no case of admiralty jurisdiction, unless it be a case under the law of nations. Cases of revenue, or of municipal seizure, are not cases of admiralty and maritime jurisdiction.

446*] *The 9th section of the judiciary act, (vol. 1, p. 53,) merely gives to the district court jurisdiction of cases of seizure, but does not make them cases of admiralty. And in all cases at common law, the trial by jury is guarantied by the constitution of the United States. The act under which this prosecution is commenced does not direct the form of trial.

The district court, as a court of admiralty, is a court of limited jurisdiction; and in this case, the libel does not state that the seizure was made on waters which are navigable from the sea by vessels of ten or more tons burthen. The fact is not alleged which alone could make it a case of admiralty jurisdiction.

In England a seizure for violation of the navigation act is tried by information in the court of exchequer, according to the course of the common law,

It is contrary to the principles of the common law to make a man criminate himself.

MARSHALL, *Ch. J.*, said the Court wished to hear the counsel for the United States on the question of fact.

Jones. It is to be understood, then, that the court is satisfied as to the questions of law?

MARSHALL, *Ch. J.* No attempt has been made to distinguish this case from those of the *Vengeance*, 3 Dall. 297, and *The Sally*, (*ante*, vol. 2, p. 406.) Those cases have settled the law, and unless this case can be distinguished from those, the court does not think an argument necessary.[1]

*Jones. It is objected that it does not [*447 appear upon the face of the libel that the seizure was made upon waters navigable from the sea by vessels of ten and more tons burthen. But it is stated in the libel that the vessel was more than ten tons burthen, that the seizure was made in the port of Alexandria, and that the vessel had sailed from that port to the West Indies, and back to Alexandria, from whence it necessarily follows, that the waters of the port of Alexandria are navigable from the sea by vessels of ten and more tons burthen. Besides, this court is bound to take notice of the ports of entry for foreign vessels established by law; and the port of Alexandria is one of those ports.

In the case of *The Vengeance*, the court officially took notice that the bay of Sandy Hook contained waters navigable, &c.

If the jurisdiction appears by necessary inference from what is stated, it is sufficient.

C. Lee, contra.

By the 3d article of the constitution of the United States, the judicial power of the United States is extended "to all cases of admiralty and maritime jurisdiction. Congress could not make cases of admiralty and maritime jurisdiction; and under that clause of the constitution they could not give their courts jurisdiction of a case which was not of admiralty and maritime jurisdiction at the time of the adoption of that constitution. The question, then, is whether, according to the understanding of the people of this country at that time, a seizure of a vessel, within the body of a county, for breach of a municipal law of trade, was a case of admiralty cognizance. It certainly was never so considered in England, from whence we draw all our ideas of admiralty jurisdiction. All seizures in that country for violation of the laws of revenue, trade or navigation, are tried by a jury in the court of exchequer, according to the course of the common law. There is nothing in the course of proceedings *in rem* which requires that they should be in a court of admiralty. A *court [*448 of common law is as competent to the trial of such cases as a court of admiralty. The high court of admiralty in England exercises no original jurisdiction in revenue cases. It hears only appeals in such cases from the vice-admiralty courts in the colonies, to whom the jurisdiction is given by an act of parliament. 2 Browne's Civil Law, 492; 2 Rob. 189, *The Sarah;* 4 Inst. 135, 139; 2 Browne, 75, 78; 3 Bl. Com. 106; Parker, 23, 273.

1.—C. Lee. I hope to show that this case is distinguishable from those; and to be permitted to argue at large the point of law, that this is not a case of admiralty jurisdiction. I argued the case of the Vengeance, and I know it was not so fully argued as it might have been; and some of the judges may recollect that it was rather a sudden decision.

Chase, *J.* I recollect that the argument was no great thing, but the court took time and considered the case well. The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries.

Nor were such cases ever supposed by the people of this country to be rightfully classed among causes of admiralty. It was one of our serious grievances, and of which we complained against Great Britain in our remonstrances to the king, and in our addresses to the people of Great Britain, while we were colonies, that the jurisdiction of the courts of vice-admiralty was extended to cases of revenue. Journals of the old Congress, vol. 1, p. 47. Such being the understanding of the people of this country at the adoption of the constitution, we are to presume that the words "cases of admiralty and maritime jurisdiction," did not include cases of seizure like the present. The 9th section of the judiciary act (vol. 1, p. 53,) is to be construed with a reference to the meaning of those expressions in the constitution; and if it cannot, consistently with the force of its terms, be reconciled with the constitution, it must yield to the superior obligations of that instrument. The words of that section of the act, as far as they affect the present question, are, "and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." "And the trial of issues in 449*] fact in the *district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury."

The word "including" means only, moreover, or, as well as.

The district court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including, within its exclusive original cognizance, all seizures, &c. It does not mean including within the expression "all civil causes of admiralty," &c. If such cases of seizure were civil causes of admiralty and maritime jurisdiction, there was no necessity to enumerate them, because the expression, all civil causes of admiralty, &c., certainly included them. If they were not civil causes of admiralty and maritime jurisdiction, Congress could not make them such, nor by forcing them into that class, deprive the citizen of his right to a trial by jury. Congress had no such intention, for in the very same breath they say, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." We have seen that in all cases of seizure for breaches of the laws of revenue, trade or navigation, the common law is competent to give a remedy; and, consequently, this suitor is entitled to it.

The several acts of Congress creating forfeitures for breaches of the laws of revenue, &c., all seem to refer to the exchequer practice, rather than to that of the admiralty.

In the act for registering vessels, passed the 31st of December, 1792, (Oswald's edition of the Acts of Congress, vol. 2, pp. 134, 144, s. 4 and 16,) if the owner shall take a false oath, "there shall be a forfeiture of the vessel, &c., or of the value thereof, to be recovered with costs of suit," of the person taking the false oath. So in case of the sale of a vessel to a foreigner, it shall be forfeited in a certain case, "provided that if it shall be made to appear to the jury before whom the trial for such forfeiture shall be had, that," &c., and the penalties and forfeitures under that act were to "be sued for, prosecuted and recovered," in such courts, &c. *as penalties and forfeitures under the [*450 act for the collection of duties, &c. Hence it is evident that Congress intended that all cases of forfeiture should be tried by jury. The expressions in the act respecting registering of vessels, explain what may otherwise appear doubtful in the act concerning the collection of duties, as to the mode of prosecution.

So in the act suspending intercourse with France, vol. 1, p. 245, offending vessels are made liable to be seized, "and may be prosecuted and condemned in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

But by the judiciary act no circuit court could take original cognizance of civil causes of admiralty and maritime jurisdiction; hence it is obvious that Congress did not consider such seizures as civil causes of admiralty, &c. The forfeiture also is to accrue to any person "who will inform and prosecute for the same," which shows that the proceedings were to be at common law.

All the forfeitures under the act for the collection of duties, are to be recovered in the same way. Some of them being cases of seizure on land, must be tried by jury, therefore all must. And in sect. 71, (vol. 4, p. 391,) it is said, "in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall be upon such claimant." These expressions all indicate proceedings at common law only.

The 89th sect. in p. 427, speaking of the recovery of penalties, clearly refers to suits at common law; and when speaking of forfeitures, it says, "and all ships, goods, &c., which shall become forfeited in virtue of this act, shall be seized, libelled and prosecuted as aforesaid;" referring to the mode of prosecution pointed out for the recovery of penalties. Here, if the word "libelled" had not been used, there could be no doubt. But the expression "libeled" relates as well to *seizures on land as [*451 to seizures on water; but seizures on land must be tried by jury according to the course of the common law. The word libel, therefore, does not refer exclusively to admiralty proceedings.

The Excise Law, vol. 1, p. 313, makes no distinction between seizures made on land, and those made on water.

By the 5th amendment to the constitution, no person shall be deprived of property without due process of law; which means by due process of the common law.

By the 7th amendment, in suits at common law the right of trial by jury shall be preserved,

i. e., continued as it then was. At that time all municipal seizures were triable at common law.

The act prohibiting the intercourse with St. Domingo differs from that under which the Vengeance was prosecuted.

There the mode of prosecution was declared to be the same as for penalties and forfeitures under the act for collecting duties; but here no mode of prosecution is prescribed.

The act creates two offenses.

1. Sailing to St. Domingo without being destined for that island.

2. Being destined and sailing for a prohibited port without arriving there. The offense of destination is an offense on land and to be tried by the course of the common law. Hence also it may be inferred that the other offense is to be tried in the same manner. No difference is made by the statute.

The act requires bonds to be given, which are forfeited if the offense has been committed. Suits at common law upon these bonds are now pending. If these had been tried first, the facts 452*] must have been decided by a *jury, and by the 7th amendment of the constitution, "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The consequence would have been that this case, involving the same fact, between the same parties, could not have been otherwise tried than by a jury. It could not have been the intention of Congress that in one case the same fact should be decided by the judge, and in the other by a jury.

The case of The Sally was decided upon the authority of that of the Vengeance, without argument; and is, therefore, of no authority.

Rodney, attorney general, in reply, was stopped by the court as to the law of the case.

MARSHALL, *Ch. J.* The court considers the law as completely settled by the case of The Vengeance. A distinction has been attempted to be drawn between this case and that, but the court can see no difference. It is the place of seizure, and not the place of committing the offense, which decides the jurisdiction.

It has been said the word "including" means moreover, or, as well as; but if this was the meaning of the legislature it was a very embarrassing mode of expressing the idea. It is clear that Congress meant to discriminate between seizures on waters navigable from the sea, and seizures upon land or upon waters not navigable; and to class the former among the civil causes of admiralty and maritime jurisdiction.

The only doubt which could arise would be upon the clause of the constitution respecting the trial by jury. But the case of the Vengeance settles that point.

The sentence of the circuit court was reversed, and that of the district court affirmed.

APPENDIX.

NOTE (A.)

455*] *Documents accompanying the President's Message of January 22, 1807.*

WILKINSON'S FIRST AFFIDAVIT.

UNITED STATES
v.
BOLLMAN AND SWARTWOUT.

I, JAMES WILKINSON, Brigadier-General and Commander in Chief of the army of the United States, to warrant the arrest of Doctor Erick Bollman, on a charge of treason, misprision of treason, or such other offense against the government and laws of the United States as the following facts may legally charge him with, on my honor as a soldier; and on the Holy Evangelists of Almighty God, do declare and swear, that on the sixth day of November last, when in command at Natchitoches, I received by the hands of a Frenchman, a stranger to me, a letter from Doctor Erick Bollman, of which the following is a correct copy:

New Orleans, September 27, 1806.

"SIR: I have the honor to forward to your excellency the enclosed letters, which I was charged to deliver to you by our mutual friend: I shall remain for some time at this place, and should be glad to learn where and when I may have the pleasure of an interview with you. Have the goodness to inform me of it, and please to direct your letter to me care of , or enclose it under cover to them.

"I have the honor to be,
"With great respect, Sir,
"Your excellency's most obedient servant,
(Signed). "ERICK BOLLMAN.
"Gen. Wilkinson."

456*] *Covering a communication in cipher from Colonel Aaron Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession; "I (Aaron Burr) have obtained funds, and have actually commenced the enterprise. Detachments from different points, and under different pretences, will rendezvous on the Ohio, 1st November. Everything internal and external favors views; protection of England is secured.

T.[1] is gone to Jamaica to arrange with the admiral of that station, and will meet at the Mississippi——England——navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward 1st August, never to return: with him go his daughter; the husband will follow in October with a corps of worthies: send forthwith an intelligent and confidential friend, with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to Wilkinson west of the mountains, who could be useful, with a note delineating their characters.

"By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please; they shall be returned faithfully; already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used until the last moment, and then under proper injunctions: the project is brought to the point so long desired: Burr guarantees the result with his life and honor, the lives, the honor and fortunes of hundreds, the best blood of our country; Burr's plan of operations is to move down rapidly from the falls on the fifteenth of November, with the first five hundred or one thousand men, in light boats, now constructing for that purpose; to be at Natchez between the fifth and fifteenth of December, then to meet Wilkinson; then to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge; on receipt of this send Burr an answer; draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us; their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen whether we deserve the boon: the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr, a copy of which is hereunto subjoined; he is a man of inviolable honor and perfect discretion; formed to execute rather than to project: capable of relating facts with fidelity, and incapable of relating them otherwise: he is thoroughly informed of the plans and intentions of , and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your *character, [*457 and may be embarrassed in your presence: put him at ease and he will satisfy you: Doctor Bollman, equally confidential, better informed

1.—Truxton.

on the subject, and more intelligent, will hand this duplicate.

"29th July."

The day after my arrival at this city, the 26th of November last, I received another letter from the doctor, of which the following is a correct copy:

New Orleans, November 25th, 1806.

"SIR: "Your letter of the 16th inst. has been duly received; supposing that you will be much engaged this morning, I defer waiting on your excellency till you will be pleased to inform me of the time when it will be convenient for you to see me. I remain with great respect,

"Your Excellency's most obedient servant,

"ERICK BOLLMAN.

"His Excellency Gen. Wilkinson, Fauxbourg."

Marigny, the house between Madam Trevigne and M. Macarty.

On the 30th of the same month I waited in person on Doctor E. Bollman, when he informed me that he had not heard from Colonel Burr since his arrival here. That he (the said Doctor E. Bollman) had sent despatches to Colonel Burr by a Lieutenant Spence, of the navy, and that he had been advised of Spence's arrival at Nashville, in the state of Tennessee, and observed that Colonel Burr had proceeded too far to retreat; that he (Colonel Burr) had numerous and powerful friends in the United States, who stood pledged to support him with their fortunes, and that he must succeed. That he (the said Doctor E. Bollman) had written to Colonel Burr on the subject of provisions, and that he expected a supply would be sent from New York, and also from Norfolk, where Colonel Burr had strong connections. I did not see or hear from the doctor again until the 5th inst., when I called on him the second time. The mail having arrived the day before, I asked him whether he had received any intelligence from Colonel Burr; he informed me that he had seen a letter from Colonel Burr of the 30th October, in which he (Colonel Burr) gave assurances that he should be at Natchez with 2,000 men on the 20th December, inst. where he should wait until he heard from this place; that he would be followed by 4,000 men more, and that he, (Colonel Burr,) if he had chosen, could have raised or got 12,000 as easily as 6,000, but that he did not think that number necessary. Confiding fully in this information, I became indifferent about further disguise. I then told the doctor that I should most certainly oppose Colonel Burr if he came this way. He replied that they must come here for equipments and shipping, and observed that he did not know what had passed between Colonel Burr and myself, obliqued at a sham defence, and waived the subject.

458*] *From the documents in my possession, and the several communications, verbal as well as written, from the said Doctor Erick Bollman, on this subject, I feel no hesitation in declaring under the solemn obligation of an oath, that he has committed misprision of treason against the government of the United States.

(Signed) JAMES WILKINSON.

Signed and sworn to this 14th day of December, 1806, before me, one of the justices of the peace of this country.

(Signed) J. CARRICK.

"Philadelphia, July 25, 1806.

"DEAR SIR:

"Mr. Swartwout, the brother of Colonel S. of New York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respectable from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you.

"With entire respect,

"Your friend and obedient servant,

"A. BURR.

"His Excellency Gen. Wilkinson."

Message from the President of the United States to the Senate and House of Representatives:

I received from Gen. Wilkinson, on the 23d inst., his affidavit, charging Samuel Swartwout, Peter V. Ogden, and James Alexander, with the crimes described in the affidavit, a copy of which is now communicated to both houses of Congress.

It was announced to me at the same time, that Swartwout and Bollman, two of the persons apprehended by him, were arrived in this city in custody each of a military officer. I immediately delivered to the attorney of the United States, in this district, the evidence received against them, with instructions to lay the same before the judges, and apply for their process to bring the accused to justice, and I put into his hands orders to the officers having them in custody, to deliver them to the marshal on his application. TH. JEFFERSON.

January 26, 1807.

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*WILKINSON'S SECOND AFFIDAVIT. [*459

I, JAMES WILKINSON, Brigadier General and commander in chief of the army of the United States, to warrant the arrest of Samuel Swartwout, James Alexander, Esq., and Peter V. Ogden, on a charge of treason, misprision of treason, or such other offence against the government and laws of the United States, as the following facts may legally charge them with, on the honor of a soldier, and on the Holy Evangelists of Almighty God, do declare and swear, that in the beginning of the month of October last, when in command at Natchitoches, a stranger was introduced to me by Colonel Cushing, by the name of Swartwout, who a few minutes after the colonel retired from the room, slipped into my hand a letter of formal introduction from Colonel Burr, of which the following is a correct copy:

"Philadelphia, 25th July, 1806.

"DEAR SIR:

"Mr. Swartwout, the brother of Colonel S. of New York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and

highly respected from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you.

"With entire respect,

"Your friend and obedient servant.

(Signed) "A. BURR.

"His Excellency General Wilkinson."

Together with a packet, which, he informed me, he was charged by the same person to deliver me in private; this packet contained a letter in cipher from Colonel Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession:

"I, Aaron Burr, have obtained funds and have actually commenced the enterprise. Detachments from different points and under different pretences, will rendezvous on the Ohio, 1st November. Everything internal and external favors views; protection of England is secured; T——— is going to Jamaica, to arrange with the admiral on that station; it will meet on the Mississippi——England——Navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward 1st August, never to return; with him go his daughter; the husband will follow in October, with a corps of worthies. 460*] *"Send forwith an intelligent and confidential friend with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to Wilkinson, west of the mountains, who may be useful, with a note delineating their characters. By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please; they shall be returned faithfully. Already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used until the last moment, and then under proper injunctions; the project is brought to the point so long desired; Burr guarantees the result with his life and honor; with the lives, the honor and fortunes of hundreds, the best blood of our country. Burr's plan of operations is to move down rapidly from the falls on the 15th November, with the first 500 or 1,000 men, in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December; there to meet Wilkinson; there to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge; on receipt of this, send an answer; draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us; their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen whether we deserve the boon; the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr; he is a man of inviolable honor and perfect discretion; formed to execute rather than to project: capable of relating facts with fidelity, and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of , and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your character, and may be embarrassed in your presence; put him at ease and he will satisfy you.

"29th July."

I instantly resolved to avail myself of the reference made to the bearer, and in the course of some days drew from him (the said Swartwout) the following disclosure: "That he had been dispatched by Colonel Burr from Philadelphia, had passed through the states of Ohio and Kentucky, and proceeded from Louisville for St. Louis, where he expected to find me, but discovering at Kaskaskias that I had descended the river, he procured a skiff, hired hands, and followed me down the Mississippi to Fort Adams, and from thence set out for Natchitoches, in company with Captain Sparks and Hooke, under the pretense of a disposition to take part in the campaign against the Spaniards, then depending. That Colonel Burr with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of 7,000 men from the state of New York and the western states and territories, with a view to carry an expedition against the Mexican provinces, and that 500 men under Colonel Swartwout and a Colonel or *Major Tyler, were to descend the Alle- [*461 ghany, for whose accommodation light boats had been built, and were ready." I inquired what would be their course; he said, "This territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans; that they expected to be ready to embark about the first of February, and intended to land at Vera Cruz, and to march from thence to Mexico." I observed that there were several millions of dollars in the bank of this place; to which he replied, "We know it full well;" and on remarking that they certainly did not mean to violate private property, he said they "merely meant to borrow, and would return it; that they must equip themselves in New Orleans; that they expected naval protection from Great Britain; that the Capt. ———, and the officers of our navy, were so disgusted with the government that they were ready to join; that similar disgusts prevailed throughout the western country, where the people were zealous in favor of the enterprise, and that pilot boat built schooners were contracted for along our southern coast for their service; that he had been accompanied from the falls of Ohio to Kaskaskias, and from thence to Fort Adams, by a Mr. Ogden, who had proceeded on to New Orleans with letters from Colonel Burr to his friends there." Swartwout asked me whether I had heard from Doctor Bollman; and on my answering in the negative, he expressed great surprise, and observed, "That the doctor and a Mr. Alexander had left Philadelphia before him, with despatches for me, and that they were to proceed by sea to New Orleans, where he said they must have arrived."

Though determined to deceive him if possible, I could not refrain telling Mr. Swartwout it was

impossible that I could ever dishonor my commission; and I believe I duped him by my admiration of the plan, and by observing, "That although I could not join in the expedition, the engagements which the Spaniards had prepared for me in my front, might prevent my opposing it;" yet I did, the moment I had deciphered the letter, put it into the hands of Colonel Cushing, my adjutant and inspector, making the declaration that I should oppose the lawless enterprise with my utmost force. Mr. Swartwout informed me he was under engagements to meet Colonel Burr at Nashville the 20th of November, and requested of me to write him, which I declined; and on his leaving Natchitoches, about the 18th of October, I immediately employed Lieutenant T. A. Smith to convey the information, in substance, to the President, without the commitment of names; for, from the extraordinary nature of the project, and the more extraordinary appeal to me, I could not but doubt its reality, notwithstanding the testimony before me, and I did not attach solid belief to Mr. Swartwout's reports respecting their intentions on this territory and city, until I received confirmatory advice from St. Louis.

After my return from the Sabine, I crossed the country to Natchez, and on my descent of the Mississippi from that place, I found Swartwout and Peter V. Ogden at Fort Adams; with the latter I held no communication, but was informed by Swartwout, that he (Ogden) had 462*] *returned so far from New Orleans, on his route to Tennessee, but had been so much alarmed by certain reports in circulation that he was afraid to proceed. I inquired whether he bore letters with him from New Orleans, and was informed by Swartwout that he did not, but that a Mr. Spence had been sent from New Orleans through the country to Nashville, with letters for Colonel Burr.

I reached this city the 25th ultimo, and on the next morning James Alexander, Esq., visited me; he inquired of me aside whether I had seen Doctor Bollman, and on my answering in the negative, he asked me whether I would suffer him to conduct Bollman to me, which I refused. He appeared desirous to communicate something, but I felt no inclination to inculpate this young man, and he left me. A few days after he paid me a second visit, and seemed desirous to communicate, which I avoided until he had risen to take leave; I then raised my finger, and observed, "Take care, you are playing a dangerous game." He answered, "It will succeed." I again observed, "Take care;" and he replied with a strong affirmation, "Burr will be here by the beginning of next month." In addition to these corroborating circumstances against Alexander, I beg leave to refer to the accompanying documents, A. B. From all which I feel no hesitation in declaring, under the solemn obligation of an oath, that I do believe the said Swartwout, Alexander, and Ogden, have been parties to, and have been concerned in, the insurrection formed, or forming, in the states and territories on the Ohio and Mississippi rivers, against the laws and constitution of the United States.

(Signed) JAMES WILKINSON.

Sworn to, and subscribed before me, this 26th day of December, in the year of our Lord, 1806.

(Signed) GEORGE POLLOCK.

Justice of the Peace, for the county of Orleans.

The following are the depositions made in open court and alluded to in the foregoing statement:

THE DEPOSITION OF WILLIAM EATON, ESQ.

Early last winter Col. Aaron Burr, late Vice-President of the United States, signified to me, at this place, that, under the authority of the general government, he was organizing a secret expedition against the Spanish provinces on our south-western borders, which expedition he was to lead, and in which he was authorized to invite me to take the command of a division. I had never before been made personally acquainted with Col. Burr, and, having for many years been employed in foreign service, I knew but little about the estimation this gentleman *now held in the opinion of his coun- [*463 trymen and his government; the rank and confidence by which he had so lately been distinguished, left me no right to suspect his patriotism. I knew him a soldier. In case of a war with the Spanish nation, which, from the tenor of the President's message to both houses of Congress, seemed probable, I should have thought it my duty to obey so honorable a call of my country; and, under that impression, I did engage to embark in the expedition. I had frequent interviews with Col. Burr in this city, and, for a considerable time, his object seemed to be to instruct me by maps, and other information, the feasibility of penetrating to Mexico; always carrying forward the idea that the measure was authorized by government. At length, some time in February, he began by degrees to unveil himself. He reproached the government with want of character, want of gratitude, and want of justice. He seemed desirous of irritating resentment in my breast by dilating on certain injuries he felt I had suffered from reflections made on the floor of the house of representatives concerning my operations in Barbary, and from the delays of government in adjusting my claims for disbursements on that coast during my consular agency at Tunis; and he said he would point me to an honorable mode of indemnity. I now began to entertain a suspicion that Mr. Burr was projecting an unauthorized military expedition, which, to me, was enveloped in mystery; and, desirous to draw an explanation from him, I suffered him to suppose me resigned to his counsel. He now laid open his project of revolutionizing the western country; separating it from the union; establishing a monarchy there, of which he was to be the sovereign, and New Orleans to be his capital; organizing a force on the waters of the Mississippi, and extending conquest to Mexico. I suggested a number of impediments to his scheme; such as the republican habits of the citizens of that country, and their affection towards our present administration of government; the want of funds; the resistance he would meet from the regular army of the United States on those frontiers; and the opposition of Miranda, in case he should succeed to republicanize the Mexicans.

Mr. Burr found no difficulty in removing these obstacles; he said he had, the preceding season, made a tour through that country, and had secured the attachment of the principal citizens of Kentucky, Tennessee and Louisiana, to his person and his measures; declared he had

inexhaustible resources to funds; assured me the regular army would act with him, and would be re-inforced by ten or twelve thousand men from the above-mentioned states and territory, and from other parts of the union; said he had powerful agents in the Spanish territory; and, as for Miranda, said Mr. Birr, we must hang Miranda. He now proposed to give me the second command in his army. I asked him who should have the chief command? He said, General Wilkinson. I observed it was singular that he should count on General Wilkinson; the elevated rank and high trust he now held as commander in chief of our army and governor of a province, 464*] he would hardly put at hazard *for any precarious prospects of aggrandizement. Mr. Burr said, General Wilkinson, balanced in the confidence of government, was doubtful of retaining much longer the consideration he now enjoyed, and was, consequently, prepared to secure to himself a permanency. I asked Mr. Burr if he knew General Wilkinson? He answered yes, and echoed the question. I said I knew him well. "What do you know of him?" said Mr. Burr. I know, I replied, that General Wilkinson will act as lieutenant to no man in existence. "You are in an error," said Mr. Burr; "Wilkinson will act as lieutenant to me." From the tenor of repeated conversations with Mr. Burr, I was induced to believe the plan of separating the union, which he had contemplated, had been communicated to, and approved of by, General Wilkinson; (though I now suspect it an artful argument of seduction;) and he often expressed a full confidence that the general's influence, the offer of double pay and double rations, the prospect of plunder, and the ambition of achievement, would draw the army into his measures. Mr. Burr talked of the establishment of an independent government west of the Alleghany as a matter of inherent constitutional right of the people, a change which would eventually take place, and for the operation of which the present crisis was peculiarly favorable. There was, said he, no energy in the government to be dreaded, and the divisions of political opinions throughout the union was a circumstance of which we should profit. There were very many enterprising men among us, who aspired to something beyond the dull pursuits of civil life, and who would volunteer in this enterprise, and the vast territory belonging to the United States, which offered to adventurers, and the mines of Mexico, and would bring strength to his standard from all quarters. I listened to the exposition of Colonel Burr's view with seeming acquiescence. Every interview convinced me more and more that he had organized a deep-laid plot of treason in the west, in the accomplishment of which he felt fully confident. Till, at length, I discovered that his ambition was not bounded by the waters of the Mississippi and Mexico, but that he meditated overthrowing the present government of our country. He said, if he could gain over the marine corps, and secure the naval commanders, Truxton, Preble, Decatur, and others, he would turn Congress neck and heels out of doors, assassinate the President, seize on the treasury and the navy, and declare himself the protector of an energetic government. The honorable trust of corrupting the marine corps, and of sounding Commodore Preble and Captain Decatur, Colonel Burr proposed confiding to me. Shocked at this proposition, I dropped the mask, and exclaimed against his views. He talked of the degraded situation of our country, and the necessity of a blow by which its energy and its dignity should be restored; said, if that blow could be struck here at this time, he was confident of the support of the best blood of America. I told Colonel Burr he deceived himself in presuming that he, or any other man, could excite a party in this country who would countenance him in such a plot of desperation, murder and treason. He replied, that he, perhaps, knew better *the dispositions of the influential [*465 citizens of this country than I did. I told him one solitary word would destroy him. He asked what word? I answered, Usurper! He smiled at my hesitation, and quoted some great examples in his favor. I observed to him, that I had lately traveled from one extreme of the union to the other; and though I found a diversity of political opinion among the people, they appeared united at the most distant aspect of national danger. That, for the section of the union to which I belonged, I would vouch, that should he succeed in the first instance here, he would within six weeks afterwards have his throat cut by Yankee militia.

Though wild and extravagant Mr. Burr's last project, and though fraught with premeditated slaughter, I felt very easy on the subject, because its defeat he had deposited in my own hands. I did not feel so secure concerning that of disjointing the union. But the very interesting and embarrassing situation in which his communications placed me, left me, I confess, at a stand to know how to conduct myself with propriety. He had committed no overt act of aggression against law. I could draw nothing from him in writing, nor could I learn that he had exposed his plans to any person near me, by whom my testimony could be supported. He had mentioned to me no persons who were principally and decidely engaged with him, except General Wilkinson, a Mr. Alston, who I found was his son-in-law, and a Mr. Ephraim Kibby, late a captain of rangers in General Wayne's army. Satisfied that Mr. Burr was resolute in pushing his project of rebellion in the west of the Alleghany, and apprehensive that it was too well and too extensively organized to be easily suppressed, though I dreaded the weight of his character when laid in the balance against my solitary assertion, I brought myself to the resolution to endeavor to defeat it by getting him removed from among us, or to expose myself to all consequences by a disclosure of his intentions. Accordingly, I waited on the President of the United States, and after some desultory conversation, in which I aimed to draw his view to the westward, I used the freedom to say to the President I thought Mr. Burr should be sent out of this country, and gave for reason that I believed him dangerous in it. The President asked where he should be sent? I mentioned London and Cadiz. The President thought the trust too important, and seemed to entertain a doubt of Mr. Burr's integrity. I intimated that no one, perhaps, had stronger grounds to mistrust Mr. Burr's moral integrity than myself; yet, I believed ambition so much predominated over him, that when placed on an eminence, and put on his honor,

respect to himself would insure his fidelity: his talents were unquestionable. I perceived the subject was disagreeable to the President; and to give it the shortest course to the point, declared my concern that if Mr. Burr were not in some way disposed of, we should, within eighteen months, have an insurrection, if not a revolution, on the waters of the Mississippi. The President answered, that he had too much confidence in the information, the integrity, and the attachment to the union, of the citizens of that country, to admit an apprehension 466*] of the kind. I am happy that *events prove this confidence well placed. As no interrogatories followed my expression of alarm, I thought silence on the subject, at that time and place, became me. But I detailed, about the same time, the whole projects of Mr. Burr to certain members of Congress. They believed Colonel Burr capable of anything, and agreed that the fellow ought to be hanged; but thought his projects too chimerical, and his circumstances too desperate, to give the subject the merit of serious consideration. The total security of feeling in those to whom I had rung the tocsin, induced me to suspect my own apprehensions unseasonable, or at least too deeply admitted; and, of course, I grew indifferent about the subject.

Mr. Burr's visits to me became less frequent, and his conversation less familiar. He appeared to have abandoned the idea of a general revolution, but seemed determined on that of the Mississippi; and, although I could perceive symptoms of distrust in him towards me, he manifested great solicitude to engage me with him in the enterprise. Weary of his importunity, and at once to convince him of my serious attachments, I gave the following toast to the public: The United States—Palsy to the brain that should plot to dismember, and leprosy to the hand that will not draw to defend, our union!

I doubt whether the sentiment was better understood by any of my acquaintance than Colonel Burr. Our intercourse ended here; we met but seldom afterwards. I returned to my farm in Massachusetts, and thought no more of Mr. Burr, nor his empire, till some time late in September or beginning of October, when a letter from Maurice Belknap, of Marietta, to Timothy E. Danielson, fell into my hands at Brimfield, which satisfied me that Mr. Burr had actually commenced his preparatory operations on the Ohio. I now spoke publicly of the fact; transmitted a copy of the letter from Belknap to the department of state, and about the same time forwarded, through the hands of the Postmaster-General, to the President of the United States, a statement in substance of what is here above detailed concerning the Mississippi conspiracy of the said Colonel Aaron Burr, which is said to have been the first formal intelligence received by the executive on the subject of the conspirator being in motion.

I know not whether my country will allow me the merit of correctness of conduct in this affair. The novelty of the duty might, perhaps, have embarrassed stronger minds than mine. The uprightness of my intentions, I hope will not be questioned.

The interviews between Colonel Burr and myself, from which the foregoing statement has resulted, were chiefly in this city, in the months of February and March, last year.

WILLIAM EATON.

Washington City, Jan. 26, 1807.

Sworn to in open court this 26th day of January, 1807.

WILLIAM BRENT, Clerk.

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*DEPOSITION OF JAMES L. DONALDSON. [*467

In open court personally appears James Lowry Donaldson, who, being duly sworn, deposeth and saith, that he was in the city of New Orleans, in the Orleans territory, and the environs of said city, from the 15th day of October to the 10th day of December, 1806; that during the latter part of this time he was frequently in the company of General James Wilkinson, and visited the general the day after his arrival at New Orleans. On this occasion, this deponent received in confidence from General Wilkinson information to the following purport: that the general had undoubted and indisputable evidence of a treasonable design formed by Aaron Burr and others to dismember the union, by a separation of the western states and territories from the Atlantic states; that New Orleans was in immediate danger, and that he had concluded a hasty compromise with the Spaniards, so as to be able to withdraw his troops instantly to this the immediate object of attack and great vulnerable point; that he had received a letter from Burr holding forth great inducements to him to become a party, of which he showed me the original in cipher, and another written paper purporting to be a deciphered copy of the letter. He expressed great indignation at the plot, and surprise that one so well acquainted with him as Burr should dare to make to him so degrading a proposal, and declared his determination of defeating the enterprise, or perishing in the attempt. He observed, in addition, that there were many agents of Mr. Burr then in the town, who had already been assiduous in their visits, and towards whom he was determined to act with cautious ambiguity, so as at the same time to become possessed of the whole extent of the plan, the persons engaged, and the time of its execution, and also to prevent any attempt on his person, of which he declared he had serious apprehensions. Of the number of these agents he was not aware, but mentioned the names of two of whom he was certain, Messrs. Bollman and Alexander. From time to time, as this deponent had interviews with General Wilkinson, he informed this deponent that he had received additional information respecting the movements and designs of Burr by means of these agents, of whom he considered Bollman as the principal. In the course of these transactions, this deponent was employed by General Wilkinson in the copying of certain papers and documents, and preparing certain despatches for the general government, which the general intended to forward by the brig Thetis. While thus employed at the general's lodgings, this deponent has remarked, upon two different occasions, a person knock for admittance at a door with a window in it opposite the table where this deponent was sit-

ting, who, this deponent was informed by General Wilkinson, was Doctor Bollman. Upon these occasions the general has suddenly risen from his seat, and accompanied this person in a number of turns up and down a balcony in the front of the house, apparently engaged in deep conversation. Upon the latter of these occa-
468*] sions the general, on *his return into the chamber, said to this deponent, "That is Doctor Bollman; his infatuation is truly extraordinary; he persists in his belief that I am with Burr, and has this moment shown me a letter from the latter, in which he says that he is to be at Natchez on the 20th December with 2,000 men, that 4,000 will follow in the course of a few days, and that he could, with the same ease, have procured double that number." General Wilkinson then observed that he had obtained all the information he wanted, and that the affair would not be kept much longer a secret from the public.

When this deponent left the city of New Orleans, the inhabitants of that city were in a state of great alarm, and apprehended a serious attack from Mr. Burr and his confederates; this deponent understood that mercantile business was much embarrassed, and great fears were entertained of considerable commercial failures in consequence of the embargo which had been imposed; that General Wilkinson was taking strong measures of defense, and that 400 persons were then actually engaged in the fortifications of the city.

And further this deponent saith not.

JAMES L. DONALDSON.

Sworn to in open court.

WILLIAM BRENT, Clerk.

January 26 1807.

DEPOSITION OF LIEUTENANT W. WILSON.

I left New Orleans on my way to this city on the 15th of December last; at that time and for some time preceding, the strongest apprehensions and belief universally prevailed among the inhabitants of that city, that Aaron Burr and his confederates had prepared an armed force, and were advancing to attack and plunder the city; in consequence of which the greatest alarms prevailed, a general stagnation of business ensued, and the danger was credited there as a matter of public notoriety; that Brigadier-General Wilkinson, with the army of the United States, was at New Orleans, occupied in the most active military preparations for the defense of the place; repairing the forts, mounting cannon, collecting ammunition, &c. All under the firm persuasion and belief that such an attack was meditated, and about very speedily to take place, by the said Burr; this deponent knows that the general was decidedly of opinion, from the most satisfactory information, that the said Burr and his confederates were advancing with an armed force against this place.

And further this deponent saith not.

(Signed)

WILLIAM WILSON.

Sworn to in open court this 27th day of January, 1807.

WILLIAM BRENT, Clerk.

The deposition of Ensign W. C. Mead is precisely similar to that of Lieut. Wilson except that the former states that he left New Orleans on the 19th of December.

NOTE (B.)

469*] *Opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr, for Treason, Pronounced Monday, August 31.

THE question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them.

A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument, and a depth of research, by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the overt act laid in the indictment, having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance and in a different state, it is objected to the testimony offered on the part of the United States to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must, therefore, be rejected.

The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made.

1st. That conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2d. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the court.

The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words 470*] "levying war?" And who *may be said to levy it? Had their first application to treason been made by our constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words raising or creating war, but as those who join after the commencement are equally the object of punishment, there would probably be a general admission, that the term also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term, would be settled by a course of decisions, and it would be affirming boldly, to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt, and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war," is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward III. from which it was borrowed.

It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster and Blackstone, are not *lightly to be re- [*471 jected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudi-

cations, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection," he says, "is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason, but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it.

Foster says, "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will prima facie make a man a traitor."

Foster does not say that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England, this discrimination need not be made except for the purpose of framing the indictment, and, therefore, in the English books we do not perceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said, by Hale and Foster, to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point Blackstone is not more satisfactory. Although we may find among the commentators upon treason enough to satisfy the inquiry, what is a state of internal war, yet no precise information can be acquired from them, which would enable us to decide, with clearness, whether persons not in arms, but taking part in a rebellion, could be said to levy war independent of that doctrine which attaches to the accessory the guilt of his principal.

If in adjudged cases this question has been taken up and directly decided, the court has not seen those cases. The arguments which may be drawn from the form of the indictment, though strong, are not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued, that had this act amounted to levying war, she would have been indicted for levying war, and the furnishing of provisions would 472*] have been laid as the *overt act. The court felt this when the precedent was produced. But the argument, though strong, is not conclusive, because, in England, the inquiry whether he had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was unimportant, and because, too, it does not appear from the indictment that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge Tucker, in a work, the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists, who seem to disapprove the principle, declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source for another reason. The terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war, or for assisting others in levying war, yet if, in correct and legal language, he can be said to have levied war, and if it has never been decided that the act would not amount to levying war, his case may, without violent construction, be brought within the letter and the plain meaning of the constitution.

In examining these words, the argument which may be drawn from felonies, as for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation composed of many parts, co-operating with each other. No one man, or body of men, can perform them all, if the war be of any continuance. Although, then, in correct and in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court, that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States, the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to *conviction, is a question of vast impor- [*473 tance, which it would be proper for the Supreme Court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine, unless the case before them should require it.

It may now be proper to notice the opinion of the Supreme Court in the case of the *United States against Bollman and Swartwout*. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued. This court is,

therefore, required to depart from the principle there laid down.

It is true, that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered, that the judges might act separately, and, perhaps, at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

The court had employed some reasoning to show that without the actual embodying of men, war could not be levied. It might have been inferred from this, that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied; that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extrajudicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use any means which the law placed in my power to carry the question again before the supreme court, for reconsideration, in a case in which it would directly occur and be fully argued.

The court which gave this opinion was composed of four judges. At the time I thought them unanimous, but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous 474*] it would have *been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who, perhaps, dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the Supreme Court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this description, in the opinion of the court, levies war. The present motion, however, does not rest upon this point; for, if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms, nor the application of force or violence, are indispensably necessary to constitute the fact of levying war. To illustrate these positions, several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable; its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because, although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be *supplied by other cir- [*475 cumstances, yet, they also serve to show that the mind requires those circumstances to be satisfied that war is levied.

Their construction of the opinion of the Supreme Court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse, from any cause whatever, without firing a gun, I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to

execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has or, it is believed, can be, produced from those books in which it has been laid down, that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities, to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But *Vaughan's Case* is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring, that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by *Vaughan's Case*. This court is not inclined to controvert them.

But although, in this respect, the opinion of the Supreme Court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

476*] *The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force, or not in force, whether in a condition to use violence, or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words, but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force, and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

But the term having been adopted by our constitution, must be understood in that sense in which it was universally received in this country, when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord Coke says that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason, for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs in stating these cases are such as indicate an impression on his mind that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion, or insurrection, is a levying of war within this act." "If any with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force, nor can "a castle or fort be defended with strength and weapons invasive and defensive" without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke, that to levy war there must be an assemblage of men in a condition, and with an intention, to employ force. He certainly puts no case of a different description.

Lord Hale says, (149 6.) "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war; for then every riot would be treason," &c., "but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as if they ride or march, *vexillis explicatis*, *with colors flying, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly." [*477

"Only the general expressions in all the indictments of this nature that I have seen are more *guerrino arraiati*, arrayed in a warlike manner."

He afterwards adds, "If there be a war levied as is above declared, viz., an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum*, but not *percussum*."

It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest,

that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawk, c. 17, s. 23, says, "That not only those who rebel against the king, and take up arms to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him, and, therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king and take up arms to dethrone him;" in many other cases those "who in a violent and forcible manner withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war, and it will be perceived that he puts no case in which actual force is dispensed with.

"Those also," he says, "who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion. As where great numbers by force attempt to remove certain persons from the king," &c. The cases here put by Hawkins, of a constructive levying of war, do in terms require force as a constituent part of the description of the offense.

478*] *Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colors, &c., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Damaree and Purchase, he says, "The want of those circumstances weighed nothing with the court, although the prisoners' counsel insisted much on that matter." But he adds, "The number of the insurgents supplied the wants of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a warlike posture;" that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase, from 8th State Trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states, s. 4, all insurrections to effect certain innovations of a public and general concern by an armed force, to be, in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying of war, all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying war, that is, where the war is intended directly against the government.

He says, s. 9. "An assembly armed and arrayed in a warlike manner for a treasonable purpose, is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable purpose" is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms, for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened, they are "without coming to a battle or action." "If men be enlisted and march," (that is, if they march prepared for battle, or in a condition for action, for marching is a technical term applied to the movement of a military corps,) it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what *seems to be put [*479 in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy, without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the State Trials from which the extracts are taken. The words used by the chief justice are, "When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "Intending to levy war is not treason, unless a war be actually levied." To this the chief justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set out and cruise, and come with a design to destroy our

ships?" Mr. Phipps still insisted, "it would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the chief justice, "the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added, "But for you to say that because they did not actually fight it is not a levying of war, is it not plain what they did intend? That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason."

The whole doctrine of Judge Foster on this subject, seems to demonstrate a clear opinion that a state of force and violence, a posture of war, must exist to constitute technically, as well as really, the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms not only to dethrone the king, but under pretense to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere forcibly in matters of such high importance."

480*] *He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war," have not received a technical, different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.

Several judges of the United States have given opinions at their circuits on this subject, all of which deserve and will receive the particular attention of this court.

In his charge to the grand jury, when John Fries was indicted, in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether, any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Paterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not, indeed, precisely state the employment of force as necessary to constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "Combining these facts with this design," (that is, combining actual force with a treasonable design,) "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration, he says, "The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons, is wholly immaterial.

"The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution: some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case *of *Fries*, the [*481 same sentiments are to be found. It is to be observed, that these judges are not content that troops should be assembled in a condition to employ force; according to them, some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said, all these authorities have been overruled by the decision of the Supreme Court in the case of the *United States against Swartwout and Bollman.*

If the Supreme Court have indeed extended the doctrine of treason further than it has here-

tofore been carried by the judges of England, or of this country, their decision would be submitted to. At least, this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the Supreme Court. The foundation on which this argument rests is the omission of the court to state, that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn, which passages are mingled with others, which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the *United States against Bollman and Swartwout*, there was no evidence that even two men had ever met for the purpose of executing the plan, in which those persons were charged with having participated. It was, therefore, sufficient for the court to say, that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assem-
482*] blage *which would amount to levying of war; but, as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime, ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are, "To constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country." Speaking in general terms of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph, the court says, "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c. and who are actually, leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war, should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained, explanation of the words, derives some additional aid from the *terms in which the paragraph last [*483 quoted commences. "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms. That the individuals who composed it had appeared in arms against their country. That is, in other words, that the assemblage was a military, a warlike assemblage.

The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said, "A design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into

execution would amount to levying of war against the United States."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage.

The decisions theretofore made by the judges of the United States, are then declared to be in conformity with the principles laid down by the Supreme Court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Paterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion, in terms, requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a means of, executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators who might be found together after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expression "any assemblage of 484*] *men," is restricted by the words "for this purpose." Now, could it be in the contemplation of the court that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe, "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage," "for the purpose of overturning the government of New Orleans by force," "to be only equivalent to a secret furtive assemblage without the appearance of force."

After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated that Mr. Burr was levying an army of 7,000 men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say, "The question, then, is, whether this evidence proves Colonel Burr to have advanced so far in levying an army as actually to have assembled them."

Actually to assemble an army of 7,000 men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitute the fact of levying war, the court proceeds to say, "It is argued that since it cannot be necessary that the whole 7,000 men should be assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime."

"This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and, therefore, this evidence should make the fact unequivocal.

"The traveling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous, (that is, of the army,) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

*"The traveling of individuals to [*485 the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? "Because," says the court, "this would be an equivocal act, and has no warlike appearance." The act, then, should be unequivocal, and should have a warlike appearance. It must exhibit, in the words of Sir Mathew Hale, *speciem belli*, the appearance of war.

This construction is rendered in some measure necessary when we observe that the court is qualifying the position, "That the army commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position they say, "The traveling of individuals would, perhaps, not be sufficient." Now, a solitary individual traveling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore must have contemplated several individuals traveling together; and the words being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments."

The court then proceeded to say, "The meet-

ing of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

It is obvious, from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done, an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a general place of rendezvous. In describing the mode of coming to this assemblage, the civil term "traveling" is dropped, and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a general place of rendezvous composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition, for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force for the purpose of subverting the government by violence, the act would be unequivocal, it would have a warlike appearance, and it would, according to the opinion of the Supreme Court, properly construed, and according to the English authorities, amount to levying war. But this, though not a definition, is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should march from those places to a place of general 486*] rendezvous, it is difficult *to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly they ought not to be so understood when they say, in express terms, that "it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not already within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the Supreme Court, it will be observed, that the direct question, whether an assemblage of men which might be construed to amount to a levying of war, must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn without particularly adverting to this question, and, therefore, upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms force and violence are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war, and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved, which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the Supreme Court considered a secret, unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing if opposed to that of the Supreme Court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

*To the judge before whom the charge [*487 against the prisoner at the bar was first brought, the same testimony was offered with that which had been exhibited before the Supreme Court, and he was required to give an opinion in almost the same case. Upon this occasion, he said, "War can only be levied by the employment of actual force. Troops must be embodied; men must be assembled in order to levy war." Again, he observed, "The fact to be proved in this case, is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions, and it is to be recollected that he had just returned from the Supreme Court, and was speaking on the very facts on which the opinion of that court was delivered.

The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which force is an indispensable ingredient. Any combination to subvert,

by force, the government of the United States, violently to dismember the union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war, and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war provided the force assembled be sufficient to attain, or perhaps to justify attempting, the object without them." This paragraph is immediately followed by a reference to the opinion of the Supreme Court.

It requires no commentary upon these words to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the Supreme Court. If in that opinion there may be found in some passages, a want of precision, and indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for, when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The court, unquestionably, did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court con-488*] sider the actual application *of the force to the object, at all times, an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the Supreme Court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's island to the jury under this explanation of the law, and to instruct them, that unless the assemblage on Blennerhassett's island was an assemblage in force; was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the Supreme Court entirely on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not the Supreme Court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force.

The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention. At any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended, but it serves to show that general *phrases must always be [*489 understood in reference to the subject matter, and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made.

1st. That this indictment, having charged the prisoner with levying war on Blennerhassett's island, and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2d. That admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons unknown, levied war on Blennerhassett's island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blennerhassett's island, nor in the county of Wood, nor in the district of Virginia.

In considering this point the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense. That, at common law, an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to Hawkins, b. 2, c. 25, sect. 84, and c. 23, sect. 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of Congress which requires that twelve petty jurors at least shall be summoned from the county where the offense was committed.

A description of the particular manner in which the war was levied seems also essential to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster, p. 149, speaking of the treason of compassing the King's death, says, "From what has been said it followeth that in every indictment for **490***] this species of treason, and indeed *for levying war and adhering to the King's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defense."

In p. 220, Foster repeats this declaration. It is also laid down in Hawk, b. 8, c. 17, sect. 29; 1 Hale, 121; 1 East, 116, and by the other authorities cited, especially *Vaughan's Case*. In corroboration of this opinion, it may be observed, that treason can only be established by the proof of overt acts, and that by the common law as well as by the statute of 7 of William III. those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense.

It seems, then, to be perfectly clear, that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's Case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation instead of informing him respecting it.

But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's island, and was, at the time, at a a great distance, and in a different state, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact.

It is, therefore, necessary to inquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually absent, while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire, if this chief should be there captured and sent to the other extremity for the purpose of *trial, if his indictment, [***491** instead of alleging an overt act which was true in point of fact, should allege that he had assembled some small party, which, in truth, he had not seen, and had levied war by engaging in a skirmish in Georgia at a time when in reality he was fighting a battle in New Hampshire, if such evidence would support such an indictment, by the fiction that he was legally present though really absent, all would ask to what purpose are those provisions in the constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally absent who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment, upon general principles, would charge him according to the truth of the case. Lord Coke says: "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. "For in treason," Continues Lord Coke, "all be principles, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if, by our constitution, the doctrine that an accessory becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to

say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books, that whatever will make a man an accessory in felony, will make him a principal in treason; but it is nowhere suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster has been particularly quoted, and certainly he is precisely in point. "It is well [illegible] says Foster, "that in the language of the law there are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason. The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessory to common law will render him a principal in treason. In other passages the words "command" or "procure" are used to indicate the same state of things, that is, a treasonable assemblage produced by a man who is not himself in that assemblage.

In point of law, then, the man who incites, 492*] aids, or procures a treasonable *act, is not, merely in consequence of that incitement, aid or procurement, legally present when that act is committed.

If it does not result from the nature of the crime, that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances, and to judge how far the circumstances of any case can make him legally present who is in fact absent, the doctrine of constructive presence must be examined.

Hale, in his 1st vol. p. 615, says: "Regularly no man can be a principal in felony unless he be present." In the same page he says: "An accessory before, is he that being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact."

These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds, p. 349: "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle will serve to illustrate it. (See Hale, 439.) In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale, in p. 449, giving the reason for the decision in the case of the *Lord Dacres*, says: "They all came with an intent to steal the deer, and, consequently, the law supposes that they came all with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park; or should even lose his way. (See Hale, 534.)

In both the cases here stated, the persons actually set out together, and were near enough to assist in the commission of the fact. That in the case of Pudsy the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration, so far as respected distance; as respected capacity to assist in case of resistance, it is the same as if the *robbery had been that which [*493 was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster, 350, plainly supposes the same particular design, not a general design composed of many particular distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case which is perhaps common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse, others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals, and all, in construction of law, are present. But suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals or different companies; to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do indeed belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject by observing, that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged, he must be ready to render assistance to those who are committing that

particular fact; he must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blennerhassett's island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact.

I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defense with considering the overt act as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. 494*] And the only division *of that point, if the expression be allowed, which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases.

Had the prisoner set out with the party from Beaver for Blennerhassett's island, or, perhaps, had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts, then he was not of the particular party assembled at Blennerhassett's island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blennerhassett's island, but the whole evidence shows he was not of that party.

In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessory, and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

This reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction, while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring, that he who counsels, procures, or aids treason, is guilty accessorily, and solely in virtue of the common law principle, that what will make a man an accessory in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged.

*What would be the effect of a differ- [*495 ent doctrine? Clearly that which has been stated. If a person levying war in Kentucky may be said to be constructively present and assembled with a party carrying on war in Virginia, at a great distance from him, then he is present at every overt act performed anywhere: he may be tried in any state on the continent, where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Paterson, in *Mitchell's Case*, has been cited on this point. 2 Dall. 348.

The indictment is not specially stated; but from the case as reported, it must have been either general for levying war in the county of Alleghany, and the overt act laid must have been the assemblage of men and levying of war in that county; or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result in the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburgh. That there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couches fort the resolution was taken to attack the house of the inspector and the body there assembled marched to that house and attacked it. It was proved by the competent number of witnesses that he was at Couches fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after

the action, attending the body of one of his comrades who was killed in it; one witness swore positively that he was present at the burning of the house, and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this, is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case? Couches fort and Neville's house being in the same county, the assemblage having been at Couches fort, and the resolution to attack the house having been there taken, the body having for the avowed purpose moved in execution of that resolution towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couches, and the marching from thence, and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider 496*] the meeting *at Couches, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it, and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed by any person who observes the caution with which Judge Paterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jefferies is enrolled.

But to estimate the opinion in *Mitchell's Case*, let its circumstances be transferred to *Burr's Case*. Suppose the body of men assembled in Blennerhassett's island had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses; that the resolution to march to Blennerhassett's island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally; the cases would then have been perfectly parallel, and the decisions would have been the same.

In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blennerhassett's island; and the court is strongly inclined to the opinion, that, without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that although he was absent, yet, if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged, that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be that the indictment would be defective unless it alleged the presence of the *person indicted at [*497 the act of treason. If upon a special verdict facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blennerhassett's island, it ought to be so construed now. But this is unimportant, for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved as will be shown hereafter.

The second position is founded on 1 Hale, 214, 288, and 1 East, 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated, and a very different case may be proved, I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and, therefore, ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offense, and in the testimony by which the accused is to defend himself. These *dicta* of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere, that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that, had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported, or referred to in the books, ever departed. These principles are, that the

indictment must give notice of the offense; that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his *dicta*, and if they will admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within the statute, for in such case, in treason, all are principals."

This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other treasons. Had 498*] *he designed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute, as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale, while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the *dictum* of a judge beyond its terms, to cases in which he has expressly treated, to which he has not himself applied it, and on which he as well as others has delivered opinions which that *dictum* would overrule. This would be the less justifiable if there should be a clear legal distinction indicated by the very terms in which the judge has expressed himself between the particular case to which alone he has applied the *dictum*, and other cases to which the court is required to extend it.

There is this clear legal distinction. "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins, and that class of treasons among which levying war is placed, is taken in the statute of Edw. III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case where a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow, that in other cases where a general indictment would be insufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled with himself, and with the general principles of law, only by permitting the limits which he has himself given to his own *dictum*, to remain where he has placed them.

In p. 238, Hale is speaking generally of the receiver of a traitor, and is stating in what such receiver partakes of an accessory. 1st. His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counsellor or consenter."

The words "may be otherwise," do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment must be special on the receipt, and not general. The words it "may be otherwise in case of a procurer," &c., signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself, as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons, in which a general indictment would lie, not to *treasons where a general indictment [*499 would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed, may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale, apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point Keeling, 26, and 1 Hale, 626, have also been relied upon. It is stated in both, that if a man be indicted as a principal and acquitted, he cannot afterwards be indicted as accessory before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be overruled. Were such a case produced, its application would be questionable. Keeling says, an accessory before the fact is *quodam modo*, in some manner guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment, therefore, may be general. But an overt act of levying war must be laid. These cases, then, prove in their utmost extent, no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay it specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the assumpsit according to the legal effect of the transaction, but in a special action on the case, the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale, 625, immediately preceding that which has been cited at the bar. He says, "If A. be indicted as principal, and B. as accessory before or after, and both be acquitted, yet B. may be indicted as principal, and the former acquittal as accessory is no bar.

The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessory, while an acquittal as accessory may not be pleaded in bar to an indictment as prin-

cipal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessory, the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessory being *quodam modo* a principal, in indictments where the law does not require the manner to be stated, which need not be special, evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as an accessory must be special. The very allegation that he is an accessory must be a special allegation, and must show how he became an accessory. The charges of this special indictment, therefore, must be proved as laid, and no evidence which proves the crime in a form sub-**500***] *stantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these *dicta* which have been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment, charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual makes the guilt of the assemblage his guilt, and in the other case the procurement by the individual makes the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present, by a train of conjectures or inferences, or of reasoning; the fact must be proved by two witnesses. Neither where procurement supplies the want of presence, is the mind to be conducted to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district.

If it be said that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion; the answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct *inference from this circumstance [***501** would seem to be, that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If, then, the doctrines of Keeling, Hale and East are to be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blennerhassett's island must be proved, not circumstantially, but positively by two witnesses, to charge him with that assemblage. But there are still other most important considerations, which must be well weighed before this doctrine can be applied to the United States.

The eighth amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be truly said to be "informed of the nature and cause of the accusation," unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense.

It is also well worthy of consideration, that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessory before the fact into the principal, and to make the act of the principal his act. The accessory before the fact is not said to have levied war. He is not said to be guilty under the statute. But the common law attaches to him the guilt of that fact which he has advised or procured, and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States, would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decisions that these accessorial crimes are not, in the case of treason, excluded by the definition of treason, given in the constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case absolutely requiring it, unless I could confer

respecting it with the judges of the Supreme Court.

I have said that this doctrine cannot apply to the United States, without implying those decisions respecting the common law which I have stated, because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer, is within the definition of levying war, and, independent of the agency of the common law, does actually levy war, then the advisement or procurement 502*] is an overt act of levying war. *If it be the overt act on which he is to be convicted, then it must be charged in the indictment, for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that although it should be conceded that since the statute of William and Mary, he who advises or procures a treason may, in England, be charged as having committed that treason, by virtue of the common law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offense, and permit them to be charged as one, yet it can never be conceded that he who commits one overt act under the statute of Edward, can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper, in this place, again to advert to the opinion of the Supreme Court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually in the general conspiracy, are to be considered as traitors."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising certainly, and, perhaps, the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.

The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was in truth performed by others, and convicted on their overt acts. It amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. It may possibly be the opinion of the Supreme Court, that those who procure a treason, and do nothing further, are guilty under the constitution; I only say that opinion has not yet been given; still less has it *been indicated, that he who ad- [*503 vises shall be indicted as having performed the fact.

It is, then, the opinion of the court, that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court, that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion, that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and, therefore, is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony, which would be required to prove actual presence.

The second point in this division of the subject is, the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point presupposes the treason of the accused, if any has been committed, to be accessorial in its nature. Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence is a point already discussed and decided. It is, then, apparent that, but for the exception to the general principle which is made in cases of treason, those who assembled at Blennerhassett's island, if that assemblage was such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although, in truth, the chief traitors, would, in law, be accessories.

It is a settled principle in the law that the accessory cannot be guilty of a greater offense than his principal. The maxim is *accessorius sequitur naturam sui principalis;* the accessory follows the nature of the principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried.

For the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a **504***] prosecution *against B. Consequently, if the guilt of B. depends on the guilt of A., A. must be convicted before B. can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A. and A should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could, in no case, be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because, in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory, for that would be ground on which a great law principle could never stand. Not because there was, in fact, a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe, is, perhaps, of the two the blacker criminal: and, were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blennerhassett's island depends, not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs, and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessory, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others, and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

If from reason we pass to authority, we find it laid down by Hale, *Foster and East, [***505** in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted.

These authorities have been read and commented on at such length, that it cannot be necessary for the court to bring them again into view. It is the less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, contended, that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had, by implication, waived his right to demand a specie of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operations. It would seem consonant to the usual course of proceeding in other respects, in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted, and that he ought not to be considered as waiving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it, because pleading to an indictment in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed, had he been charged with having advised the act. No person indicted as a principal can be expected to say, I am not a principal, I am an accessory; I did not commit, I only advised the act.

The authority of the English cases on this subject depends in a great measure on the adoption of the common law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact, and the question whether the treasonableness of the act may be decided, in the first instance, in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessory, rather than on the positive authority of those decisions.

This question is not essential in the present case, because, if the crime be within the con-

stitutional definition, it is an overt act of levying war, and to produce a conviction ought to have been charged in the indictment.

506*] * The law of the case being thus far settled what ought to be the decision of the court on the present motion? Ought the court to set and hear testimony which cannot affect the prisoner, or ought the court to arrest that testimony? On this question much has been said; much that may, perhaps, be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony, and in the course of the argument, it has been repeatedly stated by those who oppose the motion, that irrelevant testimony may, and ought to be, stopped. That this statement is perfectly correct, is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal, for they do not agree. The jury cannot constitute it, for the question is, whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is, of necessity, the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment, but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of Congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common law principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence; but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place, and in a different state, in order to prove what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's island? No, that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses, in such manner that the question of fact ought to be left with the jury. The conclusion that in this state of things no testimony can be admissible, is so inevitable, that the counsel for the United States could not resist it. I do not understand them to deny, that if the overt act be not proved by two witnesses so as to be submitted to the jury, that all other testimony must be *irrelevant, because no other [*507 testimony can prove the fact. Now an assemblage on Blennerhassett's island is proved by the requisite number of witnesses, and the court might submit it to the jury, whether that assemblage amounted to a levying of war, but the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness, and of consequence, all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this. It is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary? If enough is proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness?

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions does exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. To that declaration the court still adheres.

It was said that if the overt act was not proved by two witnesses, no testimony in its nature, corroborative or confirmatory, was admissible, or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general, commanding an army, should detach troops for a distant service, would the men composing that detachment be traitors, and would the commander in chief escape punishment.

Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war; detaching a military corps from it for military purposes might also be an overt act of levying war. It is not pretended that he would not be punishable for these acts, it is only said that he may be tried and convicted on his own acts, in the state where those acts were committed, not on the acts of others in the state where those others acted.

Much has been said in the course of the argument on points, on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly, receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a derelic-

508*] tion of duty, or *the opprobium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

That, gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that they would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's island, can be admitted, because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant, until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's island was procured by the prisoner. On that point the court, for the present, withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution, that no such testimony exists, if there be such, let it be offered and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case.

They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

The following contains the statement of the case, and the judge's reasons for the decrees given by him in the cases of *Rose and Himely*, and *Rose and Groenings*.

ALTHOUGH there are three distinct libels filed in these cases, yet, in the course of investigation, they are brought all to depend upon the same circumstances, and were argued before me as one cause.

The two first were decided in September last, when the copy of the condemnation had not been received, and the decision of the district court rested upon the ground of a defect of condemnation. But upon a motion before this court for leave to adduce new evidence upon the appeal, I decided in favor of its admissibility, and the condemnation having been received before the expiration of the term probatory assigned the appellants, consistently with my decision, I am to consider the condemnation as equally affecting the rights of the parties on all the three cases: at the hearing upon the appeal there was also a witness produced and sworn in behalf of the appellants, who testified that he was one of the officers of the capturing vessel, and that he saw in possession of the captain a permit from the agent of the French government, resident at St. Jago de Cuba, to sell the Sarah and her cargo, and that she was advertised and sold by virtue of that permit; but I shall take no notice of this evidence in forming my opinion, because it appears to me subject to this objection, that a certificate of the granting of such a permit might have been obtained from the chancery of the agent himself, if there existed such an officer, and he had done that act in an official capacity. Upon the hearing of the two first causes in the district court, the identity of the goods was also made a point, and a defect of evidence to prove their identity was strongly insisted upon in the argument, but this ground was relinquished upon the appeal, and the only point contested was the right of property.

The following are the circumstances on which 510*] the court proceeds to *form its decision, as they are collected from the libels, answers, depositions and writings in evidence:

The schooner Sarah, an American bottom, owned by citizens of the United States, sailed from Norfolk with a cargo consisting entirely of provisions, owned likewise by citizens of the United States. Whatever port she may have cleared for, her real destination was to the brigand ports in the island of St. Domingo, several of which she entered, and having disposed of her outward cargo, took in return the sugar and coffee which is the subject of the suit. On her voyage from Port au Paix, one of the brigand ports, she was captured by a French privateer and carried into Barracoa, where Henry Rose, the supercargo, and now the libellant in these cases, purchased her of the captors. The principal part of the cargo was purchased by Captain Cott, of the Example, lying then at Barracoa, in behalf of the respondent, J. J. Himely, and was transferred during the night from the Sarah to the Example. The Example having sailed for this port, she was followed by Captain Rose, and the sugar and coffee, shipped on board her from the Sarah, has been libelled on behalf of the original owners. Prior to the suing out of the libel, a part of the coffee had been sold to Messrs. L. and R. Groening, of this place, merchants, who are acknowledged to be innocent purchasers without notice; but as the English doctrine relative to the sales in market overt is unknown to the laws of this state, it is not contended that their claim rests on any better ground than that of Himely or Cott, the immediate purchasers from the captors. It appears that when the cargo of The Sarah was sold, no condemnation had taken place; that she was afterwards libeled and condemned at St. Domingo, the 13th July, 1804; whereas the vessel was captured on the 23d February, the sale of the cargo took place on the 18th March, and it had arrived in this port, and a warrant actually issued and served upon it, the 4th May preceding. Upon examining the condemnation, it appears to be professedly founded upon an *arrete* of the Captain General Ferrand, dated 1st March, 1804, declaring the port of Santo Domingo to be the only free port in that island, and directing the vessels of neutrals trading to any other port to be brought to adjudication.

It was, indeed, asserted in the argument, and I believe was the fact, that General LeClerc had formerly issued a similar *arrete* but there was not then, nor is there now adduced, any evidence to prove it to the satisfaction of the court, nor does it appear to be one of those facts of general notoriety, which this court is sanctioned in noticing as such.

On behalf of the claimants it is contended, that there is an original defect in the title of the libellants, as the property appears to have been purchased from revolted slaves, a description of people who could not possess, and, of course, could not convey, a right of property to another. That there is a turpitude in this trade, which ought to predispose this court to discountenance the pretensions of the libellants. That if the libellants ever possessed a right, it was defeated by the capture, which alone gave them a possession not to be violated by us; if not *by the capture, by the carrying [*511 *infra præsidia*, if not by carrying *infra præsidia*, by the effects of the condemnation.

For the libellants it was argued,

That there could be no original defect in the title acquired from the brigands, because a power existing *de facto*, is, as to neutrals, a power *de jure*.

That the subjects of the existing government of Hayti were a mixed multitude of slaves and colored freemen, the latter of whom, before the revolution, possessed extensive estates, and who,

for aught we know, may have been the vendors of these articles.

That the law of nations knows no such description of people as slaves, and it is not, in fact, every description of slaves who are destitute of rights of property; even within the bounds of the United States, widely different are the opinions entertained, and laws existing, on this subject, and the decisions of the court would fluctuate according to the state in which the decisions took place, and the judge who presided.

That if there is turpitude in the trade to the brigand ports, there is an equal degree in the conduct of the claimants, in lying in wait to draw a profit from the ravages on our commerce, and in the clandestine manner in which the cargo was transferred from the one vessel to the other.

That the property of the libellants would not be devested by the capture or carrying *infra præsidia*, because a sentence of condemnation is indispensably necessary to change the property.

That this sentence of condemnation could not operate to produce that effect, because,

1st. Before the condemnation, the captors had parted with that possession which alone could give the court its prize jurisdiction over the property.

2d. Because, before the condemnation, it had actually returned within the jurisdiction of our own courts, and thus became revested by the *jus postliminii*.

3d. Because the sentence of condemnation appears on the face of it to be inconsistent with every idea of law and justice, inasmuch as the fact was committed before the *arrete* was passed which was made the foundation of the sentence.

4th. Because it is in direct violation of the 12th article of the convention with France, inasmuch as the trade to Port du Prince was a trade to a port of an enemy of France, which is sanctioned, under certain restrictions, by that article; also of the 22d article, which enjoins that the adjudication of American vessels captured shall be made by the tribunals of the country into which the prize shall be carried; also, inasmuch as the 22d article has also been violated, which prohibits the sale of goods captured previous to adjudication by a competent authority.

Without considering these arguments in detail, I shall recur to principles adopted by the district court in its decisions, and afterwards 512*] cursorily *examine such of the arguments of counsel as shall not appear to me to be disposed of by my previous observations.

In the decree of September, 1804, there are three questions considered.

1st. Whether the libellants could acquire any legal interest by a purchase from the brigands?

2d. Whether the capture and firm possession, without a condemnation, would convey a title to the claimants which this court could not violate.

3d. The question of identity.

The last of these questions has been relinquished upon the appeal. The second no longer exists since the production of the condemnation; and on the first I would only remark, that it is too much of a refinement upon the acquisition of property in commercial transactions, especially in the purchase of the products of the earth from the actual possessors and cultivators of the soil; and it is conclusive against the doctrine on this point insisted on for the claimants, that even the French courts have not ventured to adopt such a principle. But I must here express my dissent from the opinion of my much respected associate in this court, in the decision made by him in the court below on this point, to wit, that he had no jurisdiction of the question; because, that whenever a court has a jurisdiction of the principal subject of a suit, it must, of necessity, decide upon all questions which occur in the course of investigation, and have any bearing upon the principal cause of action. Had the libellants never acquired any legal interest in this property, it is plain that their suit must have been dismissed, without any inquiry into the subsequent occurrences.

In the decree of April, 1805, the only subject considered was the effect of the decree of condemnation, and it was declared irrelevant upon two grounds.

1st. Because, upon the face of it, it appears to have been founded on an ordinance passed subsequent to the commission of the act for which the vessel and cargo were condemned.

2d. Because the property was actually brought within the jurisdiction of the United States before the sentence of condemnation was pronounced.

Upon considering the first of the grounds, it will be immediately perceived that it supposes two things, viz.:

That a decree of a foreign court is examinable, and that it derives its validity only from its correctness—doctrines which, in my opinion, can in no wise be maintained. The respect required to be shown to the decrees of foreign tribunals is not founded upon the mere comity of nations; it has, for its foundation, that universal equality and independence of all governments, from which it results, as Vattel observes, "That to undertake to examine the justice of a definitive sentence, is an attack on the jurisdiction of him who passed it." It becomes, therefore, an absolute right of nations, as universal as the principle on which it depends, and one which we cannot dispense with conceding, "That *decisions made by the judge of [*513 the place, within the extent of his powers, shall be considered as justly made." Not being at liberty, as it were, to lift the mantle of justice cast upon their decrees, it is, as to other tribunals of justice, immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule. And, perhaps, if this doctrine were not deducible from any fixed principle, nations must long since have adopted it from a necessary attention to general convenience; for, otherwise, the sentence which I am now considering might, perhaps, again be reviewed in the courts of Santo Domingo, and from thence return to our own jurisdiction, after making the circuit of all the courts of Europe.

A question will no doubt here suggest itself to those who hear me; are our citizens, then, bound to acquiesce under every species of injustice? and do they sue in vain to our courts for relief? The answer is, while our government makes one of the society of nations, we

are bound to submit to the obligation of those rules which that society has assumed for their government; rules which are founded in truth and wisdom, and, but for the misapplication of fraud and flagitiousness of power, are well calculated to produce the best effects.

It is not in our courts that redress is to be sought for the errors or injustice of foreign adjudications. Nations pledge to each other the lives, the fortunes of their citizens, and even their very national existence, for the integrity and correctness of their judicial tribunals, and "when justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or an odious distinction adopted, to the prejudice of the subjects of another," and negotiation for satisfaction fails, the appeal lies to the *ultima ratio* of nations.

The government is bound to extend a protecting arm to her citizens, whilst confining themselves strictly within the limits of their duty, and to make compensation to them for such injuries as policy may withhold her from resenting.

The jurisdiction of the court of admiralty is of a peculiar nature. Acting wholly *in rem*, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel, its decrees are laid down to be conclusive against all the world; a doctrine which, as to the right of property in the subject libeled, is strictly and universally correct. "Whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations, and the style of the admiralty." Nor must it be supposed that to produce this effect upon the right of property, the decision of the court must be formed upon a just idea of the law of nations, as applies to any particular case; a decision founded upon an erroneous opinion will be as efficient, in that respect, as one which flows from the most unerring judgment. It is the thing decreed that courts of justice are to look to, not to the reasons from whence the conclusions are deduced.

514*] *Governments will, indeed, examine into the correctness of proceedings against their citizens, and insist on satisfaction, or dissolve the bonds of peace.

It remains for me to consider the second of the principles upon which the court below founded its decree of April last in favor of the libellants, to wit, "That as the property of the actors was actually brought into their own jurisdiction long before any judicial decision had taken place elsewhere, and the marshal of this court had the custody of it at least three months prior to any such decision, that alone might have been good cause for ordering restitution."

In the argument upon this head, the counsel contended that it was the possession alone which could bring the subject within the jurisdiction of the court of admiralty which condemned it; that in parting with the possession, by the sale, the court then lost its jurisdiction, and could not affect the right of property by their decree. The court below, without adopting this idea in the extent contended for, appears to assume another, to wit, that coming within our jurisdiction, it could no longer be subject to the court of France, and the property revested by *jus postliminii*. I am sorry here again to be under the necessity of adopting a different opinion. Mere locality will not, of itself, deprive the prize court of one nation of its jurisdiction, nor give jurisdiction to another. The taking as prize is the foundation of admiralty jurisdiction. A prize, brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the corpus be within the limits of another jurisdiction; and it is now the general practice of European nations to condemn in their own courts captured vessels carried into the ports of an ally or even a neutral. On the other hand, a prize brought into our ports would be in no wise subjected by that circumstance to our jurisdiction, except, perhaps, in the single case of its being necessary to assume a jurisdiction to protect our neutrality or sovereignty; as in the case of capture within our jurisdictional limits, or by vessels fitted out in our ports. Nor does it appear to me that the *jus postliminii* can at all attach in this case, because that this capture was not a reprisal upon us as a nation, but upon a single offending individual in the commission of an act unauthorized by his nation. To satisfy the mind on this subject, it is necessary to inquire what is the liability of an individual of a neutral state, who commits an act inconsistent with his neutrality, or even with the municipal laws of another nation? How is his state affected by his conduct, and who is to decide upon the offense with which he is charged? As to the tribunal that must determine on the offense, there is no longer a contrariety of opinion entertained among civilized nations. Every nation is the arbiter and vindicator of its own rights, and the courts of the capturing power have exclusive jurisdiction of questions arising on supposed breaches of neutrality, the violation of belligerent rights, or even of municipal law. With regard to the liability of individuals charged with these offenses, it is proper to observe, *that in strictness every [*515 nation is bound to restrain its own citizens from the commission of offenses against all other nations. But as it is impossible, in the present state of things, for the most vigilant government to prevent these aggressions, which a desire of gain and the spirit of adventure are hourly producing, nations have agreed in giving up the individual to the consequence of his own temerity, and the offender is now treated as an individual enemy, abandoned by his own government, and who cannot ever claim the rights of war, but from the humanity or policy of his captor. A consideration which will set this idea in a strong point of view, and show that he is considered as waging individual war with the capturing belligerent, is that if he escapes or rescues his vessel after capture, he is never demanded of his government, nor complaint made against him, whatever acts of violence he may commit in so doing, but avoids the danger as another enemy would under similar circumstances.

If an American vessel charged with a breach of neutrality, were to be captured by a belligerent beyond our jurisdictional limits, and before condemnation were to be driven into one of our ports, either by stress of weather or the pursuit of any enemy, will it be contended that this

court could interfere to devest the captor of his possession? It must be recollected that such an attempt would draw to this court, the jurisdiction of a question which it is the acknowledged right of the belligerent to have decided by his own tribunals. Therefore, in the case of a neutral captured on a charge of a breach of neutrality, the *jus postliminii* can only attach in case of rescue or recapture, and his nation cannot interfere to restore him that possession which he has lost by the capture, without becoming a party in the contest; she regards the individual and capturing power as belligerents, between whom she is bound equally to observe the laws of neutrality, and particularly to consider possession as the criterion of right, at least while the cause of capture is in its progress to adjudication. It will be perceived how large a portion of the argument went to justify and condemn the trade in which this vessel was engaged; the one side contending that the libellants had committed no act for which she was liable to condemnation; the other, that they had a question which is exclusively cognizable in the courts of the capturing power, but which this court would be compelled to decide upon if the libel be sustained upon a claim interposed on behalf of the captors, or, even, I conceive, of their vendee, unless there were reason to contend that the vessel was piratically captured.

At the same time I heartily concur in the opinion, that as far as between neutrals, at least, a sentence of condemnation is indispensably necessary to produce a complete devesture of property, and unless the neutral property captured be put in a train for legal adjudication, I should think a nation at liberty to seize it as being piratically taken; for the capturing power is bound to satisfy the neutral nation that she had a legal right to attack her citizen; and it will be found, upon reflection, that this cannot be satisfactorily done in any other mode 516*] than *by a decree of her tribunals of justice. Much has been said about the different rules adopted by European nations respecting the devesture of property. These rules were universally adopted by the respective nations to regulate the claims of their own citizens in questions of salvage and restitution. In case of alliances in war, each nation extended to its ally the benefit of a rule which ascertained the rights of her own citizens. And the correctness of these rules was mere matter of speculation, in no wise affecting the interest of neutrals, until Great Britain thought proper, in the last war, to exact a salvage on the recapture of neutral property. There appears to me to remain but two of the points made by counsel, on which it may be necessary for me to remark.

1st. How far the sentence of condemnation would affect the property after the sale.

2d. Whether the whole transaction was not inconsistent with the treaty subsisting between the two nations, and, therefore, producing no change of property.

1st. In the case of *Sheafe and Turner v. A parcel of Sugars*, decided in the district court of this district in the year 1800, in favor of the purchasers, and affirmed on appeal to the circuit court, the property captured was carried into the Havanna and libelled and condemned by a French court sitting at the Cape. The sale also took place prior to the condemnation. It was, indeed, asserted in that case, as it was in this, that the sale was made with the consent of the captain, but there was no evidence to prove it. In two important features, these cases are parallel, and I might rest my opinion on this point, on precedent alone; but it affords me more satisfaction to be able also to decide on principle. As the sale was not made by order of a competent tribunal, and was made by the captors at a time when their rights were not consummated by a judicial decision, the claimant in this case could have acquired no more than an inchoate right, subject to be confirmed or defeated by the event of the decision of the court to which the cause was preferred; that is, he acquired no more interest than what was possessed by the captor from whom he purchased. Had the decision been against the captors, with the evidence now before me, I should not hesitate to decide in favor of restitution; but when once the decree of condemnation was passed, the government of France has made the act of capture its own, and all questions of individual interest are at an end.

The whole of the argument founded on the violation of the treaty, is subject to the general objection, that it leads to a revision of a decree of a foreign tribunal.

The French courts are bound by the convention with France, and it is to be presumed, that they bear it in mind in their decisions. They possess the same power in construing its meaning and effect that we do, and though influenced by an erroneous opinion, that would not, of itself, vitiate their decrees. With regard to the ground of the argument drawn from the 12th article, to wit, that Port de Paix is the port *of an enemy of France, and, [*517 therefore, a trade with it is sanctioned by that article, I think is totally incorrect in point of fact. France has not yet relinquished the contest, and until she does, I think that all the ports of the island are still ports of France, and that she possesses the right to exclude all the world from a commerce with them, and to fix the penalty for a breach of such exclusion. There is a peculiarity in the unhappy conflict raging in that devoted island, which should make us hesitate in applying to it the general rules of war between independent nations. Great Britain, deeply interested as she is in embarrassing and distressing her enemy, has not ventured to apply the general laws of war to this newly erected empire. On the contrary, she condemns our vessels carrying contraband of war to the brigand ports, as if carrying to the ports of her enemy, although, in fact, it is carrying them to the most inveterate enemy of her rival. As the 20th article relates only to the case of a capture for carrying contraband of war to an enemy's port, I shall pass it over without any observations, and shall close with a few remarks on the 22d article, the last noticed in the argument.

The first clause of this article, and the only one relating to this case, is in the following words: "It is further agreed, that in all cases, the established courts for prize causes in the country to which prizes may be conducted, shall take cognizance of them," &c. It strikes me, upon an attentive consideration of this article,

that the only object of it was a recognition of the established doctrine, that the courts of the capturing power shall judge of the legality of capture, and to add the very necessary provision that the reasons of condemnation shall be in all cases expressed in their decrees. But certainly the words literally taken, will produce the inference contended for by counsel, to wit, that vessels captured from our citizens by France, cannot be condemned, except in a French port, for it would be absurd to suppose that it was intended to give jurisdiction to the courts of any neutral or ally, into whose ports such prizes might be carried. If this were a just construction of the article alluded to, it would only follow, that a violation of the treaty had been committed, for which France is bound to make atonement, and that the court of admiralty of Santo Domingo was incorrect in proceeding to adjudicate a vessel not lying in their own port. But I conceive that the validity of the decree will still remain unshaken as to the change of property.

If this article was not brought to the notice of that court, it may well be attributed to the laches of the libellant himself in not making this defense, or, indeed, any other in a court that was open to his claims. But there is a liberality and candor necessary in the construction of treaties which would make me reject the one here contended for, were it necessary to decide upon it. I could never be induced to think that a point of such importance would be left to mere inference, by the able men who negotiated that treaty, when it could have been so easily expressed, in a single unequivocal sentence. Nor do I think the interest of the neutral would be promoted by a construction which would *subject the fair trader to the [*518 melancholy inconvenience of being detained in some distant port, until he could be safely conveyed to that of the captor for adjudication, or be exposed, perhaps, to the perils of the ocean during some tedious voyage for the same purpose.

Upon the whole, I am of opinion that the decrees in these cases should be reversed, and the libels be dismissed. But as the claimant purchased before condemnation, and the libellant had a fair claim to this investigation, I am of opinion that each party should pay his own costs.

FEBRUARY TERM, 1807.

GENERAL RULE.

It is ordered, that where damages are given by the rule passed in February term, 1805, the said damages shall be calculated to the day of affirmance of the said judgment in this court.

FEBRUARY TERM, 1808.

GENERAL RULES.

1. Ordered, that all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

2. Ordered, that upon the clerk of this court producing satisfactory evidence, by affidavit or acknowledgment of the parties or their sureties, of having served a copy of the bill of costs due by them respectively in this court, on such parties or sureties, and of their refusal to pay the same, an attachment shall issue against such parties or sureties respectively to compel payment of the said costs.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and Distarct Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citations of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., **Am. Rep.** and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,
So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text-books.

EDITOR.

IV CRANCH.

4 Cr. 1, 2 L. 531, UNITED STATES v. KIDD.

No citations.

4 Cr. 2-29, 2 L. 531, JENNINGS v. CARSON.

Admiralty.— District Courts of the United States are courts of prize, with all the powers of continental courts of appeal in prize cases, p. 23.

Rule applied in dissenting opinion, Brown v. United States, 8 Cr. 137, 3 L. 514, majority denying jurisdiction where property left on mud by tide; Taylor v. Carryl, 20 How. 600, 15 L. 1034, holding further that seizure must be valid, and control of marshal actual; The Hiawatha, Blatchf. Prize, 7, F. C. 6,451, and holding jurisdiction not restricted to seizures made within territorial dimensions or on high seas; The Actor, Blatchf. Prize, 200, F. C. 36, holding question as to whether seizure is one of prize, is one for court in first instance; The Lizzie Weston, Blatchf. Prize, 265, F. C. 8,425, as to procedure; The Wave, Blatchf. & H. 252, F. C. 17,297, holding act of congress unnecessary to establish jurisdiction in civil causes; Fay v. Montgomery, 1 Curt. 269, F. C. 4,709, holding that court will first ascertain whether case is one of prize; The Emulous, 1 Gall. 573, F. C. 4,479, as to captures made in port; The Centurion, 1 Ware, 480, F. C. 2,554, to point that one court may enforce decree of another court; Jones v. The Richmond, 13 Fed. Cas. 1013, holding action against vessel for salvage, service does not depend upon question as to whether vessel was arrested or brought within territorial jurisdiction of court. Cited generally in The Rio Grande, 23 Wall. 465, 23 L. 159. See also The Ella Warley, Blatchf. Pr. 207, F. C. 4,371, citing note to principal case on this point. Approved in The Anna, Blatch. Pr. 339, F. C. 402, discussing general subject.

Distinguished in Assign v. The G. B. Lamar, 2 Fed. Cas. 69, holding judgment against master for wages recovered in common-law court cannot be enforced in admiralty; Slocum v. Wheeler, 1 Conn. 447, where property seized on shore held not to be subject to admiralty jurisdiction; Braithwaite v. Jordan, 5 N. Dak. 216, 65 N. W. 707, holding action on bond given for stay of proceedings not to be part of original prize action.

Admiralty.— In all proceedings in rem the property is presumed to be in the custody of the law unless the contrary appears, p. 25.

Cited and principle applied in The Celestine, 1 Biss. 7, F. C. 2,541,

as to attachment in State court, denying control to a creditor in United States Court; aso in The Bolina, 1 Gall. 81, F. C. 1,608, as to seizure for violation of revenue laws; Burke v. Trevitt, 1 Mason, 100, F. C. 2,163, as to libel for restitution of goods seized under revenue laws; and in The Robert Fulton, 1 Paine, 626, F. C. 11,890, as to libel for materials furnished; The Phebe, 1 Ware. 364, F. C. 11,066, holding attachment will issue where property taken from custody of officer of court; United States v. The Pitt, 27 Fed. Cas. 542, holding that court may order delivery of property to claimants upon filing stipulation bond; so also in the Frank Vanderkerchen, 87 Fed. 765; Tracey v. Corse, 58 N. Y. 151, as to property seized for violation of revenue laws. See note 62 Am. Dec. 245, on general subject. Approved in Cushing v. Laird, 107 U. S. 78, 27 L. 394, 2 S. Ct. 202; and The Young America, 30 Fed. Rep. 791, discussing general subject.

Admiralty.— Belligerent cruiser seizing a neutral with probable cause, and taking her in for adjudication, proceeding regularly, is not a wrong doer, pp. 28, 29.

Admiralty — Appeal.— The property does not follow the appeal into the higher court, and the lower court may order it sold notwithstanding the appeal, pp. 26, 27.

Rule applied in The William Bagaley, 5 Wall. 412, 18 L. 591. Discussed in Young v. Kellar, 94 Mo. 594, 4 Am. St. Rep. 413, 7 S. W. 298, and principle applied to sale of perishable goods held under attachment; so, also, in Cilley v. Jenness, 2 N. H. 92.

Miscellaneous citations.— Cited in Averill v. Smith, 17 Wall. 93, 21 L. 616, to the point that custodian of goods seized is responsible for loss or injury due to neglect.

4 Cr. 29–46, 2 L. 540, RHINELANDER v. INSURANCE CO. OF PENNSYLVANIA.

Marine insurance — Abandonment.— The capture of a neutral vessel by a belligerent constitutes a constructive total loss, and entitles the insured to abandon at any time before restitution, p. 42.

Discussed and followed in Marshall v. Insurance Co., 4 Cr. 206, 2 L. 597, under similar facts. Cited in Olivera v. Insurance Co., 3 Wheat. 195, 4 L. 368, as to vessel in blockaded port; Thompson v. Insurance Co., 2 La. 240, 22 Am. Dec. 136, as to unwarranted seizure on ground of illicit trade; Bohlen v. Insurance Co., 4 Binn. 441, but holding that assured need not abandon before vessel condemned. Approved in Peele v. Insurance Co., 3 Mason 65, 67, F. C. 10,905, and Thompson v. Insurance Co., 2 La. 240, 22 Am. Dec. 136, discussing general subject.

Marine insurance.— The state of the loss at the time of the offer to abandon fixes the rights of the parties, and subsequent release does not prevent recovery for total loss, p. 46.

Cited and rule applied in Bradlie v. Insurance Co., 12 Pet. 397, 9 L. 1132, where value of vessel, at place where repairs must be made, held to govern right; Orient Ins. Co. v. Adams, 123 U. S. 75, 31 L. 67, 8 S. Ct. 72, holding, where abandonment is in good faith, it is not affected by change in circumstances rendering repairs less expensive; so, also, in Peele v. Insurance Co., 3 Mason, 37, F. C. 10,905, holding further act of underwriter, in taking possession, constituted acceptance of abandonment; and, conversely, where abandonment not made when right accrued, but vessel repaired, owner could not afterwards abandon, Humphreys v. Insurance Co., 3 Mason, 436, F. C. 6,871; Fuller v. Insurance Co., 31 Me. 327, holding repair of vessel by purchaser after abandonment not to impair validity of abandonment; Dickey v. Insurance Co., 4 Cow. 243, holding repairing of vessel by master destroys right, although unknown to owner; Radcliff v. Coster, 1 Hoff. Ch. 103, holding offer to abandon must be based upon information of facts sufficient to warrant abandonment.

Miscellaneous citations.— Cited in Flanagan v. Insurance Co., 25 N. J. L. 521, to the point that, when policy is open, insurer can only recover to extent of damage, although loss be total.

4 Cr. 46–47, 2 L. 545, MONTALET v. MURRAY.

Jurisdiction of U. S. courts.— Facts necessary to give jurisdiction must be averred, p. 47.

Cited and applied, in dissenting opinion, McNutt v. Bland, 2 How. 22, 11 L. 164, majority holding it sufficient if parties beneficially interested be competent; dissenting opinion, Marshall v. Railroad Co., 16 How. 341, 14 L. 964, declaring corporation not a citizen and that citizenship of president and directors should be averred; Dred Scott v. Sandford, 19 How. 402, 15 L. 699, holding free negro, born of slave parents, not a citizen; Childress v. McGehee, Minor, 133, and principle applied to Justices' Courts as being of limited jurisdiction; also in Commissioners' Court v. Thompson, 18 Ala. 697, as to Commissioners' Court of Roads; and in Ingraham v. Arnold, 1 J. J. Marsh. 407, to the "General Court;" Clarey v. Marshall's Heirs, 4 Dana (Ky.), 97, holding, further, that facts may appear in any part of record; Beebe v. Armstrong, 11 Mart. (La.) (O. S.) 441, as to removal of causes; Florence Co. v. Baker Co., 110 Mass. 81, on same point. Cited generally in Blair v. West Point Manfg. Co., 7 Neb. 154.

Jurisdiction.— Federal courts have not jurisdiction between aliens, p. 47.

Doctrine applied in Picquet v. Swan, 5 Mason, 55, F. C. 11,134, holding citizen of Territory not citizen for purpose of suing in Fed-

eral courts; Pooley v. Luco, 72 Fed. 561, under facts similar to those in principal case; Petrocokino v. Stuart, 19 F. C. 385, holding that fact that foreign corporation has office within jurisdiction does not render it competent to sue another alien; Orosco v. Gagliardo, 22 Cal. 85, denying petition for removal to Federal court.

Distinguished in Hinckley v. Byrne, Deady, 227, F. C. 6,510, where plaintiff was citizen of United States.

Jurisdiction.— Where payee and maker of note are both aliens indorsee cannot sue in Federal court, p. 47.

Cited and principle applied in Morgan v. Gay, 19 Wall. 83, 22 L. 100, where payee of inland bill of exchange not competent to sue; Parker v. Ormsby, 141 U. S. 85, 35 L. 656, 11 S. Ct. 913, dismissing suit where citizenship of payee not averred; Shurford v. Cain, 1 Abb. (U. S.) 308, F. C. 12,823, where original parties citizens of same State; Rogers v. Linn, 2 McLean, 127, F. C. 12,015, sustaining demurrer where citizenship of assignor of bond not alleged; Hampton v. Canal Co., 9 Sawy. 383, 19 Fed. 3, ruling similarly as to mechanics' liens; New Orleans, etc., Co. v. The Recorder, 27 La. Ann. 293, dismissing suit where original parties to mortgage not competent to sue. The rule has been approved in Bullard v. Bell, 1 Mason, 251, F. C. 2,121, and Donaldson v. Hazen, Hemp. 425, F. C. 3,984, discussing the general subject.

Distinguished in Coffee v. Planters' Bank, 13 How. 187, 14 L. 106, and Phillips v. Preston, 5 How. 291, 12 L. 157, where suit was not upon note assigned but upon new agreement between maker and assignee; Wilson v. Fisher, 1 Bald. 137, F. C. 17,803, holding that where original parties competent, intermediate assignment to one not competent is immaterial; Dundas v. Bowler, 3 McLean, 208, F. C. 4,140, denying application to case of mortgage; Towne v. Smith, 1 Wood. & M. 119, F. C. 14,115, where note payable to maker, and by him indorsed, held payable to bearer.

Costs on appeal.— If a judgment is reversed for want of jurisdiction costs are not to be allowed, p. 47.

The rule has been applied in Hornthall v. The Collector, 9 Wall. 567, 19 L. 562, and Abbey v. The Robert L. Stevens, 1 F. C. 12, in admiralty proceedings, dismissing libels for want of jurisdiction; Burnham v. Rangely, 2 Wood. & M. 421, 422, F. C. 2,177, ruling similarly in dismissing suit in equity. Cited approvingly in Miller v. Clark, 52 Fed. 902, and Jim v. State, 3 Mo. 163, discussing general subject.

Rule limited in Mansfield, etc., Ry. Co. v. Swan, 111 U. S. 388, 28 L. 466, 4 S. Ct. 514, awarding costs against party wrongfully removing cause to Federal court; Bradstreet v. Higgins, 114 U. S. 264, 29 L. 176, 5 S. Ct. 880, holding party entitled to costs incident to motion to dismiss; Bitz v. Meyer, 40 N. J. L. 256, 29 Am. Rep. 236, awarding costs where trial of issue of fact necessary to determine jurisdiction.

4 Cr. 48-59, 2 L. 546, UNITED STATES v. WILLINGS.

Admiralty.— Vessel may be transferred, by parol, at sea, and, if resold to vendor, on arrival in port does not lose her American character and no new register is necessary, pp. 55-59.

Rule applied in Calais Steamboat Co. v. Van Pelt, 2 Black, 285, 17 L. 289, and in Scudder v. Calais Steamboat Co., 1 Cliff. 380, F. C. 12,565; also in Barnes v. Taylor, 31 Me. 334. See also Vinal v. Burrill, 16 Pick. 406, discussing subject generally.

Denied in Ohl v. Insurance Co., 4 Mason, 394, F. C. 10,473, holding written contract necessary.

Vessel.— Transfer of, at sea, without change of papers does not work a forfeiture of her national character, p. 56.

Rule applied in D'Wolf v. Harris, 4 Mason, 533, F. C. 4,221, also in The Forrester, Newb. 94, F. C. 15,132, holding further as to distinction between registration and enrollment.

4 Cr. 60-62, 2 L. 550, ONEALE v. LONG.

Appeal and error.— Exceptions will lie to refusals of the court to give instructions when requested to do so, p. 62.

Rule applied in Emerson v. Hogg, 2 Blatchf. 7, F. C. 4,440, holding that where charge does not comply with prayer, instructions are to be considered as refused.

Alteration of written instruments.—Alteration of a bond by principal, in substituting a surety without consent of the other sureties, renders the bond invalid, p. 62.

Cited to this point and principle applied in Anderson v. Bellenger, 87 Ala. 337, 13 Am. St. Rep. 48, 6 So. 82, holding contract of suretyship should be construed strictly in favor of surety; Sans v. People, 8 Ill. 336, as to alteration of penalty in bail bond; Covert v. Shirk, 58 Ind. 268, as to withdrawal by surety on appeal bond before approval by court; People v. Brown, 2 Doug. (Mich.) 13, as to alteration of penalty in sheriff's bond. Discussed in Humphreys v. Guillow, 13 N. H. 387, 38 Am. Dec. 500, and principle applied to material alteration of promissory note. See also note, 25 Am. Rep. 709, on general subject.

The principle has also been approved in the following cases discussing the general subject: Taylor v. Johnson, 17 Ga. 533; Barrett v. Thorndyke, 1 Me. 76; Walla Walla County v. Ping, 1 Wash. Ter. 344, where authorities are collected and compared.

Distinguished in State v. Pepper, 31 Ind. 86, holding that where spaces are left for subsequent insertions, surety is estopped from denying validity; Yeager v. Musgrave, 28 W. Va. 111, as to immaterial alteration by third party.

4 Cr. 62–73, 2 L. 550, SMITH v. CARRINGTON.

Evidence.— Admission of a copy of a letter in evidence, not authenticated, and the original unaccounted for, is error and ground for reversal of judgment, and the court cannot inquire into its weight or importance, p. 70.

Cited to this point in Manhattan Malting Co. v. Sweteland, 14 Mont. 272, 36 Pac. 84, as to admission of parol evidence where statute requires written. Approved in Laty v. Purdy, 2 Overt. 165, discussing general subject.

Exception to instructions.— Misdirection in the charge to the jury affords ground for a bill of exceptions, p. 72.

Cited in Texas & Pacific Ry. v. Volk, 151 U. S. 78, 38 L. 80, 14 S. Ct. 240, as to omission of court to charge when requested; and, on same point, in Emerson v. Hogg, 2 Blatchf. 7, 13, F. C. 4,440; Brackett v. Norton, 4 Conn. 521, 10 Am. Dec. 181, as to charge containing construction of unproved foreign laws; State v. Hascall, 6 N. H. 359, as to omission to charge regarding competence of evidence; Firemen's Ins. Co. v. Walden, 12 Johns. 517, 7 Am. Dec. 344, holding erroneous a positive direction as to materiality of facts; Fletcher v. Howard, 2 Aikens, 117, 16 Am. Dec. 689, as to refusal to instruct regarding effect of possession by pledgor in case of pledge; Gordon v. City of Richmond, 83 Va. 439, 2 S. E. 729, as to obscure and misleading instructions. See note, 72 Am. Dec. 542, on general subject.

Distinguished in Knapp v. McBride, 7 Ala. 30, holding mere neglect to charge not ground for reversal; Dunlop v. Patterson, 5 Cow. 246, and Washburn v. Tracy, 2 D. Chip. 136, 15 Am. Dec. 663, holding that omission must be of instruction requested by counsel.

Instructions to jury.— The court cannot be required to charge respecting a matter of fact and, when such request is made, is not bound to separate law from fact and charge as to former, p. 71.

Cited and applied in United States v. Burnham, 1 Mason, 69, F. C. 14,690, where request contained recital of evidence; so, also, in Stearns v. Barrett, 1 Mason, 173, F. C. 13,337; Proctor v. Hart, 5 Fla. 467, holding court may refuse to charge as to abstract proposition not based on color of evidence. Followed in Brooke v. Young, 8 Rand. 112; in Peasley v. Boatwright, 2 Leigh (Va.), 197, under facts similar to principal case. Rule discussed and approved in Kitty v. Fitzhugh, 4 Rand. 604.

Evidence — Competency of witnesses.— Incompetency of a witness as to one point is not ground for his rejection generally, p. 69.

Cited in Beers v. Broome, 4 Conn. 256, as to witness interested in part of transaction; McMicken v. Fair, 4 Mart. (La.) (N. S.) 173, as to interest in certain items of account. Cited generally in

Knowles v. Dow, 22 N. H. 410, 55 Am. Dec. 171, discussing subject of evidence of custom.

Miscellaneous citations.— Cited in Sibly v. Hood, 3 Mo. 298, as to functions of jury; also in Denny v. Palmer, 5 Ired. 624, but not in point.

4 Cr. 73–74, 2 L. 554, PENDLETON v. WAMBERSIE.

Partnership — Assignment of interest.— An assignee of a copartner may maintain a bill for an account against the other members of a partnership which was formed to deal in lands, p. 74.

Cited and rule applied in Hirbour v. Reeding, 3 Mont. 25, holding, further, as to effect of statute of frauds; so, also, in Chester v. Dickerson, 54 N. Y. 7, 13 Am. Rep. 552; Tiller v. Cook, 77 Va. 481, as to partnership formed for purpose of repairing and operating mill.

4 Cr. 75–137, 2 L. 554, EX PARTE BOLLMAN & SWARTWOUT.

Jurisdiction.— Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction, p. 93.

Cited and applied in In re Garvey, 7 Conn. 248, denying authority of judge to issue habeas corpus, in chambers, where such authority not given by statute; People v. Taylor, 1 Scam. 202, State Supreme Court refusing writ of habeus corpus in exercise of original jurisdiction; Baker v. Chisholm, 3 Tex. 158, disclaiming jurisdiction to entertain appeal from decision of lower court in contested election case; Solon v. State, 5 Tex. App. 305, denying jurisdiction of Justice's Court over misdemeanor not specified by statute.

Jurisdiction.— Federal courts have no common-law jurisdiction, and can take cognizance of offenses only as authorized by congress. p. 93.

Cited, and applied in dissenting opinion, Tennessee v. Davis, 100 U. S. 282, 25 L. 657, majority holding trial for murder, committed by revenue officer in discharge of duty, removable to Federal court; dissenting opinion, In re Neagle, 135 U. S. 78, 96, 34 L. 76, 83, 10 S. Ct. 673, 679, majority sustaining decree of Circuit Court discharging, in habeas corpus proceeding, Federal officer held for murder by State court; In re Barry, 136 U. S. 601, 607, 608, 609, 610, 612, 613, note, 34 L. 505, 507, 508, 509, 42 Fed. Rep. 116, 120, 121, 122, 123, 124, 126, 127, F. C. 1,059, denying jurisdiction of Circuit Court to issue writ, at instance of alien parent, to determine right of other parent to custody of child; United States v. Wilson, 3 Blatchf. 438, F. C. 16,731, where jurisdiction given to Circuit Court, over torts committed on "high seas," held not to extend to those committed in port; Ex parte Everts, 1 Bond, 200, 202, F. C. 4,581, refusing writ

to review proceedings of State court awarding custody of child, although petitioner was citizen of another State; so, also, in Bennett v. Bennett, Deady, 314, F. C. 1,318; United States v. New Bedford Bridge, 1 Wood. & M. 408, 436, 440, 448, F. C. 15,867, quashing indictment against corporation for maintaining obstruction in navigable river, in absence of act of congress making such act punishable; United States v. Plumer, 3 Cliff. 55, F. C. 16,056, denying jurisdiction of Circuit Court to review, on writ of error, judgment of District Court in criminal cause; In re Boles, 48 Fed. Rep. 76, 4 U. S. App. 1, denying jurisdiction of Federal Court of Appeals to issue writ of habeas corpus to be served outside of circuit; King v. McLean Asylum, 64 Fed. Rep. 342, 347, 348, 21 U. S. App. 481, refusing writ to review commitment of person in insane asylum, by order of State court; Ludington v. The Nucleus, 15 F. C. 1095, holding contracts for materials furnished at home port in building vessel not to be within act extending jurisdiction of District Courts to great lakes; dissenting opinion, Slocum v. Wheeler, 1 Conn. 453, arguing that in order to render judgment of District Court, sitting as Admiralty Court, conclusive, jurisdiction must appear on record; dissenting opinion, Chumasero v. Potts, 2 Mont. 290, arguing that Territorial court cannot issue writ of mandamus without authority of congress. The principle has also been applied in In re Garvey, 7 Colo. 507, 4 Pac. 760, denying jurisdiction of judge to issue habeas corpus at chambers where statute gives such jurisdiction to court generally.

Distinguished in Ex parte Des Rochers, McAll, 72, 73, F. C. 3,824, issuing writ, at instance of party to suit, where justice of State Supreme Court, whose presence was necessary to decide cause, was deprived of liberty by individuals.

Construction.— The nature of a provision in a statute, as well as its context, may be resorted to to determine its meaning, p. 95.

Cited and applied in Brady v. Bartlett, 56 Cal. 364, construing statute directing mode of levying assessments for public improvements.

Jurisdiction.— State courts are not inferior courts within meaning of Federal Constitution, p. 97.

Cited and principle applied in Davison v. Champlin, 7 Conn. 248, holding that congress cannot confer on State court jurisdiction of offense arising under postal laws.

Habeas corpus will not issue from Federal to State court except in cases arising under laws of the United States, p. 97.

Cited and applied in Holmes v. Jennison, 14 Pet. 620, 621, 625, 626, 10 L. 622, 623, 625, 626, refusing writ where prisoner held for extradition under warrant issued by governor of State; Ex parte Hung Hang, 108 U. S. 553, 27 L. 812, 2 S. Ct. 864, where petitioner held for trial for violation of city ordinance alleged to be repugnant

to Federal Constitution; In re Barry, 136 U. S. 625, note, 34 L. 513, 42 Fed. Rep. 133, F. C. 1,059, refusing writ to review decision of State court awarding custody of minor child; so also in Ex parte Everts, 1 Bond, 200, 202, F. C. 4,581, Bennett v. Bennett, Deady, 314, F. C. 1,318, and King v. McLean Asylum, 64 Fed. Rep. 342, 347, 348, 21 U. S. App. 481.

Habeas corpus.— The Supreme Court has jurisdiction to issue a writ of habeas corpus to examine into the cause of a commitment by an inferior Federal court, p. 101.

A number of citing cases are upon this point. The rule has been cited and applied in Ex parte Watkins, 7 Pet. 572, 573, 8 L. 788, where prisoner committed under ca. sa. to collect fine; dissenting opinion, In re Kaine, 14 How. 146, 14 L. 363, majority refusing writ where proceedings of commissioner committing prisoner had been held valid in Circuit Court upon a habeas corpus; Ex parte Milligan, 4 Wall. 110, 18 L. 292, holding that suspension of privilege of writ does not suspend writ itself, and it will issue to review decision of lower court committing prisoner under declaration suspending writ; Ex parte McCardle, 6 Wall. 324, 18 L. 817, and Ex parte Yerger, 8 Wall. 97, 98, 19 L. 336, holding that Supreme Court may issue writ accompanied by writ of certiorari to revise decision of lower court, in habeas corpus proceedings, remanding prisoner; Ex parte Lange, 18 Wall. 166, 21 L. 875, extending principle and discharging prisoner held under final judgment of lower court, rendered without authority; Ex parte Perkins, 29 Fed. 908, applying principle in Circuit Court issuing habeas corpus where prisoner committed for contempt by court lacking jurisdiction in first instance; State v. Sullivan, 50 Fed. 598, holding that grant by congress of general power to issue writ included writ of habeas corpus cum causa; In re McDonald, 16 Fed. Cas. 20, 23, collecting and discussing authorities; the principle has also been applied in State courts, and the following cases have relied upon it: Ex parte Harbour, 39 Ark. 129, holding that Supreme Court of State may review, on certiorari, decision of inferior court refusing bail; State v. Neel, 48 Ark. 288, 3 S. W. 633, issuing writ to determine as between lessees, who has right to services of convict; State v. Mace, 5 Md. 340, issuing writ of habeas corpus ad testificandum; State v. Grant, 10 Minn. 46, holding constitutional, act of legislature conferring upon Supreme Court power to issue writ; dissenting opinion, Ex parte Marmaduke, 91 Mo. 251, 4 S. W. 99, as instance where United States Supreme Court issued writ; State v. Barber, 4 Wyo. 68, 32 Pac. 16, holding that where State Supreme Court is authorized to issue writ of mandamus generally, it may issue it to compel election board to canvass returns.

Cited generally in Ex parte Davis, 7 Fed. Cas. 47; In re Kaine, 14 Fed. Cas. 87, 88, discussing subject of habeas corpus; People v. Tur-

ner, 1 Cal. 147, 52 Am. Dec. 298, discussing subject of ex parte jurisdiction of State Supreme Court; dissenting opinion, Hyatt v. Allen, 54 Cal. 364, 368, as instance where Supreme Court issued writ in exercise of appellate jurisdiction.

Distinguished in Ex parte Kearney, 7 Wheat. 42, 5 L. 392, holding commitment for contempt to be in the nature of a conviction, and hence habeas corpus could not issue; Ex parte Watkins, 3 Pet. 208, 7 L. 655, where prisoner held under conviction in criminal case by court of competent jurisdiction; In re Metzger, 5 How. 189, 190, 191, 12 L. 110, denying jurisdiction of court to issue writ, as incident to appellate power, where commitment ordered by district judge at chambers; In re Kaine, 14 How. 119, 130, 131, 133, 14 L. 351, 356, 357, denying jurisdiction to issue writ where legality of proceedings of commissioner ordering extradition of prisoner had been inquired into and sustained by Circuit Court; dissenting opinion, Ex parte Wells, 18 How. 317, 15 L. 426, majority entertaining writ to inquire as to legality of imprisonment under sentence of Circuit Court; Ex parte Siebold, 100 U. S. 374, 375, 25 L. 718, denying authority to issue writ where commitment was under decree of court of competent jurisdiction; In re Kaine, 14 Fed. Cas. 83 (see 14 How. 119, 130, 131, 133, 14 L. 351, 356, 357.) See also dissenting opinion of Johnson J. in Ex parte Watkins, 7 Pet. 581, 8 L. 791, where rule criticised and denied.

Habeas corpus.— The decision that the individual shall be imprisoned must always precede the application for habeas corpus, and as the writ is for the purpose of revising that decision it is appellate in its nature, p. 101.

Principle applied in Ex parte Tom Tong, 108 U. S. 560, 27 L. 828, 2 S. Ct. 873, refusing to entertain certificate of division from Circuit Court as to whether writ should issue to State court, there having been no committment by a Federal court; Yarborough v. State, 2 Tex. 521, holding that appeal does not lie to State Supreme Court from inferior court remanding prisoner on habeas corpus. Cited also in People v. Spiers, 4 Utah, 387, 10 Pac. 610, discussing powers of territorial courts to issue writs ancillary to appellate jurisdiction.

Habeas corpus.— If sufficient ground for the prisoner's detention be shown, he is not to be discharged for mere defects in the original commitment, p. 114.

Principle applied in Nishimura Ekiu v. United States, 142 U. S. 662, 35 L. 1150, 12 S. Ct. 339, refusing writ to review decision of inspector denying right of immigrant to land, although such decision irregular in form; In re Van Campen, 2 Ben. 421, 422, F. C. 16,835, holding, as to indictment under national bank act, for embezzlement, that probable cause to believe in guilt is sufficient

to warrant commitment; In re Veremaitre, 28 Fed. Cas. 1149. remanding prisoner for extradition where warrant of commissioner prima facie sufficient; Peltier v. Pennington, 14 N. J. L. 318, remanding prisoner, where original warrant irregularly issued; Ex parte Mooney, 26 W. Va. 39, 53 Am. Rep. 61, holding that where person is imprisoned under sentence, part of which is invalid, he will not be discharged until legal portion of sentence has been served.

Treason — Levying war.— A conspiracy to subvert the government by force is not treason; war must actually be levied, p. 126.

Cited in United States v. Hanway, 2 Wall. Jr. 202, F. C. 15,299, defining treason in charge to jury; affirmed in United States v. Burr, 25 Fed. Cas. 165, where same facts involved as in principal case; State v. McDonald, 4 Port. 463, applying principle in holding that to make a free person guilty of encouraging a rebellion of slaves there must be proof of actual rebellion. See also note. 94 Am. Dec. 580. Cited arguendo in dissenting opinion, Luther v. Borden, 7 How. 81, 12 L. 615; United States v. O'Sullivan, 27 Fed. Cas. 378.

Treason — Levying war.— If a body of men be actually assembled for the purpose of subverting the government by force, all who perform a part, however minute and however remote from the scene of action, are traitors, p. 126.

Cited and principle applied in United States v. Athens Armory, 2 Abb. (U. S.) 146, F. C. 14,473 (see 35 Ga. 360), holding property used for purpose of manufacturing arms for Confederate government liable to confiscation; United States v. Greathouse, 2 Abb. 373, 4 Sawy. 467, F. C. 15,254, defining treason in charge to jury on indictment for fitting out vessel to aid rebel government; Lawson v. Miller, 44 Ala. 625, 4 Am. Rep. 149; Hill v. Edwin, 44 Ala. 667, 668; Latham v. Clark, 25 Ark. 579, holding Confederate government to have been treasonable in origin, hence notes issued by it could not constitute valid consideration for contract; State v. Larkin, 49 N. H. 43, holding remote acts done in aid of conspiracy renders person conspirator; Druecker v. Salomon, 21 Wis. 626, 94 Am. Dec. 575, holding persons remotely connected with concerted attempt to resist execution of draft, guilty of levying war. See also note, 94 Am. Dec. 581. Cited arguendo in Sparf v. United States, 156 U. S. 66, 39 L. 349, 15 S. Ct. 279, discussing subject of evidence of accomplices; Noble v. Cullom, 44 Ala. 562, maintaining invalidity of judgments rendered by courts in insurrectionary States; Anderson v. Baker, 23 Md. 625, enumerating crimes defined in State Constitution.

Distinguished in Young v. United States, 97, U. S. 65, 24 L. 999. as to nonresident alien; Charge to Federal Grand Jury by Sprague, J., 1 Sprague, 594, F. C. 18,263, holding action of mob in interrupting proceedings of court and rescuing fugitive slave not to constitute "levying war."

Practice.— An affidavit made before one magistrate may justify a commitment by another, p. 129.

Cited and principle applied in In re Kaine, 14 Fed. Cas. 90, holding that district judge awarding writ of habeas corpus may make it returnable before Circuit Court; In re Metzger, 17 Fed. Cas. 235, in extradition proceedings, committing prisoner on affidavits made in foreign court, and duly authenticated; In re Alexander, 1 Low. 531, F. C. 162, where person was arrested in one judicial district for crime committed against Federal laws in another district, and certified copy of indictment found in latter held admissible in evidence.

Jurisdiction.— Trial of offenses against the laws of the United States, committed without the jurisdiction of any State or district, shall be held in the district where the offender is found or into which he is first brought, p. 136.

Cited and principle applied in Jones v. United States, 137 U. S. 212, 34 L. 695, 11 S. Ct. 83, extending principle to crime of murder committed upon Guano Islands, previously declared to be United States territory; United States v. Bird, 1 Sprague, 300, F. C. 14,597, sustaining indictment for violation of anti-slavery laws upon high seas; United States v. Baum, 74 Fed. 46, as to adultery committed in territory, holding offense punishable in territorial court.

Certiorari.— In this case the writ of habeas corpus was accompanied by a writ of certiorari.

Cited as precedent in In re Martin, 5 Blatchf. 306, 308, F. C. 9,151, reviewing commitment by commissioner to await action of Federal grand jury; In re Snell, 31 Minn. 111, 16 N. W. 692, issuing writ to examine record of court, prisoner to answer on criminal charge.

Miscellaneous citations.— Cited also in Holmes v. Jennison, 14 Pet. 628, 10 L. 627, as instance of practice on awarding writ; dissenting opinion, Luther v. Borden, 7 How. 87, 12 L. 618, on point that writ of habeas corpus is in force during insurrection as well as peace, unless suspended by competent authority; Ex parte Terry, 128 U. S. 303, 32 L. 408, 9 S. Ct. 79 (see also 13 Sawy. 462), and United States v. New Bedford Bridge, 1 Wood. & M. 440, F. C. 15,867, on point that Federal courts have power to punish for contempt (not directly decided in principal case); Johnson v. Tompkins, 1 Bald. 594, F. C. 7,416, citing argument of counsel to effect that accused in criminal proceedings has right to be confronted with witnesses against him. The following cases cite the principal case as authority for holding that the privilege of the writ of habeas corpus can be suspended only by authority of congress; Ex parte Field, 5 Blatchf. 82, F. C. 4,761; Ex parte Merryman, Taney, 267, F. C. 9,487; Ex parte Benedict, 3 Fed. Cas. 168, 171. Cited in Dunlop v. Monroe, 1 Cr. C. C. 541, F. C. 4,167, on point that parol

evidence is admissible to show authority of person taking deposition (application doubtful); In re Dana, 68 Fed. 894, as to practice in taking testimony in ex parte proceeding; so also in In re Bates, 2 Fed. Cas. 1018; Hussey v. State, 87 Ala. 126, 6 So. 421, on point that where affidavits are presented in support of change of venue counter affidavits may be received; Johnson v. Duncan, 3 Mart. (La.) (O. S.) 533, 6 Am. Dec. 676, as to suspension of writ of habeas corpus; Swan v. Gray, 44 Miss. 392, on point that acts of de facto officer will be deemed valid as regards third persons (application doubtful). Erroneously cited in Little v. Chauvin, 1 Mo. 632. Cited in Girard v. Taggart, 5 Serg. & R. 35, as holding that courts are not precluded from examining into the correctness of their previous decisions; State v. Frew, 24 W. Va. 437, 49 Am. Rep. 258, and State v. Tugwell, 19 Wash. 252, 52 Pac. 1061, on point that courts have power to punish for contempt.

4 Cr. 137–141, 2 L. 574, SKILLERN'S EXRS. v. MAY'S EXRS.

Judgment.— Equity will enjoin a judgment at law based on an obligation to convey lands, to which the obligor has retained the legal title, and part of which have been lost through obligor's neglect to pay taxes, pp. 140, 141.

Cited in Tufts v. Tufts, 3 Wood. & M. 475, 503, F. C. 14,233, as to contract for sale of land where vendee has failed to pay any part of purchase price; Smith v. Robertson, 23 Ala. 318, as to contract for sale of land where defect in vendor's title.

Distinguished in Buford v. Bird, 8 Mo. 243, where action not in equity.

4 Cr. 141–164, 2 L. 576, FRENCH v. BANK OF COLUMBIA.

Negotiable paper.— Accommodation indorser is entitled to have demand on maker and notice, p. 161.

Cited and applied in dissenting opinion, Magruder v. McDonald, 3 Cr. C. C. 310, F. C. 8,965; Ramdulollday v. Darieux, 4 Wash. 63, F. C. 11,543, as to indorser of bill of exchange, where drawer not entitled to notice; Phipps v. Harding, 70 Fed. 478, 34 U. S. App. 148, holding insolvency no excuse for failure of notice; so also in Adams v. Torbert, 6 Ala. 868; followed in Holland v. Turner, 10 Conn. 315; Hill v. Martin, 12 Mart. (La.) (O. S.) 182, 184, 13 Am. Dec. 375, as to note indorsed after maturity; Hilton v. Smith, 5 Gray, 401; Ferris v. Saxton, 4 N. J. L. 21, and in Bogy v. Keil, 1 Mo. 743, under facts similar to those in principal case; applied in Brown v. Mott, 7 Johns. 362, holding further as to liability of indorser; Agan v. McManus, 11 Johns. 182, holding insolvency of maker no excuse unless known to indorser; Smedes v. The Bank, 20 Johns. 382, as to note indorsed and delivered to bank for collec-

tion; Denny v. Palmer, 5 Ired. 623, 624, where belief on part of indorser that note would not be paid, held not to excuse notice; Richter v. Selin, 8 Serg. & R. 438; applied in McNeill v. Elam, Peck (Tenn.), 269, holding further as to right to sue prior indorsers; Farmers' Bank v. Vanmeter, 4 Randolph, 559, holding further no right of contribution as between several accommodation indorsers in absence of agreement; Catlin v. Jones, 1 Pinn. 132, holding that declaration must aver presentment and dishonor; Corwith v. Morrison, 1 Pinn. 490, as to note indorsed after maturity. The rule is also approved in the following cases, discussing the general subject of liability of accommodation indorsers: Yeaton v. Bank, 5 Cr. 50, 3 L. 34; Woodworth v. Bank, 19 Johns. 407, 10 Am. Dec. 252; Strothart v. Lewis, 1 Overt. 258.

Distinguished in Morris v. Bank, 93 Ala. 513, 9 So. 606, holding that where note made for accommodation of payee, he is not entitled to notice of presentment to maker; so also in Blenderman v. Price, 50 N. J. L. 300, 12 Atl. 777, and in Mechanics' Bank v. Griswold, 7 Wend. 168, where note was discounted for accommodation of indorser.

Negotiable paper.— Drawer of bill of exchange is entitled to strict notice, if, at time of drawing bill, he has right to expect that it will be honored, p. 154.

Rule applied in Dickins v. Beal, 10 Pet. 577, 578, 9 L. 540, holding drawer entitled where he had funds in hands of drawee; Hopkirk v. Page, 2 Brock. 27, F. C. 6,697, holding notification by drawee to drawer that bills will not be honored, excuses indorsee. See also separate opinion of Godard J., in Shepard v. Hawley, 1 Conn. 372, 6 Am. Dec. 247, applying principle in holding each joint indorser entitled to notice; Pitts v. Jones, 9 Fla. 524, holding that drawer's right to sue drawee fixes right to notice; Bloodgood v. Hawthorn, 9 La. 127, holding that where from nature of business relations, drawer could reasonably expect draft to be honored, mere lack of funds in drawee's hands does not excuse notice; Eichelberger v. Finley, 7 Harr. & J. 387, 16 Am. Dec. 316, holding that check is drawn without funds in bank, drawer is not entitled to notice although drawee has not been diligent in presenting; Grosvenor v. Stone, 8 Pick. 83, where draft drawn pursuant to agreement to honor; Dunbar v. Tyler, 44 Miss. 13, holding that open and current account between parties creates implied authority to draw; so also in Robinson v. Ames, 20 Johns. 150. 11 Am. Dec. 260; Durrum v. Hendrick, 4 Tex. 500, where bill drawn in good faith but without funds in drawee's hands. See also Neederer v. Barber, 17 Fed. Cas. 1274, and Hamlin v. Simpson, 105 Iowa, 128, 74 N. W. 907, discussing general subject of notice.

Distinguished in Bowen v. Bank, 87 Fed. Rep. 436, under State statute holding notice excused by absence of prejudice to drawer;

Taylor v. Bank; 7 T. B. Mon. 582, holding excuse of notice to drawer not to apply to indorser. Rule limited in Foard v. Womack, 2 Ala. 371, and in McRae v. Rhodes, 22 Ark. 319, holding notice excused where no funds in drawer's hands.

4 Cr. 164–165, 2 L. 583, HOPKIRK v. BELL.

No citations.

4 Cr. 165–166, 2 L. 583, HICKS v. ROGERS.

Ejectment.— In Vermont devisees of a tract of land "to be equally divided between them," may maintain ejectment jointly, p. 166.

Cited in Matthews v. Hall, 1 Vt. 331, to support the rule that a note payable to A. or bearer may be sued upon by a bearer without indorsement. Cited generally in Lytle v. State, 17 Ark. 659, and McFarland v. Stone, 17 Vt. 175, 44 Am. Dec. 328.

Denied in Campbell v. Wallace, 12 N. H. 370, 37 Am. Dec. 224.

4 Cr. 167–168, 2 L. 584, UNITED STATES v. CANTRIL.

Penal statutes — Repugnancy.— A penal statute, in itself repugnant, cannot support an indictment, p. 167.

Cited and principle applied in Hall v. Bank, 6 Whart. 597, construing statute providing penalty for failure of bank to redeem notes. Cited generally in Campbell's Case, 2 Bland Ch. 231, 20 Am. Dec. 372.

Criticised in United States v. Howell, 11 Wall. 437, 20 L. 197. Distinguished in Mackey v. State, 3 Ohio St. 364; State v. Randall, 2 Aikens, 102, 105, and State v. Twitty, 2 Hawks, 453, under facts, in construing statutes providing penalty for counterfeiting bank notes.

4 Cr. 169–171, 2 L. 584, STHRESHLEY v. UNITED STATES.

Office — Effect of removal from.— A collector of revenues has no authority to receive duties after his removal from office, though they became payable while he was in office, p. 171.

Rule applied in Cutts v. United States, 1 Gall. 74, F. C. 3,522. And see note, 10 Am. St. Rep. 856, citing principal case to the point that sureties on official bond are not liable for acts committed after removal of principal from office.

Miscellaneous citations.— Cited also in Calhoun v. Levy, 33 La. Ann. 1299, but not in point.

4 Cr. 172–177, 2 L. 585, MARSHALL v. CURRIE.

Land — Description of.— If monuments mentioned in a deed are uncertain, courses and distances may identify or dispense with them, p. 176.

Cited in Higueras v. United States, 5 Wall. 836, 18 L. 471, to the point that monuments, when certain, control courses and distances; McNeel v. Herold, 11 Gratt. 315, as to description in entry upon public lands.

4 Cr. 177-179, 2 L. 585, VIERS v. MONTGOMERY.

Equity jurisdiction.— Equity will not interfere between a donee of land by deed and a devisee under a will of the donor, in absence of fraud, p. 178.

Cited in Boyd v. Anderson, 1 Overt. 443, as to conveyance of land containing invalid warranty.

4 Cr. 179-180, 2 L. 587, DIGGS v. WOLCOTT.

Injunction.— A United States court cannot enjoin proceedings in a State court, p. 179.

This case has been recognized as an authority of considerable importance, as the citing cases indicate. It is cited and the principle is applied in Peck v. Jenness, 7 How. 625, 12 L. 846, holding that attachment on mesne process of State court could not be defeated by subsequent decree of bankruptcy rendered by District Court; Riggs v. Johnson County, 6 Wall. 195, 18 L. 776, as to validity of State court to enjoin proceedings in United States court; United States v. Keokuk, 6 Wall. 517, 18 L. 934, on same point; Watson v. Jones, 13 Wall. 719, 20 L. 672, affirming the rule; Dial v. Reynolds, 96 U. S. 341, 24 L. 644, applying the rule in a case respecting foreclosure proceedings; dissenting opinion, Providence, etc., S. S. Co. v. Hill Mfg. Co., 109 U. S. 607, 27 L. 1048, 3 S. Ct. 620, majority holding that proceedings in District Court relating to liability of shipowners for damage to goods, take precedence over proceedings in State courts; In re Sawyer, 124 U. S. 220, 31 L. 409, 8 S. Ct. 492, holding injunction cannot issue from Circuit Court to restrain removal of municipal officer; The Celestine, 1 Biss. 12, F. C. 2,541, where domestic vessel seized under State statute; Amory v. Amory, 3 Biss. 271, F. C. 334, holding that United States courts cannot impeach decree of State court having jurisdiction; Ruggles v. Simonton, 3 Biss. 330, F. C. 12,120, as to sale of property under decree of State court; City Bank of New York v. Skelton, 2 Blatchf. 28, F. C. 2,740, following and applying the doctrine; Dennistoun v. Draper, 4 Blatchf. 339, F. C. 3,804, holding further as to removal of causes from State courts; Evans v. Peck, 2 Flipp, 271, 274, F. C. 4,566, denying power of Federal court to enjoin action of trespass in State court; Perry Mfg. Co. v. Brown, 2 Wood. & M. 469, F. C. 11,015, holding construction of State statutes by State courts conclusive; Sumner v. Marcy, 3 Wood. & M. 119, F. C. 13,609, under facts similar to principal case; Hutchinson v. Green, 2 McCrary, 476, 6 Fed. 838, as to disposition of property under control of State

court; Yick Wo v. Crowley, 11 Sawy. 423, 425, 26 Fed. 208, 209, as to service of warrant issued by Police Court; Clark v. Binnringer. 3 Bank. Reg. 130; S. C., 38 How. Pr. 345, as to proceedings for dissolution of partnership; Wagner v. Drake, 31 Fed. 851, extending prohibition to injunctions issued to parties before State courts; Tefft v. Sternberg, 40 Fed. 4, as to disposition of property held under mesne process of State court; Dillon v. Kansas City, etc., Ry. Co., 43 Fed. Rep. 111, applying the rule; Whitney v. Wilder, 54 Fed. 555, 13 U. S. App. 180, as to acts of administrator in distributing funds; Reinach v. Atlantic, etc., Ry. Co., 58 Fed. 44, as to acts of receiver appointed by State court; Worthy v. Lyon, 18 Ala. 787, holding that one State court will not interfere with proceedings in another of co-ordinate jurisdiction; Ex parte Hill, 38 Ala. 462, but holding that State court could determine question of fact in case of arrest by marshal of Confederate States under conscript laws; City of Opelika v. Daniel, 59 Ala. 215, as to interference by one State with proceedings in another; Strozier v. Howes, 30 Ga. 580, as to inability of State court to enjoin proceedings in Federal courts; Munson v. Harroun, 34 Ill. 423, 85 Am. Dec. 317, on same point; Ex parte Holman, 28 Iowa, 106, 4 Am. Rep. 169, as to habeas corpus to procure release of prisoner held under order of Federal court; Goodrich v. Hunton, 29 La. Ann. 376, holding that suit pending in State court to enjoin execution of judgment of same court cannot be removed to Federal court; Watson v. Bondurant, 30 La. Ann. (pt. 1), 8, as to auxiliary proceeding in State court; discussed and principle applied in Brown v. Wallace, 4 Gill & J. 496, 2 Bland Ch. 603, as to courts of concurrent jurisdiction in same State; Hill Mfg. Co. v. Providence, etc., S. S. Co., 113 Mass. 500, 18 Am. Rep. 532, holding proceedings in State court against shipowner for loss of goods, not affected by subsequent proceeding in Federal court; Stone v. Sargent, 129 Mass. 507, holding State Supreme Court has jurisdiction over bill of exceptions from order of superior judge removing cause to Federal court; Carroll v. The Bank, Harr. Ch. (Mich.) 204, as to proceedings in courts of sister States; Rushworth v. The Judges, 58 N. J. L. 101, 32 Atl. 745, holding further as to appellate jurisdiction of Federal courts; Mead v. Merritt, 2 Paige, 404, as to proceedings in courts of sister States; also in Boyd v. Hawkins, 2 Dev. Eq. 337, on same point; Chapin v. James, 11 R. I. 89, 23 Am. Rep. 415, as to process of Federal courts; Lockwood v. Nye, 2 Swan, 521, 58 Am. Dec. 76, as to attachment issued by court of sister State. Approved in Dorr's Admr. v. Rohr, 82 Va. 370, 3 Am. St. Rep. 114; Edwards, etc., Co. v. Sprague, 76 Me. 62; note to Smith v. Schroed, 2 McCrary, 444; Kittredge v. Emerson, 15 N. H. 269, 270, discussing general subject.

Distinguished in Moran v. Sturges, 154 U. S. 268, 38 L. 985, 14 S. Ct. 1022, as to admiralty proceeding to enforce maritime lien, District Court having exclusive jurisdiction; Perry v. Sharpe, 8 Fed. 23, holding that injunction prayed for before removal from

State court may be granted in Federal court; Texas, etc., Ry. Co. v. Kuteman, 54 Fed. 551, 13 U. S. App. 99, holding that Federal court may enjoin prosecution in State courts of multiplicity of suits not actually begun; Fisher v. Lord, 9 Fed. Cas. 135, where parties subject to jurisdiction of Federal courts; Irving v. Hughes, 13 Fed. Cas. 13, and Yeadon v. Bank, 30 Fed. Cas. 797, holding that while Federal court cannot enjoin proceedings in State court it may enjoin party from suing contrary to bankrupt act of congress; Gay v. Brierfield, etc., Co., 94 Ala. 311, 33 Am. St. Rep. 129, 11 So. 356, holding that pendency of suit in Federal court against insolvent corporation does not oust jurisdiction of State court to entertain bill by creditors not parties to former suit in Federal court.

4 Cr. 180-181, 2 L. 588, WOOD v. LIDE.

Writ of error.— If writ be served before return day it may be returned after, even at subsequent term, p. 181.

This rule has been directly applied in Pickett's Heirs v. Legerwood, 7 Pet. 147, 8 L. 639, and Sparrow v. Strong, 3 Wall. 103, 18 L. 49. See also note, 1 Blackf. 6, on general subject. While approving the principle, the following cases have dismissed appeals where the record did not show proper service and return: Villabolos v. United States, 6 How. 90, 12 L. 356; Buford v. Hickman, Hemp. 234, F. C. 2,114a; State v. Kennedy, 18 N. J. L. 24, 25; and State v. Commissioners, etc., 37 N. J. L. 395. See also McCoy v. Lemons, Hemp. 216, F. C. 8,730a, where appearance held to be waiver of service.

Overruled in Grigsby v. Purcell, 99 U. S. 507, 25 L. 354.

Writ of error.— Service of, is the lodging a copy for the adverse party with clerk of court rendering the judgment, p. 181.

4 Cr. 185-202, 2 L. 591, FITZSIMMONS v. NEWPORT INS. CO.

Marine insurance — Forfeiture.— Mere intention to enter blockaded port is not breach of blockade; there must be an actual attempt to enter, knowing the fact of blockade, p. 200.

Cited generally in note to Olivera v. Insurance Co., 3 Wheat. 197, 4 L. 368, on general subject, and in The Delta, Blatchf. Pr. 134, 135, F. C. 3,777, collecting authorities. See also United States v. Tropic Wind, 28 Fed. Cas. 219.

Rule limited in The Empress, Blatchf. Pr. 178, 179, F. C. 4,477, and The Nyade, Newb. 372, F. C. 7,046, where intention coupled with knowledge of facts held to be sufficient. In United States v. Packages, 27 Fed. Cas. 286, the principal case has been cited as holding that mere sailing with intent to enter blockaded port constitutes breach of blockade.

Admiralty.—Sentence of a foreign Court of Admiralty is conclusive evidence with respect to what it professes to decide, p. 198.

Affirmed in Croudson v. Leonard, 4 Cr. 435, 2 L. 670. Cited and principle applied in Pinson v. Ivey, 1 Yerg. 350, as to adjudication regarding title to land. See note, 75 Am. Dec. 724, on general subject of effect of judgments in rem.

Admiralty.—A ship warranted to be American is impliedly warranted to conduct as American, and knowingly attempting to enter blockaded port forfeits that character, p. 198.

4 Cr. 202-208, 2 L. 596, MARSHALL v. DELAWARE INS. CO.

Marine insurance — Abandonment.—The State of the loss at the time of the offer to abandon fixes the right to abandon, p. 206.

This rule has been applied in Bradlie v. Insurance Co., 12 Pet. 397, 9 L. 1132, where value of vessel at place where repairs must be made, held to govern right; Orient Ins. Co. v. Adams, 123 U. S. 75, 31 L. 67, 8 S. Ct. 72, where abandonment in good faith held not affected by change in circumstances rendering repairs less expensive; Peele v. Insurance Co., 3 Mason, 37, F. C. 10,905, holding further, act of underwriter in taking possession constituted acceptance of abandonment; Humphreys v. Insurance Co., 3 Mason, 436, F. C. 6,871, holding that where abandonment not made when right accrued, but vessel repaired, owner could not afterwards abandon; Fuller v. Insurance Co., 31 Me. 327, as to repair of vessel by purchaser after abandonment; Dorr v. Insurance Co., 4 Mass. 229, and note to same case, p. 232, on general subject; Radcliff v. Coster, 1 Hoff. Ch. 103, holding offer must be based upon information of facts sufficient to warrant abandonment; Montgomery v. Insurance Co., 4 Binn. 470, but holding that where assured does not abandon he may recover to extent of loss. See also note to Beale v. Pettit, 1 Wash. 244, F. C. 1,158, on general subject.

Marine insurance.—In case of capture, right to abandon ceases with final decree of restitution, p. 208.

Cited in Olivera v. Union Ins. Co., 3 Wheat. 195, 4 L. 368, and principle applied where vessel detained in blockaded port; Adams v. Insurance Co., 3 Binn. 293, where offer made after decree, but before actual restitution. Cited also in Peele v. Insurance Co., 3 Mason, 65, 67, F. C. 10,905, in discussion of general subject.

4 Cr. 209-215, 2 L. 598, McILVAINE v. COX'S LESSEE.

[See 2 Cr. 280, 2 L. 279.]

Sovereignty.—The several States of the Union became entitled on July 4, 1776, to the rights and powers of sovereign States, so far as respects their internal regulations, p. 212.

Rule applied in dissenting opinion, Scheible v. Bacho, 41 Ala. 454, majority holding governments of Confederate States were governments de facto, and that validity of contracts made under them must be tested by Constitution as then existing; dissenting opinion, McElvain v. Mudd, 44 Ala. 70, majority holding that emancipation proclamation did not of itself determine status of slaves, and thus did not invalidate contracts relating to them; Commonwealth v. Philadelphia, etc., R. R. Co., 62 Pa. St. 292, 1 Am. Rep. 403, holding constitutional, act taxing tonnage of railroads; Sporrer v. Eifler, 1 Heisk. 637, sustaining power of State to provide rules of evidence for its own courts. And see Dred Scott v. Sandford, 19 How. 502, 15 L. 741, where subject discussed generally.

Citizenship.— Where State of New Jersey, by act of 1776, asserted its right to allegiance of all persons born, and at that time residing within the State, the act of such person in afterwards leaving and adhering to the crown did not render him an alien, p. 214.

Principle applied by following citing cases: Dissenting opinion, Shanks v. Dupont, 3 Pet. 265, 7 L. 674, majority holding that marriage of woman to alien does not destroy her allegiance; Dred Scott v. Sandford, 19 How. 577, 15 L. 772, as to effect of Declaration of Independence; Jones v. McMasters, 20 How. 20, 15 L. 810, where burden of proof held to be on party asserting change of allegiance; White v. Burnley, 20 How. 250, 15 L. 890, as to citizenship of person forced to leave Texas prior to independence, and holding further as to effect of intention; Boyd v. Thayer, 143 U. S. 163, 36 L. 110, 12 S. Ct. 382, holding that declaration of intention by father during son's minority fixes status of latter; Cornwall v. Hoyt, 7 Conn. 427, holding abandonment of country and adhering to public enemy, on part of husband, restores wife to capacity as feme sole; Brooks v. Clay, 3 A. K. Marsh. 550, 1 Litt (Ky.) 266, where expatriation held not to work forfeiture of property already acquired; Trimbles v. Harrison, 1 B. Mon. 143, where fact of remaining in country after treaty of peace, held prima facie an election of allegiance; dissenting opinion, State ex rel. Thayer v. Boyd, 31 Neb. 750, 48 N. W. 759, majority holding that act of congress admitting territory into Union does not ipso facto render inhabitants citizens (see 143 U. S. 163, 36 L. 110, 12 S. Ct. 382, supra); Munro v. Merchant, 28 N. Y. 34, holding son, born of alien parents during temporary residence, to be alien if he adopts foreign residence of parents; Dupont v. Pepper, Harper's Eq. 18, citing to point that marriage with officer of foreign government does not divest wife of citizenship; Kilpatrick v. Sisneros, 23 Tex. 125, holding status of residents of Texas fixed by act declaring independence; dissenting opinion, Read v. Read, 5 Call (Va.), 198, majority holding that British subject born before Revolution, could not, before treaty of peace, inherit lands in this country. See also note to Jackson v. Clarke, 3 Wheat. 12, 4 L. 322.

Distinguished in Inglis v. Trustees, 3 Pet. 124, 125, 160, 163, 171, 7 L. 626, 627, 639, 640, 642, where person who left country previous to Declaration of Independence, held never to have been citizen; Hebron v. Colchester, 5 Day, 173, where British subject coming to this country previous to Declaration of Independence, held to have become legally settled by purchase of lands after treaty of peace; Jackson v. White, 20 Johns. 326, where person claiming citizenship remained in country only as prisoner of war.

4 Cr. 216–218, 2 L. 600, UNITED STATES v. BRIG UNION.

Jurisdiction — Appeal.— Dismissed for want of jurisdictional facts, p. 217.

Cited in Dred Scott v. Sandford, 19 How. 473, 15 L. 728, collecting authorities on averment of jurisdictional facts.

Jurisdiction — Appeal.— Oral testimony admitted to determine value of property in dispute for purposes of jurisdiction, p. 217.

Cited in Elgin v. Marshall, 106 U. S. 580, 27 L. 250, 1 S. Ct. 487, holding affidavits admissible; Ringgold's Case, 1 Bland Ch. 24, admitting affidavits and holding further as to notice to adverse party; followed in Harris v. Hopson, 5 Tex. 533. Cited in Dryden v. Swinburn, 15 W. Va. 250, holding statement of record of lower court that value has been proved, sufficient to establish jurisdiction. The rule has also been approved in The Philadelphian, 60 Fed. 428, 21 U. S. App. 90, discussing general subject.

Appeal and error.— Appraisement made by order of court is best though not conclusive evidence of value of matter in dispute, p. 217.

4 Cr. 219–224, 2 L. 601, PAWLING v. UNITED STATES.

Demurrer to evidence.— Testimony is to be taken most strongly against party demurring, p. 222.

The following citing cases affirm and apply this principle: Columbian Ins. Co. v. Catlett, 12 Wheat. 389, 6 L. 667, as to evidence of usage of trade; Pleasants v. Fant, 22 Wall. 121, 22 L. 783, holding further as to charge to jury regarding burden of proof; United States v. Williams, 1 Ware, 178, F. C. 16,724, holding, however, that party demurring admits only facts fairly inferred from evidence; Hathaway v. East Tennessee, etc., R. R. 29 Fed. Rep. 491, as to evidence of negligence; Mt. Adams, etc., Ry. Co. v. Lowery, 74 Fed. 469, 43 U. S. App. 408, holding further as to sufficiency of evidence; Catlin v. Gilder's Exrs., 3 Ala. 545, holding that party having offered evidence may not withdraw it and demur to evidence adduced by adverse party; Southern Life Ins. Co. v. Gray, 3 Fla. 265, as to evidence of contract; Higgs v. Shehee, 4 Fla. 384, holding as to

effect where evidence uncertain and contradictory; Wilkinson v. Railroad Co., 35 Fla. 85, 17 So. 72, affirming preceding case; Phillips v. Dickerson, 85 Ill. 15, as to facts admitted by demurrer; Joliet, etc., Ry. Co. v. Velie, 140 Ill. 62, 29 N. E. 707, as to evidence of negligence; Hanna v. Pegg, 1 Blackf. 186, as to evidence of assignment of promissory note; Lindley v. Kelley, 42 Ind. 300, holding further, bill of exceptions will not lie where there is demurrer to evidence; Willcutts v. Insurance Co., 81 Ind. 303, as to effect of conflict in evidence; Talkington v. Parish, 89 Ind. 203, as to evidence of fraud in conveyance; Cleveland, etc., Ry. Co. v. Adair, 12 Ind. App. 590, 39 N. E. 679, discussing what evidence may be demurred to; Stanchfield v. Palmer, 4 G. Greene, 24, as to evidence tending to prove partnership; Chewning v. Gatewood, 5 How. (Miss.) 555, holding that demurrer to evidence of presentation of note admits fact; Nolan v. Shickle, 3 Mo. App. 309, as to evidence of contributory negligence and holding further as to sufficiency of evidence. See also the following notes, discussing the general subject: 11 Wheat. 183, 6 L. 448; 1 Blackf. 110; 8 Ind. 270; 1 Hill, 472. Cited generally in discussion in Muhlman v. Insurance Co., 6 W. Va. 514.

Escrow — Evidence — Principal and surety.— Stipulation by a surety that a bond is not to be delivered until other sureties sign renders the instrument an escrow; and parol evidence is admissible to show such stipulation, p. 223.

The citing cases are numerous and show various applications of this principle. The rule is applied in Philadelphia, etc., R. R. Co. v. Howard, 13 How. 334, 14 L. 169, holding parol evidence admissible to show deed not fully executed; Ware v. Allen, 128 U. S. 597, 32 L. 565, 9 S. Ct. 176, where cases on subject are collected and discussed; Burke v. Dulaney, 153 U. S. 235, 38 L. 700, 14 S. Ct. 818, as to promissory note delivered conditionally; United States v. Hammond, 4 Biss. 286, F. C. 15,292, under facts similar to those in principal case; Virginia v. Evans, 1 Cr. C. C. 582, F. C. 16,969, holding sureties competent witnesses as to provisions in bond; Piles v. Plum, 2 Cr. C. C. 32, F. C. 11,165, where defendants in joint action of trespass held competent witnesses for each other, if they plead severally; Brown v. Brown, 1 Wood. & M. 330, F. C. 1,994, as to deed of gift; Cowen v. Adams, 78 Fed. 551, 47 U. S. App. 676, as to deed; Bibb v. Reid, 3 Ala. 91 as to executor's bond; Morgan v. Smith, 29 Ala. 286, to point that deed cannot be delivered to grantee as escrow; Sharp v. Allgood, 100 Ala. 186, 14 So. 17, as to note signed by surety on condition that another surety be obtained; State v. Wallis, 57 Ark. 73, 20 S. W. 812, as to bond of special attorney for State; Hoboken Bank v. Phelps, 34 Conn. 103, as to bond securing loan; Crawford v. Foster, 6 Ga. 204, 50 Am. Dec. 328, applying the rule; Pepper v. State, 22 Ind. 411, 412, 85 Am. Dec. 439, 440, as to

bond of county treasurer. Followed in Allen v. Marney, 65 Ind. 401, 32 Am. Rep. 75. Cited in McCramer v. Thompson, 21 Iowa, 248, 250, where authorities are collected and discussed; Millett v. Parker, 2 Met. (Ky.) 614, holding surety to be competent witness to show condition; Chamberlin v. Brewer, 3 Bush (Ky.), 570, as to sheriff's bond; Wells v Dill, 1 Mart. (La.) (N. S.) 594, as to bond of administrator; McNamara v. Jarvis, 2 La. Ann. 592, holding further as to negligence of principal in performing condition; Canal, etc., Co. v. Brown, 4 La. Ann. 546, but holding that surety must retract within reasonable time after failure of condition; Hall v. Parker, 37 Mich. 593, 26 Am. Rep. 542, where surety released because of failure of condition; McCullough v. Day, 45 Mich. 557, 8 N. W. 536, holding, however, that evidence of intention must be clear; Linn Co. v. Farris, 52 Mo. 77, 14 Am. Rep. 391, and further as to effect of fraud in securing signatures of sureties; Ayres v. Milroy, 53 Mo. 522, 14 Am. Rep. 470, as to promissory note delivered conditionally; State v. Potter, 63 Mo. 219, 227, 21 Am. Rep. 443, 449, where cases are collected and discussed; Gay v. Murphy, 134 Mo. 107, 56 Am. St. Rep. 501, 34 S. W. 1093, holding further as to burden of proof. Followed in State Bank v. Evans, 15 N. J. L. 162, 28 Am. Dec. 405. See also Ordinary v. Thatcher, 41 N. J. L. 417, 32 Am. Rep. 236, approving preceding case; Black v. Lamb, 12 N. J. Eq. 117, as to indemnity bond; People v. Bostwick, 32 N. Y. 453, as to bond securing loan; Whitford v. Laidler, 94 N. Y. 152, 46 Am. Rep. 136, as to lease. Cited and principle applied in Milliken v. Brown, 1 Rawle, 399, where receipt, not under seal, to one of several joint debtors for his proportion of debt, held to discharge others. Followed in Sullivan v. Williams, 43 S. C. 507, 21 S. E. 649. Approved in McCormick, etc., Co. v. Faulkner, 7 S. Dak. 366, 58 Am. St. Rep. 841, 64 N. W. 164, and principle applied to promissory note; Brown v. State, 18 Tex. App. 328, holding as to effect of delivery to obligee; State Bank v. Burton, etc., Co., 14 Utah, 423, 48 Pac. 403, holding further that promissory note containing conditional guaranty may be delivered to payee. Followed in Fletcher v. Austin, 11 Vt. 449, 34 Am. Dec. 699. Applied in Smith v. The Bank, 32 Vt. 350, 353, 76 Am. Dec. 183, 186, as to deed. Followed in Ward v. Churn, 18 Gratt. 811, 812, 98 Am. Dec. 756, 757. Cited in notes, 28 Am. Dec. 679, 680, and 25 Am. Rep. 706, 707, 708, 709, on general subject. Approved in Hodge v. Bank, 7 Ind. App. 98, 34 N. E. 124, and Flournoy v. Andrews, 5 Mo. 515, in discussion. See also 2 Hill, 586, note.

The principal case has been distinguished in the following cases where the instrument was perfect on its face and delivered unconditionally: Dair v. United States, 16 Wall. 5, 21 L. 493; Riley v. Johnson, 10 Ga. 419; Guard v. Bradley, 7 Ind. 605; Deardorff v. Foresman, 24 Ind. 483; State v. Pepper, 31 Ind. 85; Carroll County v. Ruggles, 69 Iowa, 273, 275, 58 Am. Rep. 225, 226, 28 N. W. 592, 593; State v. Peck, 53 Me. 289, 296; Bank v. Smith, 5 Ohio, 222;

Bank v. Gass, 31 Vt. 319; Nash v. Fugate, 24 Gratt. 213, 18 Am. Rep. 645, and see same case on rehearing, 32 Gratt. 607, 34 Am. Rep. 788; and in King County v. Ferry, 5 Wash. St. 545, 34 Am. St. Rep. 887, 32 Pac. 541. Distinguished also in Mathis v. Morgan, 72 Ga. 530, 53 Am. Rep. 850, holding surety estopped from claiming delivery as escrow when such delivery afforded opportunity for forgery of names of cosureties; in State v. Chrisman, 2 Ind. 132; Carter v. Moulton, 51 Kan. 14, 37 Am. St. Rep. 261; 32 Pac. 634; Blume v. Bowman, 2 Ired. 341; Easton v. Driscoll, 18 R. I. 321, 27 Atl. 446, holding rule inapplicable where instrument delivered to obligee; in Taylor v. Jones, 3 La. Ann. 621, holding judge by whom administrator's bond accepted not to be competent to prove that bond was executed conditionally; and in Bickford v. Daniels, 2 N. H. 74, holding that defeasance dependent for delivery upon condition never performed will not render absolute deed a mortgage. The principal case has also been criticised upon this point in Russell v. Freer, 56 N. Y. 69; State v. Lewis, 73 N. C. 142, 143, 21 Am. Rep. 462, 463; Dun v. Garrett, 93 Tenn. 658, 42 Am. St. Rep. 949, 27 S. W. 1014 (collecting cases); and Belden v. Hurlbut, 94 Wis. 566, 69 N. W. 358, in discussions of general subject. Cited but not followed in Bopp v. Hansford, 45 S. W. 748, where surety signed renewal of guardian's bond, attempting to impose condition that others sign, but the judge accepting it did not understand it to be conditional.

4 Cr. 224-236, 2 L. 603, GRANT v. NAYLOR.

Guaranty — Evidence.—Where letter of credit is ambiguous as to name of party to whom addressed, parol evidence is not admissible to show intention of writer, p. 235.

Principle applied in the following citing cases: Dissenting opinion, Salmon, etc., Co. v. Goddard, 14 How. 463, 14 L. 500, majority holding parol evidence admissible to explain equivocal terms in a memorandum of sale; National Bank v. Hall, 101 U. S. 51, 25 L. 825, as to insufficiency of correspondence purporting to authorize cashing of drafts; Butler v. Thompson, 11 Blatchf. 538, F. C. 2,244, holding memorandum of sale made by broker insufficient under statute; Warner v. Brinton, 29 Fed. Cas. 237, holding void, will ambiguous in its words and containing no reference to anything which would cure such defect; First National Bank v. Sowles, 46 Fed. Rep. 732, and Merchants' Bank v. Armstrong, 65 Fed. 940, where representation by directors as to solvency of bank held insufficient, under Vermont statute, to charge directors, such representation not being addressed expressly to plaintiff; Allen v. Booker, 2 Stew. 24, 19 Am. Dec. 34, as to contract for purchase of land; Woodbury Bank v. Insurance Co., 29 Conn. 382, holding parol evidence inadmissible to show real party to contract of insurance; Henderson v. Johnson, 6 Ga. 392,

holding parol evidence inadmissible to show consideration for guaranty, where under statute such consideration must be evidenced by writing; Johnson v. Brown, 51 Ga. 500, holding further as to effect of alteration in letter of credit without drawer's consent; Hodgkins v. Bond, 1 N. H. 286, holding that where signature was placed on blank note, a guaranty subsequently written by payee was not sufficient memorandum; Ham v. Goodrich, 33 N. H. 36; Hickman v. Fargo, 1 Kan. App. 709, 42 Pac. 386, as to bail bond; Bell v. Norwood, 7 La. 103, remarking that guaranty must be construed strictly to charge guarantor; dissenting opinion in Succession of Edwards, 34 La. Ann. 228, majority holding that authorization of agent to bind principal by agreement required to be in writing, may be shown by parol; Hood v. Bowman, 1 Freem. Ch. 294, respecting a contract to convey and parol proof thereof. Followed in Crane v. Specht, 39 Neb. 133, 42 Am. St. Rep. 569, 57 N. W. 1018; Waters v. Travis, 9 Johns. 462, holding parol evidence inadmissible to vary terms of deed; Lenington v. Campbell, Tappan (Ohio), 109, holding that part performance of contract to convey land does not take case out of statute. Followed in McGovney v. State, 20 Ohio, 98. Principle applied in dissenting opinion, Williamson's Admr. v. Hall, 1 Ohio St. 198, majority holding that misrecital of condition in bond may be corrected by parol; dissenting opinion, Brown v. Dysinger, 1 Rawle, 418, majority holding parol evidence admissible to establish trust in case of purchase of land; Sollee v. Warley, 1 Bailey L. 622, holding letter of credit not assignable without consent of writer; Patton v. McClure, Mart. & Y. 338, holding that equity will not relieve against provisions of statute. Followed in Allison v. Rutledge, 5 Yerg. 194; Smith v. Montgomery, 3 Tex. 207, where letter of credit addressed to two persons, but acted upon by one only without reference to other, held not binding on guarantor. See also note, 28 Am. Rep. 347, on general subject of letters of credit, and note, 32 Am. Rep. 51, on subject of contract by letter.

Distinguished in Bleeker v. Hyde, 3 McLean, 280, F. C. 1,537, where letter gave general credit and advances made afterwards approved by guarantor; Loomis v. Smith, 17 Conn. 119, where parol evidence held admissible, not to show guaranty, but extent of debt; Michigan Bank v. Peck, 28 Vt. 207, 65 Am. Dec. 237, holding that where initials are used in letter of credit, parol evidence is admissible to identify parties.

Miscellaneous citations.— Cited in Webster v. Wyser, 1 Stew. 188, to point that in any action there can be but one plea puis darrein continuance; also in Wiehold v. Hermann, 2 Mont. 610, to point that complaint must, under statute, contain Christian names of parties. Erroneously cited in United States v. New Bedford Bridge, 1 Wood. & M. 488, F. C. 15,867.

4 Cr 237-238, 2 L. 607, WOODS v. YOUNG.

Appeal and error — Continuance.— Refusal of a court to continue a cause after it is at issue cannot be assigned as error, p. 238.

Cited in Wright v. Hollingsworth, 1 Pet. 168, 7 L. 98, applying rule to refusal of court to allow amendment in pleadings; Earnshaw v. United States, 146 U. S. 68, 36 L. 889, 13 S. Ct. 15, applying the rule; as also Isaacs v. United States, 159 U. S. 489, 40 L. 230, 16 S. Ct. 52, under similar facts; Texas, etc., Ry. Co. v. Nelson, 50 Fed. Rep. 815, 2 U. S. App. 213, as to continuance because of absence of material witness; as also in Richmond, etc., Co. v. Dick, 52 Fed. Rep. 380, 8 U. S. App. 99; and Drexel v. True, 74 Fed. 13, 36 U. S. App. 611; Baker v. The Bank, 74 Fed. 601, 41 U. S. App. 185, as to refusal to grant continuance upon application of an intervenor; Taylor v. Powers, 3 Ala. 285, where principle applied to refusal to allow revision of defective bond; White v. Trinity Church, 5 Conn. 188, as to refusal to grant new trial; Stone v. Stevens, 12 Conn. 227, 30 Am. Dec. 615, as to refusal to set aside verdict; State v. Hunt, 4 La. Ann. 439, as to motions for continuance in criminal cases; also in State v. Brette, 6 La. Ann. 660, and State v. Muldoon, 9 La. Ann. 26, on same point. Followed in Babcock v. Scott 1 How. (Miss.) 101, and Jameson v. Butler, 1 Neb. 119. Cited and applied in Romaine v. Norris, 8 N. J. L. 82, holding it to be within discretion of court to determine when motion for nonsuit shall be heard. Followed in M'Courry v. Doremus, 10 N. J. L. 249; Crawford v. Railroad Co., 28 N. J. L. 482, applying rule to refusal to allow amendment of pleadings as to substance. So, also, in Bruch v. Carter, 32 N. J. L. 559; People v. Colt, 3 Hill, 436, as to continuance in criminal cases; Clymer v. Thomas, 7 Serg. & R. 180, as to amendment of pleadings; also in Burk v. Huber, 2 Watts, 312, on same point. Approved in Borden v. Houston, 2 Tex. 604, and Ringgold's Case, 1 Bland Ch. 9, discussing general subject.

Denied in Brussard v. Traban's Heirs, 4 Mart. (La.) (O. S.) 501. Distinguished in Gilliland v. Rappleyea, 15 N. J. L. 143, holding that where verdict has been set aside at instance of plaintiff it is error to render judgment for defendant. Discussed in Brooks v. Calloway, 12 Leigh. (Va.) 474, but holding rule otherwise as settled in Virginia. Limited in Logie v. Black, 24 W. Va. 22, and Buster v. Holland, 27 W. Va. 534, holding that abuse of discretion in refusing continuance is subject for inquiry in higher court. Distinguished in Fowler v. Colton, 1 Pinn. 339, and Wisconsin v. Doty, 1 Pinn. 404, under statute.

4 Cr. 239-241, 2 L. 607, YOUNG v. PRESTON.

Contract under seal — Part performance.— If a contract under seal be partly performed, and further performance prevented by

defendant, remedy must be in action on the sealed instrument and not in assumpsit upon a quantum meruit, p. 241.

Cited and principle applied in Walker v. Brown, 28 Ill. 384, 81 Am. Dec. 289, holding that implied contract cannot exist where there is express contract as to same subject-matter; Clendennen v. Paulsel, 3 Mo. 232, 25 Am. Dec. 436, 437, holding person having contract under seal to do work cannot, upon breach of contract by employer, sue in assumpsit for work and labor; Boston, etc., Co. v. Smith, 13 R. I. 35, holding where parties liable jointly under specialty, action does not lie against one in assumpsit; Lewis v. Weldon, 3 Rand. 82, ruling similarly in case of a series of dependent contracts. Cited approvingly, but without particular application in Garred v. Doniphan, 10 Mo. 165. See also note to Parker v. United States. Pet. C. C. 268, F. C. 10,750, on general subject.

Distinguished in Saxton v. Railway Co., 4 N. Mex. 383 (202), 16 Pac. 853, holding that where law prescribes form of corporate seal, private seal of chief engineer of corporation is, therefore, not the corporate seal, and corporation may be sued in assumpsit for breach of contract to which such seal affixed.

4 Cr. 241-293, 2 L. 608, ROSE v. HIMELY.

Foreign judgment in prize case.— The authority of the tribunal as a prize court, as well as the question whether property was so situated as to be subject to jurisdiction, may be inquired into, p. 269.

In the following citing cases this principle is affirmed and relied upon: Hickey's Lessee v. Stewart, 3 How. 762, 11 L. 819, holding want of jurisdiction renders judgment void; Williamson v. Berry, 8 How. 541, 12 L. 1190, as to decree of court of equity; Thompson v. Whitman, 18 Wall. 461, 21 L. 899, as to judgment of State court in case of seizure of vessel for violation of State statute; Guaranty, etc., Co. v. Green Cove, etc., Co., 139 U. S. 147, 35 L. 120, 11 S. Ct. 516, as to decree of foreclosure; Scott v. McNeal, 154 U. S. 46, 38 L. 902, 14 S. Ct. 1113, as to proceeding in Probate Court; Bell v. Ohio Life & Trust Co., 1 Biss. 270, F. C. 1,260, holding further, priority of jurisdiction determined by service of process; The J. W. French, 5 Hughes, 432, 13 Fed. 919, holding void, sentence against person in suit to which he was not a party, and which was not in rem nor against the vessel; Lincoln v. Tower, 2 McLean, 477, 486, F. C. 8,355, where principle is applied to judgments of sister States; Juando (Stoughton) v. Taylor, 2 Paine, 677, 678, 683, F. C. 7,558, holding further as to jurisdiction of court over incidental questions; Ex parte Norton, 44 Ala. 186; Slocum v. Wheeler, 1 Conn. 439, 451, 454, 457, as to jurisdiction of prize court over property of enemy seized on land; Holcomb v. Phelps, 16 Conn. 132, as to jurisdiction of Probate Court to order sale of property; Pritchett v. Clark, 3 Harr.

247, holding as to effect of judgment where jurisdiction fails; also in McNealy v. Gregory, 13 Fla. 446, and in Opinion of Court to Governor, 14 Fla. 306, on same point; Justices v. Selman, 6 Ga. 442, as to power to appoint guardian; Thomas v. People, 107 Ill. 527, 47 Am. Rep. 463, holding void, decree of Probate Court ordering sale of property, owner being alive; Nooe v. Bradley, 3 Blackf. 160; Beard v. Beard, 21 Ind. 327, as to jurisdiction to decree alimony; Melhop v. Doane, 31 Iowa, 400, 401, 7 Am. Rep. 149, 150, holding further as to effect of failure of jurisdiction; Maguire v. Maguire, 7 Dana (Ky.), 183, as to jurisdiction in action for divorce; Cucullu v. La. Ins. Co., 5 Mart. N. S. 469, 16 Am. Dec. 199, in proceedings between insurer and insured under marine insurance contract; Palmer v. Oakley, 3 Doug. (Mich.) 490, 47 Am. Dec. 67, as to decree of Probate Court appointing guardian; Gerault v. Anderson, Walk. (Miss.) 34, 12 Am. Dec. 525, holding void decree in chancery against unrepresented deceased person; Latimer v. Union Pac. Ry., 43 Mo. 109, 97 Am. Dec. 379, as to judgments of courts of sister States; also in Russell v. Perry, 14 N. H. 156, and Kittredge v. Emerson, 15 N. H. 263, 267, on same point; Pennywit v. Foote, 27 Ohio St. 616, 22 Am. Rep. 349, in action to recover on foreign judgment; Trutch v. Bunnell, 11 Or. 60, 50 Am. Rep. 457, 4 Pac. 589, as to jurisdiction to authorize mortgage by guardian of ward's land. Discussed and followed in Cheriot v. Foussat, 3 Binn. 250, 267, as to decree of foreign prize court condemning vessel; Bailey v. Insurance Co., 3 Brev. (S. C.) 369, holding sentence of foreign Admiralty Court conclusive as to rights under marine insurance policy; Miller v. Miller, 1 Bailey L. 245, holding judgment void if face of record shows want of jurisdiction; James v. Smith, 2 S. C. 187, holding further as to mere irregularity in proceedings; Lyles v. Bolles, 8 S. C. 262, as to judgment pronounced at chambers; McCreery v. Davis, 44 S. C. 211, 51 Am. St. Rep. 805, 22 S. E. 184, as to jurisdiction of parties in divorce proceedings; Den v. Deaderick's Exrs., 1 Yerg. 140, as to judgment on attachment; also in Moren v. Killibrew, 2 Yerg. 380, as to judgments of sister States generally; and in Earthman v. Jones, 2 Yerg. 493, holding further as to effect on jurisdiction where no process served; Horan v. Wahrenberger, 9 Tex. 321, 58 Am. Dec. 147, holding further as to distinction between courts of general and those of limited jurisdiction; Hunter v. Martin, 4 Munf. (Va.) 53, holding jurisdiction of United States court in issuing mandate directing reversal of judgment, reviewable in State court; Herring v. Lee, 22 W. Va. 672, holding further as to fraud of third party in altering judgment; In re Tarble, 25 Wis. 398, 3 Am. Rep. 89, holding that State court may inquire into legality of detention of person by military officer of United States. See also note, 75 Am. Dec. 724, on subject of decrees in admiralty; and note, 11 Am. Rep. 437, on general subject.

Distinguished in Noble v. Railroad Co., 147 U. S. 173, 37 L. 126, 13 S. Ct. 273, holding that decision of secretary of interior as to

whether railroad is entitled to right of way cannot be attacked collaterally.

Foreign judgment rendered by a court of competent jurisdiction, is conclusive as to matters which it professes to decide, p. 270.

The following cases cite and affirm this principle and apply it variously: Moch v. Insurance Co., 4 Hughes, 119, 10 Fed. Rep. 706, where authorities are collected and discussed; Juando (Stoughton) v. Taylor, 2 Paine, 679, F. C. 7,558; The Fortitude, 3 Sumn. 230, F. C. 4,953, as to action in rem on bottomry bond; Bradstreet v. Insurance Co., 3 Sumn. 605, F. C. 1,793, holding sentence conclusive as to facts upon which based; The Trenton, 4 Fed. Rep. 661, holding that sale of vessel under decree of maritime court discharges all liens, although same court could not have enforced liens for want of jurisdiction; Pierce v. The Alberto, 19 Fed. Cas. 633, holding that conversion by foreign government of piratical vessel into public vessel is conclusive evidence of condemnation as prize; Wyman v. Campbell, 6 Port. 233, 238, 31 Am. Dec. 683, 686, holding that mere irregularity does not impair validity of judgment; Holcomb v. Phelps, 16 Conn. 131, as to decree of Probate Court directing sale of property; Rodgers v. Evans, 8 Ga. 145, 52 Am. Dec. 391, holding further as to effect of error; Roth v. Roth, 104 Ill. 46, 44 Am. Rep. 84, applying principle to decrees affecting status of persons; Reed v. Wright, 2 G. Greene, 35, holding judgment not impeachable collaterally, unless void on its face; Seely v. Reid, 3 G. Greene, 379, to same effect; Cucullu v. Insurance Co., 5 Mart. (La.) (N. S.) 477, 16 Am. Dec. 205, as to condemnation of vessel for illicit trade; Moulin v. Insurance Co., 24 N. J. L. 237, holding further as to effect of failure to serve process on defendant; so also in Monroe v. Douglas, 4 Sandf. Ch. 181, 183; Hunt v. Hunt, 72 N. Y. 234, 28 Am. Rep. 141, as to decree of divorce; Pelton v. Platner, 13 Ohio, 217, 42 Am. Dec. 199, applying rule to judgments in personam of sister States; Sipes v. Whitney, 30 Ohio St. 74, to same effect; Cheriot v. Foussat, 3 Binn. 258, 260, 261, a prize case; Passmore Williamson's Case, 26 Pa. St. 30, 67 Am. Dec. 394, holding that State court cannot issue habeas corpus to obtain release of prisoner confined under order of United States courts; Keystone Bridge Co. v. Summers, 13 W. Va. 506, as to decree establishing highway.

Distinguished in Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 32 L. 243, 8 S. Ct. 1374, as to judgment in action for recovery of penalty; Risley v. Bank, 83 N. Y. 332, 38 Am. Rep. 429, holding confiscation proceedings under act of congress do not divest title of third persons which originated prior to seizure, or of real owner not proceeded against.

Recognition of foreign States is a political question, to be decided by government and not by courts of justice, p. 272.

Cited and rule applied in Gelston v. Hoyt, 3 Wheat. 324, 4 L. 401, holding insurrectionary government not to be a "prince or State"

within meaning of act prohibiting fitting out for service of a foreign prince or State; Cherokee Nation v. Georgia, 5 Pet. 59, 8 L. 46. holding that Indian tribe is not "foreign State," and so cannot sue in United States courts; Luther v. Borden, 7 How. 57, 12 L. 605, as to power to declare which is rightful government in case of insurrection within a State; Mennett v. Chambers, 14 How. 51, 14 L. 322, holding further as to effect of subsequent recognition; White v. Hart, 13 Wall. 649, 20 L. 687, as to right of congress to authorize framing of new State Constitution; Clarke v. United States, 3 Wash. 102, 104, F. C. 2,838, refusing to recognize independence of de facto government established in St. Domingo; The Ambrose Light, 25 Fed. Rep. 418, 433, holding further that recognition of rebel belligerency clothes insurgents with quasi sovereignty for war purposes; United States v. Packages, 27 Fed. Cas. 289, holding "nonintercourse acts" to be in force until determined otherwise by political authorities; so also in United States v. Cement, 27 Fed. Cas. 293, and United States v. Cotton, 27 Fed. Cas. 328; dissenting opinion, Scheible v. Bacho, 41 Ala. 460, majority holding Confederate States during rebellion to have been de facto governments, and contracts then made should be governed by respective Constitutions; Central R. R., etc., Co. v. Ward, 37 Ga. 525, as to recognition of Confederate States; Perkins v. Rogers, 35 Ind. 156, 9 Am. Rep. 664, on the same point; Russell v. Barnes, 13 Johns. 155, under facts similar to those in principal case; so also in Gelston v. Hoyt, 13 Johns. 588; Wright v. Overall, 2 Cold. 340, 341, as to recognition of Confederate States, holding payment of debt in Confederate currency void; also in Thornburg v. Harris, 3 Cold. 169, on same point; Hedges v. Price, 2 W. Va. 225, 226, 94 Am. Dec. 511, 512, holding that persons engaged in rebellion are amenable to sovereign power for injuries committed while so engaged. Cited also in Baxter v. Brooks, 29 Ark. 190, discussing general subject.

International law — Belligerent rights as well as sovereignty may vest in a government, and the class to which any particular act belongs is to be determined by the nature of the law and the proceedings under it, pp. 272, 273.

Cited to this point in The Prize Cases, 2 Black. 673, 17 L. 478, where principle is held to apply in case of rebellion; Miller v. United States, 11 Wall. 307, 20 L. 145, on same point; The Hiawatha, Blatchf. Prize, 10, 13, F. C. 6,451, holding further as to effect of such acts on neutrals; The Sarah Starr, Blatchf. Prize, 83, F. C. 12,352; Dole v. Insurance Co., 2 Cliff. 420, F. C. 3,966, holding further as to seizure by privateer; The Amy Warwick, 2 Sprague, 133, F. C. 341, holding that belligerent right may exist without any declaration of congress; The Ambrose Light, 25 Fed. 441, as to right of belligerents to seize as pirates vessels acting as privateers without commissions; United States v. Tropic Wind, 28 Fed. Cas. 221, hold-

ing authority to establish blockade to be a belligerent right; Norris v. Doniphan, 4 Met. (Ky.) 395, as to insurrection, and holding that insurgents cannot be treated at same time as alien enemies and rebellious subjects; Kershaw v. Kelsey, 100 Mass. 576, 97 Am. Dec. 138, 1 Am. Rep. 155, holding it to be discretionary as to which will be exercised; Hammond v. State, 3 Cold. 138, distinguishing, however, between belligerent States and rebels as belligerents; Beirne v. Brown, 4 W. Va. 79, holding that either may be exercised in confiscating enemy's property; Caperton v. Martin, 4 W. Va. 140, 141, 143, 159, 6 Am. Rep. 271, 273, holding that both may be exercised at same time towards insurgents. Cited, generally, in Hedges v. Price, 2 W. Va. 233, 94 Am. Dec. 518, discussing general subject.

Admiralty — Parties.—Persons on board a vessel are supposed to represent all who are interested in it, and if so situated that they must take notice of proceedings and may assert the rights of those interested, the cause is properly heard and all persons concerned are parties, p. 277.

Cited and principle applied in dissenting opinion, Florida v. Georgia, 17 How. 502, 15 L. 198, majority holding that in suit between States to settle boundary, United States was not a party, although proprietor of lands in disputed territory; Cushing v. Laird, 107 U. S. 81, 27 L. 395, 2 S. Ct. 205, holding further that upon decree of restitution, vessel may be delivered to master.

Distinguished in dissenting opinion, Miller v. United States, 11 Wall. 328, 20 L. 152, majority holding that seizure of corporate stock may be made by serving notice on president of corporation.

Prize — Seizure beyond limits of territorial jurisdiction, for breach of municipal regulation, cannot give jurisdiction to courts of offended country, and the seizure is invalid, p. 279.

Distinguished in Hudson v. Guestier, 4 Cr. 293, 2 L. 625, where vessel seized within territorial jurisdiction. Overruled in Hudson v. Guestier, 6 Cr. 284, 285, 3 L. 225. See also The Sarah Starr, Blatchf. Prize, 82, F. C. 12,352. Discussed in The Invincible, 2 Gall. 39, 40, F. C. 7,054, approving opinion of Johnson, J., on point that vessel remains within jurisdiction of courts of captor's country, although taken to neutral port. Denied in Francis v. Ocean Ins. Co., 6 Cow. 425; approved in dissenting opinion, Hewett v. Allen, 54 Wis. 585, 12 N. W. 46. See also Hernandez v. Aury, 12 Fed. Cas. 33.

Miscellaneous citations.— Cited in Jecker v. Montgomery, 13 How. 517, 14 L. 248, as to procedure; also in De Lovio v. Boit, 2 Gall. 436, F. C. 3,776, holding that jurisdiction of admiralty is not defeated in case of marine tort by any subsequent act on land (not decided in principal case); and in Prescott v. Bennett, 50 Ga. 274,

as to procedure. Erroneously cited in Bank v. Moss, 6 How. 38, 12 L. 334. Cited also in Schooner Tilton, 5 Mason, 471, F. C. 14,054, as instance where admiralty asserted jurisdiction in petitory suit.

4 Cr. 293-298, 2 L. 625, HUDSON v. GUESTIER.

Foreign judgment, rendered by a court of competent jurisdiction, in an action in rem, is conclusive as to title, p. 297.

Cited and applied in Bradstreet v. Insurance Co., 3 Sumn. 605, F. C. 1,793, holding sentence of condemnation conclusive as to rights of parties under contract of marine insurance; Slocum v. Wheeler, 1 Conn. 457, holding further as to effect of loss of jurisdiction by recapture or escape; Cheriot v. Foussat, 3 Binn. 251, 256, under facts similar to that in principal case.

Distinguished in Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 32 L. 243, 8 S. Ct. 1374, as to judgment in action for recovery of penalty; also in Hilton v. Guyot, 159 U. S. 167, 40 L. 109, 16 S. Ct. 145, as to judgment for recovery of sum of money.

Prize jurisdiction.— Seizure for breach of municipal regulation, made within jurisdiction, confers possession on the sovereigu, and his courts may condemn, although the res be in a neutral port, p. 297.

Rule applied in Jecker v. Montgomery, 13 How. 516, 14 L. 248, where property sold in foreign port; The Schooner Bolina, 1 Gall. 81, F. C. 1,608, as to seizure for violation of revenue laws; The Invincible, 2 Gall. 36, 40, F. C. 7,054, holding that rule applies, although captured vessel belongs to neutral; The Arabella, 2 Gall. 370, F. C. 501, holding, however, that master of ship and ship's papers must be brought within jurisdiction; Cheriot v. Foussat, 3 Binn. 259, 260, 261, holding further as to effect of recapture or escape. The rule has been approved in The Hiawatha, Blatchf. Pr. 10, F. C. 6,451, and The Sarah Starr, Blatchf. Pr. 83, F. C. 12,352, discussing general subject.

Distinguished in Juando (Stoughton) v. Taylor, 2 Paine, 678, F. C. 7,558, holding that where vessel is captured by noncommissioned privateer and taken to neutral port, courts of such neutral country may decree restitution. Questioned in Page v. Lenox, 15 Johns. 174.

4 Cr. 299-305, 2 L. 627, ALEXANDER v. HARRIS.

Pleading — Variance.— Averment of demise for three years is not supported by proof of lease for one year certain, and two years' further possession on same terms by consent of landlord, p. 302.

Cited and applied in Tice v. Norton, 4 Wend. 666, under similar facts.

Pleading.— Plea of no rent arrear admits the demise as laid in the avowry, p. 303.

Cited to this point, in Middleton v. Quigley, 12 N. J. L. 356, distinguishing between pleas non tenuit and no rent arrear. Rule applied directly in Hill v. Miller, 5 Serg. & R. 357; Williams v. Smith, 10 Serg. & R. 205, and Carter v. Grant, 32 Gratt. 772.

Miscellaneous citations.— Cited also in Kessler v. McConachy, 1 Rawle, 442, on point that interruption of enjoyment of premises demised suspends rent.

4 Cr. 306–316, 2 L. 629, CHAPPEDELAINE v. DECHENAUX.

Federal courts.— Executors and administrators as such, having jurisdictional capacity, may sue in United States courts, although decedent could not have done so, p. 308.

This holding is affirmed and applied in the following citing cases: Childress v. Emory, 8 Wheat. 669, 5 L. 711, as to suit between executors of different estates; Clarke v. Mathewson, 12 Pet. 171, 9 L. 1044, holding that administrator, although personally lacking jurisdictional capacity, may revive suit in which decedent as plaintiff was competent to sue; McNutt v. Bland, 2 How. 15, 11 L. 161, sustaining jurisdiction where party beneficially interested was competent (but see dissenting opinion, 2 How. 22, 11 L. 164, on point that such interest must be averred); dissenting opinion, Florida v. Georgia, 17 How. 499, 15 L. 196, majority holding attorney-general to be vested with interests of United States, as party to suit to settle boundary between States; Bushnell v. Kennedy, 9 Wall. 391, 19 L. 738, limiting rule prohibiting actions by assignees of choses in action, holding it to apply only to rights of action founded on contract; Susquehanna Coal Co. v. Blatchford, 11 Wall. 175, 20 L. 180, applying principle to actions by trustees; Rice v. Houston, 13 Wall. 67, 20 L. 484, asserting jurisdiction in case where executors originally competent to sue removed to State where defendant resided; Carter v. Treadwell, 3 Story, 50, F. C. 2,480, holding, however, that character as administrator must be fully established; so also in Vase v. Philbrook, 3 Story, 344, F. C. 17,010, and Wood v. Mann, 1 Sumn. 583, F. C. 17,952; Harper v. Railroad Co., 36 Fed. Rep. 104, as to action for damages for causing death of intestate; Reinach v. Railroad Co., 58 Fed. Rep. 38, holding that beneficiary judisdictionally competent, may sue in case trustee incompetent by reason of citizenship; Calderwood v. Braly, 28 Cal. 99, as to removal of cause; Sharps, etc., Co. v. Rowan, 34 Conn. 332, 91 Am. Dec. 729, holding that where jurisdiction depends on citizenship of party, it is the party on the record; Dunn v. Waggoner, 3 Yerg. 59, holding action by trustees, citizens of same State as defendants, not within jurisdiction of United States courts, although cestui que trust resident of another State; Mead v. Walker, 15 Wis. 503, as to

action by trustee to recover debt. And see Mayer v. Foulkrod, 4 Wash. 352, F. C. 9,341, and dissenting opinion, Marshall v. Baltimore, etc., R. R., 16 How. 350, 14 L. 968, approving rule in general discussion.

Distinguished in Sere v. Pitot, 6 Cr. 336, 3 L. 241, and United States Bank v. McNair, 56 Fed. Rep. 325, denying application of rule in suit by assignee of insolvent; Mellus v. Thompson, 1 Cliff. 131, F. C. 9,405, holding that administrator cannot be party to suit in official character in another State for assets lawfully received by him in State of appointment; Dodge v. Perkins, 4 Mason, 438, F. C. 3,954, holding executor incompetent if citizen of same State as defendant, although testator competent; Clarke v. Matthewson, 2 Sumn. 263, F. C. 2,857, refusing to entertain bill of revivor under which executor would be citizen of State of defendant (but see 12 Pet. 171, 9 L. 1044, supra).

Account stated is a bar to a bill in equity to open a settled account, unless complainant clearly show it to be erroneous, p. 309.

Cited and principle applied in Baker v. Biddle, 1 Bald. 418, F. C. 764, holding further that where account is retained unreasonable time without objection, it becomes a stated or settled account; so also in Bainbridge v. Wilcocks, 1 Bald. 540, F. C. 755; Pulliam v. Pulliam, 10 Fed. Rep. 56, F. C. 11,463a, but holding, account stated only prima facie evidence of its correctness; so also in Elder v. Clark, 51 Fed. Rep. 120, holding evidence of mistake or fraud must be clear in order to set aside account; Clafling v. Bennett, 51 Fed. Rep. 700, as to settlement of accounts between partners; Baxter v. Card, 59 Fed. Rep. 167, holding acceptance of note for balance due, conclusive, subject only to correction for mistake; Langdon v. Roane's Admr., 6 Ala. 526, 41 Am. Dec. 61, holding further as to burden of proof where mistake alleged; Desha v. Smith, 20 Ala. 752, and Paulling v. Creagh's Admr., 54 Ala. 652, on same point; Roberts v. Totten, 13 Ark. 616, as to settlement of partnership accounts; Branger v. Chevalier, 9 Cal. 361, on same point, holding further as to effect on whole, of allegations of mistake in particular items; so also in St. Louis v. Alexander, 23 Mo. 526, to same effect; Lawler v. Jennings, 55 Pac. 61, going behind an account stated, there being a palpable error; Kennedy v. Goodman, 14 Neb. 588, 16 N. W. 836, as to presumption in case of fraud or mistake; Keller v. Keller, 18 Neb. 368, 25 N. W. 365, as to burden of proof; in Swayze v. Swayze, 37 N. J. Eq. 187, holding burden of proof on party disputing account; Lockwood v. Thorne, 11 N. Y. 176, 62 Am. Dec. 84, as to what constitutes account stated; McDow v. Brown, 2 S. C. 107, 112, as to accounts between administrator of deceased ward and executor of guardian; Seabright v. Seabright, 28 W. Va. 433, holding account stated presumed to be correct. Cited, generally, in Holmes v. Hunt, 122 Mass. 513, 23 Am. Rep. 383. See also extended note, 62 Am. Dec. 91, on general subject.

4 Cr. 316–317, 2 L. 632, UNITED STATES v. McDOWELL.

Federal courts.— In determining sufficiency of matter in dispute to sustain jurisdiction in action on bond, court will look to sum alleged to be due upon condition of bond and not to penalty, p. 316.

Affirmed and followed in United States v. Hill, 123 U. S. 683, 31 L. 276, 8 S. Ct. 309, denying jurisdiction where amount due United States less than jurisdictional amount, although penalty greater; Reynolds v. Sneed, 1 Ark. 200, denying appeal where damages awarded against appellant less than amount required to give jurisdiction, although amount claimed had been more than necessary; State v. St. Louis Court of Appeals, 87 Mo. 572, under facts similar to those in principal case; Lewis v. Long, 3 Munf. (Va.) 151, 155, as to appeal from judgment in action of debt where amount awarded less than jurisdictional amount; so also in Clark v. Brown, 8 Gratt. 553, in action on the case. See also note, 21 Am. St. Rep. 619, on general subject.

Distinguished in Postmaster-General v. Cross, 4 Wash. C. C. 327, F. C. 11,306, where action was to recover penalty itself.

4 Cr. 317–321, 2 L. 633, MAYOR, ETC., OF ALEXANDRIA v. PATTEN.

Payment, application of.— If, at time of payment, debtor does not direct to which account payment is to be applied, creditor may at any time elect as to its application, p. 320.

This principle has been extensively affirmed and applied by the citing cases: Page v. Patton, 5 Pet. 310, 8 L. 137, holding further that application is concluded by election; Jones v. United States, 7 How. 691, 12 L. 874, where authorities collected and discussed; Schuelenburg v. Martin, 1 McCrary, 351, 2 Fed. Rep. 749, sustaining right to apply to debts unsecured; Martin v. Pope, 6 Ala. 540, 41 Am. Dec. 70, as to appropriation by factor of proceeds of sales; Haynes v. Waite, 14 Cal. 449, holding institution of suit evidences creditor's application; Wendt v. Ross, 33 Cal. 657, holding creditor bound by his election; Fairchild v. Holly, 10 Conn. 184, but applying payment to oldest debt, neither party having directed application; Pickering v. Day, 3 Houst. 538, 95 Am. Dec. 310, holding, however, that delay of creditor must not be such as to prejudice third parties; Randall v. Pettes, 12 Fla. 535, holding that where bank held notes and deposits of debtor, latter could not, after drawing largely on deposits, direct application of balance towards payment of notes; Hargroves v. Cooke, 15 Ga. 329, holding, however, that where neither party applies payment, court may do so; Koch v. Roth, 150 Ill. 226, 37 N. E. 321, holding, however, that exercise of option by creditor must be reasonable; Forelander v. Hicks, 6 Ind. 450, where principle applied to judgment debts; Plummer v. Erskine,

58 Me. 61, holding election final; Mitchell v. Dall, 2 Harr. & G. 173, holding application may be implied from circumstances; Brady's Admr. v. Hill, 1 Mo. 317, 13 Am. Dec. 505, applying rule; Paulson v. Collier, 18 Mo. App. 606, 607, as to payment of rent due; Hilton v. Burley, 2 N. H. 196, holding that where neither party has directed application, court should appropriate to unsecured debt; so also in Caldwell v. Wentworth, 14 N. H. 437, holding that in absence of such reason court should appropriate to earliest debt; Edwards v. Derrickson, 28 N. J. L. 67, applying rule; in Seymour v. Van Slyck, 8 Wend. 417, holding it to be duty of court to make application where neither party has done so; Stone v. Seymour, 15 Wend. 32, 40, where authorities collected and discussed; Bank of California v. Webb, 94 N. Y. 472, holding as to effect of request by debtor to exercise option; Orleans Co. Bank v. Moore, 112 N. Y. 557, 8 Am. St. Rep. 786, 20 N. E. 364, citing note to principal case; Mass v. Adams, 4 Ired. Eq. 52, holding, however, that where court makes direction it should be to debt most precarious; Bogart v. Nevins, 6 Serg. & R. 378, as to bills of exchange; Matossy v. Frosh, 9 Tex. 613, following the rule; Taylor v. Coleman, 20 Tex. 777, as to time when option should be exercised; Robinson v. Doolittle, 12 Vt. 249, holding, however, that intention of debtor, if determinable, must govern; Frazer v. Miller, 7 Wash. 527, 35 Pac. 428, holding further as to proof of application. The rule has been approved in the following cases, discussing the general subject; Bailey v. Wynkoop, 10 Ill. 452; Chapman v. Smith, 25 Gratt. 747; Miller v. Womble, 122 N. C. 139, 29 S. E. 103.

Distinguished in Stone v. Talbot, 4 Wis. 449, holding application cannot be made to disputed debt; Jones v. Williams, 39 Wis. 308, holding rule inapplicable where debtor has had no opportunity to direct application. The principal case has also been cited in Brady v. United States, 1 Wood. & M. 168, F. C. 1,636, as authority for holding that application should be to oldest debt, but this is erroneous.

4 Cr. 321-324, 2 L. 634, DAWSON'S LESSEE v. GODFREY.

Alien, disability of.— Right to inherit depends upon the existing state of allegiance at time of descent cast, p. 323.

Cited and doctrine applied in Fairfax's Devisee v. Hunter's Lessee, 7 Cr. 620, 3 L. 459, as to rights confirmed by treaty; Inglis v. Trustees, 3 Pet. 171, 7 L. 642, holding that person who left this country before Declaration of Independence and never returned, was an alien and could not subsequently inherit lands; Tannis v. St. Cyre, 21 Ala. 455, as to right of emancipated slave to inherit; Donovan v. Pitcher, 53 Ala. 414, 25 Am. Rep. 635, holding that where capacity wanting at time of descent cast, subsequent laws enlarging it cannot operate retrospectively; Lyons v. California, 67 Cal. 382, 7 Pac. 764, defining

term "alien" in statute providing that nonresident aliens may inherit; Hebron v. Colchester, 5 Day, 172, holding that British subject, coming to this country in 1775, and acquiring land by purchase in 1794, was not an alien; Wunderle v. Wunderle, 144 Ill. 58, 33 N. E. 198, construing statute limiting disabilities of aliens; so also in Crane v. Reeder, 21 Mich. 68, 4 Am. Rep. 439, to same effect, holding that act authorizing "any foreigner to take and hold lands," does not confer upon heirs of such foreigner right to take such lands by inheritance; Montgomery v. Dorion, 7 N. H. 480, holding further as to escheat of lands of alien; Jackson v. White, 20 Johns. 324, holding resident in this country while under parole as prisoner of war, insufficient to establish right to inherit; Orser v. Hoag, 3 Hill, 82, where cases collected and discussed. Followed in Jackson's Lessee v. Burns, 3 Binn. 82, 87; Trezevant v. Osborn, 3 Brev. (S. C.) 31. Approved in Hunter v. Fairfax's Devisee, 1 Munf. (Va.) 227. See also notes to Jackson v. Clarke, 3 Wheat. 13, 4 L. 322, and Kemp v. Kennedy, Pet. C. C. 40, F. C. 7,686, on general subject.

Wills.— Right of inheritance not a natural and perfect right, but a creature of law, pp. 323, 324.

Miscellaneous citations.— Cited also in Society, etc. v. New Haven, 8 Wheat. 481, 5 L. 666, on point that Revolution did not deprive individual of civil rights.

4 Cr. 324–328, 2 L. 635, MOUNTZ v. HODGSON.

Appeal and error.— Quære, whether writ of error will lie to refusal of court below to quash an execution upon motion. (Court divided in opinion on the point, quashing writ of error for want of jurisdiction), p. 327.

Referred to in McCargo v. Chapman, 20 How. 566, 15 L. 1022, holding error does not lie to order of lower court quashing execution; so also in The Elmira, 16 Fed. Rep. 136, citing McCargo v. Chapman; Hicks v. Murphy, Walk. (Miss.) 67, holding that error will not lie for irregularity on part of clerk in issuing execution. But see Norcross v. Boulton, 16 N. J. L. 314, referring to principal case and holding that error will lie to order quashing execution.

4 Cr. 328–333, 2 L. 636, BLAINE v. THE CHARLES CARTER.

Admiralty.— Bottomry bond creates a right enforceable in admiralty, p. 332.

Cited and applied in The Mary, 1 Paine, 675, F. C. 9,187, enforcing bottomry bond given by owner for money advanced to purchase cargo. Rule approved in separate concurring opinion of Woodbury, J., in New Jersey, etc., Co. v. Bank, 6 How. 421, 12 L. 498, discussing general subject, and also in The Draco, 2 Sumn. 177, F. C. 4,057, defining bottomry bond.

Maritime lien.— Claims of seaman for wages are preferred to a bottomry bond, p. 332.

Cited in The Rodney, Blatchf. & H. 230, F. C. 11,993, marshalling claims against vessel; Lewis v. The Elizabeth and Jane, 1 Ware, 41, F. C. 8,321, holding further as to effect of abandonment of wreck; The Dora, 34 Fed. Rep. 349, where advancement of money to pay seamen's wages held to create lien superior to all others; The America, 1 Fed. Cas. 613, deferring lien of materialman to that of seaman.

Maritime lien.— Omission of holder to enforce bottomry bond until vessel has made another voyage after completion of that mentioned in bond, cannot prejudice rights of person in whose behalf execution is levied on vessel, such execution operating to displace bottomry lien, p. 332.

Cited in The Dubuque, 2 Abb. (U. S.) 31, 33, F. C. 4,110, applying rule to attachment under claim for wages, and holding further as to time within which original lien should be enforced; The Favorite, 1 Biss. 528, F. C. 4,696, holding libel not maintainable where filed two years and ten months after injury, and after attachment of vessel by assignee of shipper's bill of lading; The Utility, 1 Blatchf. & H. 225, F. C. 16,806, as to lien for supplies furnished, and in The Boston, Blatchf. & H. 326, 327, F. C. 1,669, on same point; Burke v. Brig M. P. Rich, 1 Cliff. 315, F. C. 2,161, holding that delay must be unreasonable, and that mere departure from return port does not waive lien; Vandewater v. The Yankee Blade, McAll. 13, F. C. 16,847, holding further that maritime lien will not be extended by implication; The Buckeye State, Newb. 114, F. C. 13,445, as to lien for materials furnished, holding as to time in which same must be enforced; Furniss v. Brig Magoun, Olcott, 66, F. C. 5,163, discussing also priority of lien for wages; The Schooner Romp, Olcott, 207, F. C. 12,030, as to mortgage on vessel to secure price of cargo; Griswold v. The Nevada, 2 Sawy. 146, F. C. 5,839, holding claim against vessel for injuries barred by unreasonable lapse of time; Packard v. The Sloop Louisa, 2 Wood. & M. 60, 61, 63, F. C. 10,652, as to time within which lien for wages must be enforced; Leland v. Ship Medora, 2 Wood. & M. 105, 107, F. C. 8,237, also as to essentials of bottomry bond, and in Greely v. Smith, 3 Wood. & M. 253, F. C. 13,009, on same point; The Arcturus, 18 Fed. Rep. 744, defining maritime lien; The J. W. Tucker, 20 Fed. Rep. 133, as to lien for towage. See also The Young America, 30 Fed. Rep. 792, quoting from preceding case, in which principal case is cited; The Nebraska, 69 Fed. Rep. 1014, 34 U. S. App. 119, as to time within which lien must be enforced. Rule approved in general discussion in Marsh v. The Minnie, 16 Fed. Cas. 812; Pierce v. The Alberto, 19 Fed. Cas. 634.

Distinguished in Cole v. The Atlantic, Crabbe, 448, F. C. 2,976,

holding lien for materials not barred by lapse of two years, unaccompanied by culpable neglect; The Mary, 1 Paine, 186, F. C. 9,186, holding failure of seamen to enforce lien for wages in port where discharged before end of voyage, does not waive lien.

Execution issued by Circuit Court before expiration of statutory period after judgment is not void, but merely voidable, p. 333.

Principle applied in Voorhees v. Bank of U. S., 10 Pet. 477, 9 L. 501, holding sale on execution cannot be attacked collaterally, although record does not show that all statutory provisions have been complied with; Beebe v. United States, 161 U. S. 113, 40 L. 638, 16 S. Ct. 536, holding further as to presumption of regularity; Thompson v. Phillips, 1 Bald. 271, F. C. 13,974, as to validity of sale, where alias fieri facias not issued as required by statute; Bank of U. S. v. Van Voorhees, 1 McLean, 225, F. C. 939 (see 10 Pet. 477, 9 L. 501, supra); Sumner's Lessee v. Moore, 2 McLean, 65, F. C. 13,610, holding sheriff's deed not avoidable collaterally, because of defect in levy of execution; Wyman v. Campbell, 6 Port. 243, 31 Am. Dec. 689, as to sale under statute regulating sales of property of deceased persons; Tucker v. Harris, 13 Ga. 10, 58 Am. Dec. 494, as to presumption of regularity of judgment where jurisdiction shown; Swiggart v. Harber, 4 Scam. 373, 39 Am. Dec. 424, applying the rule; Jones v. Carnahan, 63 Ind. 234, holding that advantage may be taken of such irregularity only by defendant in direct proceeding; Cavender v. Heirs of Smith, 1 Iowa, 348, holding provisions in statute regulating levy of executions to be directory merely, and on same point in Denegre v. Haun, 14 Iowa, 248, 81 Am. Dec. 485; Cross v. Knox, 32 Kan. 733, 5 Pac. 37, as to sale under decree of foreclosure; Commonwealth v. O'Cull, 7 J. J. Marsh. 149. 23 Am. Dec. 394, as to sale under execution issuing to county where defendant does not reside; Chesbro v. Barme, 163 Mass. 81, 82, 39 N. E. 1033, applying principle to arrest of debtor under alias execution before return day of original; Elliott v. Hart, 45 Mich. 236, 7 N. W. 813, as to writ of replevin, irregular on face in description of property; Carson v. Walker, 16 Mo. 86, as to execution issued within period forbidden by law; Wood v. Kinsman, 5 Vt. 598, as to arrest under attachment of person exempt from arrest on civil process; Pierson v. Gale, 8 Vt. 512, 30 Am. Dec. 489, holding sale under first execution, however irregular, conclusive, and attempt to enter under alias execution renders party trespasser; and in Jackson v. Astor, 1 Pinn. 161, 39 Am. Dec. 294, as to sale by administrator under order of Probate Court. Cited generally in United States v. Wonson, 1 Gall. 8, F. C. 16,750; Bayard v. Bayard, 2 Fed. Cas. 1060.

Distinguished in dissenting opinion, Borden v. State, 11 Ark. 564, majority holding judgment cannot be attacked collaterally, unless void for want of jurisdiction.

4 Cr. 333–346, 2 L. 638, UNITED STATES v. GURNEY.

Pleading.— Demurrer brings all pleadings before the court, and, upon examination of record, judgment must be given against party committing first fault, p. 341.

Cited and applied in Donnell v. Jones, 13 Ala. 500, 48 Am. Dec. 60.

Government contracts are to be construed according to same rules as those of individuals, and intent controls, p. 343.

Cited to this point in dissenting opinion, Charles River Bridge v. Warren Bridge, 11 Pet. 611, 9 L. 611, majority holding that grant of charter powers to corporation is to be construed strictly as against the corporation; Thorndike v. United States, 2 Mason, 20, F. C. 13,987, holding that where United States notes are payable in one year with interest until due, interest continues until payment made after maturity; State v. Real Estate Bank, 5 Ark. 599, 41 Am. Dec. 112, construing provisions in charter of banking corporation; Thompson v. People, 23 Wend. 580, as to charter of bridge corporation.

Payment after day stipulated, if accepted, discharges debt or obligation, and is waiver of damages, p. 343.

Cited and principle applied in McConaughy v. Wiley, 13 Sawy. 153, 33 Fed. Rep. 452, as to payment for swamp land purchased from State, holding that legislature could not declare deed void after payment accepted; McWaters v. Draper, 5 T. B. Mon. 496, holding that plea of such payment and acceptance must aver payment of full amount due.

Default of payment when due gives right to interest from such date, p. 346.

Cited in Eaton v. Truesdail, 40 Mich. 7, holding that where instrument specifies no time for payment, it bears interest from date of execution.

Miscellaneous citations.— Cited also in State v. Crocker, 5 Wyo. 398, 40 Pac. 684, on point that certificate of division removes certified questions only and not the whole cause

4 Cr. 347–366, 2 L. 643, PEISCH v. WARE.

Duties.— Goods saved from derelict vessel not liable to forfeiture for nonpayment of duties within the collection act, the goods having been removed by strangers and without the consent or connivance of the owners, pp. 358–363.

Cited and rule applied in United States v. Thirty-three Barrels of Spirits, 1 Abb. (U. S.) 313, 1 Low. 241, F. C. 16,470, to forfeiture, under internal revenue laws, of implements found on premises where illicit trade carried on; The Waterloo, 1 Blatchf. & H. 120, F. C. 17,257, as to entry into blockaded port of derelict vessel, brought in by

salvors without owner's consent; The Schooner Mary, 1 Gall. 210, F. C. 9,183, as to entry into blockaded port, of vessel in distress; and in United States v. Hayward, 2 Gall. 509, F. C. 15,336, on same point; Six Hundred and Fifty Chests of Tea v. United States, 1 Paine, 507, 511, F. C. 12,916, holding rights of owner not affected by fraud or misconduct of revenue officers; The Gertrude, 3 Story, 72, 74, 2 Ware (Dav.), 180, 182, F. C. 5,370, as to foreign goods found derelict and brought into port without collector's stamp affixed; and in United States v. Curtis, 16 Fed. Rep. 189, on same point; Cargo ex Lady Essex, 39 Fed. Rep. 767, as to vessel entering port in distress, and in United States v. Eleven Hundred and Fifty Pounds of Celluloid, 82 Fed. Rep. 629, 632, on same point; United States v. Halberstadt, 26 Fed. Cas. 71, 73, construing act providing against removal of empty liquor casks.

Distinguished in United States v. The Sarah B. Harris, 4 Cliff. 154, F. C. 16,223, where act was intentional, and innocence of intention held no excuse; United States v. Hutchinson, 1 Hask. (Fox's Dec.) 156, F. C. 15,431, holding master liable for importing goods without manifest, although ignorant that goods were on board; so also in Jackson v. United States, 4 Mason, 190, F. C. 7,149; United States v. Mules, 36 Fed. Rep. 84, decreeing forfeiture of animals used in violation of revenue law, although owner ignorant of such wrongful use.

Duties.— Quære whether goods saved from wreck are liable to, p. 361.

Referred to in The Waterloo, Blatchf. & H. 122, F. C. 17,257, holding derelict goods dutiable under act of congress; Bryant v. Commonwealth Ins. Co., 6 Pick. 142, but point not decided.

Salvage.— Fifty per cent. of gross value of goods saved from derelict in Delaware bay allowed, pp. 365, 366.

Miscellaneous citations.— Cited in Houseman v. Schooner North Carolina, 15 Pet. 48, 10 L. 657, as to jurisdiction of admiralty under facts similar to those in principal case; also in The Wave, Blatchf. & H. 240, F. C. 17,297, on same point. (Point decided only by implication.) Distinguished in Church v. Seventeen Hundred Dollars, 5 Fed. Cas. 674, denying jurisdiction of admiralty, over action for money had and received under agreement to do salvage service.

4 Cr. 367-369, 2 L. 649, SHEARMAN v. IRVINE'S LESSEE.

Entry need not be made during period prescribed by statute of limitations, after title has accrued, unless possession of party occupying is adverse, p. 369.

Cited to this point in Wade v. Doyle, 17 Fla. 528; May v. Rumney, 1 Mich. 11, as to ejectment for dower; Hawk v. Senseman, 6 Serg. & R. 24, holding that it is unnecessary to action of ejectment to allege possession within statutory period.

4 Cr. 370, 2 L. 650, MORGAN v. CALLENDER.

Appeal and error.— Appeal lies to Supreme Court from Federal District Court for Territory of Orleans, p. 370.

Jurisdiction.— No Federal jurisdiction where citizenship not averred, p. 370.

4 Cr. 370–382, 2 L. 650, ALEXANDER v. BALTIMORE INS. CO.

Marine insurance — Abandonment.— Seizure of cargo, vessel being at liberty to proceed, does not justify abandonment of vessel, p. 375.

Cited and principle applied in Bradlie v. Insurance Co., 12 Pet. 401, 402, 9 L. 1133, 1134, holding that loss of voyage does not justify abandonment; and in Church v. Insurance Co., 1 Mason, 343, F. C. 2,711, to same effect; Taber v. Insurance Co., 131 Mass. 249, holding further as to effect of delay on part of insured in abandoning; Ritchie v. Insurance Co., 5 Serg. & R. 506, holding that total loss of cargo, during voyage, does not constitute constructive total loss of vessel. Cited also in Note to Olivera v. Insurance Co., 3 Wheat. 195, 4 L. 368; and Greene v. Insurance Co., 9 Allen, 225, in discussion of general subject.

Distinguished in Peele v. Insurance Co., 3 Mason, 58, F. C. 10,905, where such abandonment was accepted by underwriters.

Marine insurance.— Total loss of cargo during voyage does not constitute technical total loss of vessel, p. 377.

4 Cr. 382–383, 2 L. 654, MATTHEWS v. ZANE.

Jurisdiction of United States Supreme Court.— Appellate jurisdiction extends to question respecting title to land, both parties claiming under same act of congress, p. 383.

Cited in Buel v. Van Ness, 8 Wheat. 324, 5 L. 627, extending principle to conflicting claims to forfeiture under revenue laws. Affirmed in Ross v. Barland, 1 Pet. 664, 7 L. 306. Cited in Mobile v. Eslava, 16 Pet. 249, 10 L. 953, where authorities collected and discussed; Kissell v. St. Louis Public Schools, 18 How. 27, 15 L. 328, as to dispute regarding title to school lands; Lewis v. Lewis, 9 Mo. 190, 43 Am. Dec. 546, asserting jurisdiction of State courts to determine rights of parties in first instance.

4 Cr. 384–398, 2 L. 655, YOUNG v. BANK OF ALEXANDRIA.

Foreign laws, authentication of.— Act of State legislature creating corporation is public act, and being printed in conformity with general act of legislature, is sufficiently authenticated, p. 388.

Cited and principle applied in Cox v. Robinson, 2 Stew. & P. 97, as to act prescribing rate of interest; and in Handrick v. Andrews, 9 Port. 38, on same point; Vance v. Bank, 1 Blackf. 80, as to act

of territorial legislature creating bank afterwards recognized by State Constitution as corporate body; Henthorn v. Shepherd, 1 Blackf. 160, holding that act of State ceding land to United States will be judicially noticed; Emery v. Berry, 28 N. H. 486, 61 Am. Dec. 627, holding that such acts cannot be proven by parol evidence alone; Smith v. Strong, 2 Hill, 247, as to act incorporating bank; Crawford v. Linn Co., 11 Or. 500, 5 Pac. 747, holding that question as to whether act is public or private is to be determined by subject-matter; Biddis v. James, 6 Binn. 327, 6 Am. Dec. 457, extending principle to private acts; Kean v. Rice, 12 Serg. & R. 207, as to penal statute; Penniman, Petitioner, 11 R. I. 339, as to act prescribing liability of stockholders of corporation; Bank of Newberry v. Railroad Co., 9 Rich. L. 498, as to act incorporating bank; State v. Abbey, 29 Vt. 65, 67 Am. Dec. 756, as to act regulating production of evidence in prosecution for bigamy; and in Stribbling v. Bank, 5 Rand. 140, as to act incorporating bank. Cited also in United States v. Wilson, 1 Bald. 91, F. C. 16,730, discussing general subject.

Corporations.— Grants of extraordinary remedies form no part of corporate franchises which will be respected in other courts than those of the State granting such remedies, p. 397.

Cited in Bank of Columbia v. Okely, 4 Wheat. 245, 4 L. 561, as to clause giving summary process by execution; United States v. Railroad, 98 U. S. 606, 25 L. 152, asserting right of congress to modify charter provision relating to procedure; Carey v. Giles, 9 Ga. 258, upholding power of legislature to appoint receiver for insolvent bank; Miners' Bank v. United States, Morris, 484, 43 Am. Dec. 116, holding that bank charter may be repealed where such power reserved in act of incorporation; Howard v. Insurance Co., 13 B. Mon. 285, 286, as to act providing that insurance company may be sued in certain courts; Burton v. State, 3 Gill, 9, as to exemption of bank from operation of law requiring affixing of stamps to bonds or obligations; Debolt v. Insurance Co., 1 Ohio St. 587, applying principle to exemption from taxation.

Appeal lies from judgments of Circuit Court for District of Columbia, to Supreme Court, in cases where corporation chartered by State of Virginia is party, although charter contains provision to contrary, p. 398.

Applied in Carter's Heirs v. Cutting, 8 Cr. 252, 3 L. 553, sustaining appeal from decree of Circuit Court of District, affirming judgment of Orphans' Court; Railroad Co. v. Church, 19 Wall. 64, 22 L. 98, holding that appeal lies in all cases not expressly excepted by act of congress; Ormsby v. Webb, 134 U. S. 55, 61, 33 L. 809, 811, 10 S. Ct. 481, 483, discussing Carter's Heirs v. Cutting and Railroad Co. v. Church, supra. Cited, generally, in Smith v. Bank of Columbia, 4 Cr. C. C. 149, F. C. 13,011.

4 Cr. 398–401, 2 L. 659, SPIERS v. WILLISON.

Parol evidence.— Although deed of gift is required by Virginia act to be in writing parol evidence of its existence is admissible to show nature of possession accompanying it, p. 400.

Affirmed in Ramsay v. Lee, 4 Cr. 402, 2 L. 660, where facts identical. Cited and principle applied in Graham v. Lockhart, 8 Ala. 25, holding admissible, parol evidence of notes described as consideration for deed of trust; Hogan v. Reynolds, 8 Ala. 68, holding, in action for purchase money of note, parol evidence of sale admissible, without production of note; East v. Pace, 57 Ala. 524, where rule as to production of best evidence held not to apply to matter merely incidental or collateral; and in Sprague v. Hosmer, 82 N. Y. 471, to same effect; Lowry v. Pinson, 2 Bail. 328, 23 Am. Dec. 142, holding that party impeaching sale for fraud may show by parol the execution of another conveyance without consideration; Sims v. Jones, 43 S. C. 95, 20 S. E. 906, discussing proof of instrument on cross-examination; Merrit v. Smith, 6 Leigh (Va.), 493, under facts similar to principal case; Taylor v. Peck, 21 Gratt. 20, holding that where fact of occupation alone is in issue, without respect to terms of tenancy, lease may be proven by parol.

4 Cr. 401–402, 2 L. 660, RAMSAY v. LEE.

No citations.

4 Cr. 403–414, 2 L. 660, STEAD v. COURSE.

Pleading.— Plea containing, in substance, sufficient to bar a bill, if replied to and found true in fact, is a bar, though defective in form, p. 413.

Cited in Dalzell v. Dueber Mfg. Co., 149 U. S. 326, 37 L. 755, 13 S. Ct. 890, on point that where plea is not supported by testimony it must be overruled. Approved in United States v. California Land Co., 148 U. S. 40, 37 L. 359, 13 S. Ct. 461, discussing general subject. The general rule is also approved in Farley v. Kittson, 120 U. S. 315, 30 L. 688, 7 S. Ct. 540, holding, however, that objection to equity of plaintiff's claim cannot be taken by pleas.

Distinguished in Matthews v. Lalance, etc., Co., 18 Blatchf. 87, 2 Fed. Rep. 235, where plea held bad in substance.

Tax sale, validity of.— Tax collector must conform to law from which his power is derived, otherwise he makes no title. Unnecessary sale of whole tract where sale of part would satisfy tax, is void, p. 413.

This is a leading case, and an examination of the citations shows that this principle has been extensively affirmed and applied, as follows: Williams v. Peyton's Lessee, 4 Wheat. 82, 4 L. 520, holding that party claiming under such sale must show compliance with

statute. So also in Mason v. Fearson, 9 How. 260, 13 L. 130, and Early v. Homans, 16 How. 618, 14 L. 1083; French v. Edwards, 13 Wall. 513, 20 L. 704, holding recitals in sheriff's deed as to manner in which judgment executed, to be evidence against grantee; Schroeder v. Young, 161 U. S. 341, 40 L. 725, 16 S. Ct. 515, as to sale on execution; United States v. Pacific R. R., 1 McCrary, 7, 1 Fed. 102, holding, however, that statute should be construed favorably to innocent purchasers; Lyon v. Hunt, 11 Ala. 312, 46 Am. Dec. 223, as to burden of proof; Mahone v. Williams, 39 Ala. 217, as to sale under decree of foreclosure; Ritch v. Eichelberger, 13 Fla. 182, setting aside sale where more land sold than necessary to pay tax; Dickerson v. Acosta, 15 Fla. 620, construing act of congress providing for forfeiture of land for nonpayment of taxes; Curtis v. Swearingen, Breese, 142, discussing as to burden of proof; Day v. Graham, 1 Gil. 443, as to sale of lots en masse when susceptible of division; Scott v. Babcock, 3 G. Greene, 140, holding that there is no presumption in favor of authority of officer to sell; Laraby v. Reid, 3 G. Greene, 420, where order of sale did not conform to that prescribed by statute; Penn v. Clemans, 19 Iowa, 379, holding irregular sale in gross of several distinct parcels of land; McCready v. Sexton, 29 Iowa, 392. 4 Am. Rep. 230, holding clause in statute making tax deed "conclusive evidence," to apply only to regularity of proceedings and not to authority of officer to sell; City Bank of New Orleans v. McIntyre, 8 Rob. (La.) 478, but where execution debtor made no objection to manner of sale, held he could not enjoin purchaser from using property pending suit to annul; Nesbitt v. Dallam, 7 Gill & J. 512, 28 Am. Dec. 243, as to sale of property en masse; Hamilton v. Valiant, 30 Md. 140, as to failure to give notice where required; Margraff v. Cunningham, 57 Md. 588, as to sale en masse; Rowland v. Doty, Harr. Ch. (Mich.) 10, holding tax sale, although regular, void if tax paid; Morton v. Reeds, 6 Mo. 73, 86, holding that in all summary and ex parte proceedings, burden of proof is on party claiming under them; but distinguished in dissenting opinion, p. 103; Reeds v. Morton, 9 Mo. 886 (875), affirming Morton v. Reeds, supra; Gordon v. Edson, 2 N. H. 153, holding sheriff liable for escape, where prisoner released on bonds in sum less than that required by statute; Brown v. Dinsmoor, 3 N. H. 105, as to failure to describe land of nonresident in assessment list; Thompson v. Currier, 24 N. H. 239, as to sale on execution of more property than necessary to satisfy judgment; Howell v. Sebring, 14 N. J. Eq. 93, holding executor bound by directions in will regarding disposal of property; Johnson v. Garrett, 16 N. J. Eq. 32, under facts similar to principal case; Hopper v. Malleson's Executors, et al. 16 N. J. Eq. 384, holding that the tax deed impugned is not prima facie evidence of regularity; dissenting opinion, Jackson v. Roberts' Exrs., 11 Wend. 434, 435, majority holding parol evidence inadmissible to show that one of several executions under

which sales made, had been satisfied; Tiernan v. Wilson, 6 Johns. Ch. 414, under facts similar to principal case; dissenting opinion. Register v. Bryan, 2 Hawks, 21, majority holding sale en masse valid; Lessee of Holt v. Hemphill, 3 Ohio, 234, holding further as to burden of proof; and in Lafferty v. Byers, 5 Ohio, 458, on same point; Waln v. Shearman, 8 Serg. & R. 369, as to tax sale void for want of authority to sell; dissenting opinion, Stewart v. Schoenfelt, 13 Serg. & R. 375, majority holding valid, sale of property for taxes, where original assessment made without authority; Winters v. Burford, 6 Cold. 332, as to sale en masse; Hadley v. Tankersley, 8 Tex. 20, construing statute providing that "tax deed shall be good and effectual both in law and equity;" Hall v. Collins, 4 Vt. 324, discussing as to burden of proof; Flanagan v. Grimmet, 10 Gratt. 426; Dequasie v. Harris, 16 W. Va. 353, construing strictly, statute providing that tax deed shall be prima facie evidence of regularity of sale. See valuable note, 13 Am. Dec. 213, on subject of sale by sheriff of more land than necessary.

The principal case has been approved on this point in the following cases discussing the general subject: Jackson v. Morse, 18 Johns. 443, 9 Am. Dec. 227; Jackson v. Shepard, 7 Cow. 92, 17 Am. Dec. 505; Aldrich v. Wilcox, 10 R. I. 411.

Distinguished in Merrick v. Hutt, 15 Ark. 338, and Sharpleigh v. Surdam, 1 Flipp. 481, F. C. 12,711, under statute; Cavender v. Smith, 1 Iowa, 354, holding statute prescribing order in which property is to be sold, to be merely directory. Limited in Allen v. Robinson, 3 Bibb (Ky.), 328, holding sheriff's deed to be prima facie evidence of regularity of proceedings. Distinguished in Hutchins v. Lee, Walker (Miss.), 294, holding provisions in statute regulating sale of fugitive slaves to be directory only; Minor v. Natchez, 4 Smedes & M. 627, 43 Am. Dec. 495, as to mere irregularity in form of sale under execution. Limited in Woods v. Monell, 1 Johns. Ch. 506, holding that proof of abuse of power must be clear; Williamson v. Farrow, 1 Bail. L. 619, 21 Am. Dec. 499, holding that irregularity must be as to matter of substance.

Miscellaneous citations.— Cited in Blight's Heirs v. Tobin, 7 T. B. Mon. 615, 18 Am. Dec. 223, on point that equity has jurisdiction to revise sales under fieri facias.

4 Cr. 415-421, 2 L. 664, HIGGINSON v. MEIN.

Confiscation act of Georgia vested in the State the property of all persons contemplated in the act, p. 418.

Cited to this point in Thompson v. Carr, 5 N. H. 515, construing like statute of New Hampshire.

Adverse possession.— Possession of person claiming under mortgagor is not adverse as regards mortgagee, p. 419.

Rule applied in Herbert v. Hanrick, 16 Ala. 594; Byrd v. McDaniel,

33 Ala. 27, holding, however, that possession of mortgagee after payment due may be sufficiently adverse to bar mortgagor's equity of redemption, after period of time prescribed in statute for bringing actions generally, has expired; Whittington v. Flint, 43 Ark. 515, 51 Am. Rep. 579, collecting and discussing authorities; Jefferson, etc., R. R. Co. v. Oyler, 82 Ind. 399, applying principle to possession of land by vendor after sale; Tripe v. Marcy, 39 N. H. 445, holding mortgagor in possession to be tenant at will; Bailey v. Jackson, 16 Johns. 214, 8 Am. Dec. 310, holding, however, that payment of mortgage debt may be presumed from lapse of time, when mortgagor in possession and no interest paid, and in Roberts v. Welch, 8 Ired. Eq. 292, on same point; McCormick v. Herndon, 86 Wis. 453, 56 N. W. 1098, where principle applied to possession of land by grantor after sale.

Payment.— Presumption of, from lapse of time, may be rebutted, p. 420.

Applied in Howard v. Hildreth, 18 N. H. 106, where payment of interest proven; so also in Tripe v. Marcy, 39 N. H. 449; Gulick v. Loder, 13 N. J. L. 73, 23 Am. Dec. 714, and Jackson v. Sackett, 7 Wend. 98, on same point; Summerville v. Holliday, 1 Watts, 515, as to payment of legacy; Hazard v. Martin, 2 Vt. 87, where principle applied to presumption of regularity in proceedings of administrator arising from lapse of time; Appleton v. Edson, 8 Vt. 241, as to adverse possession, holding that presumption is always in favor of legal estate where possession vacant.

Mortgages.— Act of Georgia confiscating land of mortgagor does not destroy estate of mortgagee in the land, pp. 418, 419.

Miscellaneous citations.— Cited in Bauserman v. Blunt, 147 U. S. 652, 37 L. 318, 13 S. Ct. 469, and Balkam v. Woodstock Iron Co., 154 U. S. 188, 38 L. 957, 14 S. Ct. 1014, on point that United States Supreme Court will recognize construction of statute of limitations of highest court in State where cause arose; dissenting opinion, McArthur v. Porter, 1 Ohio, 108, on same point as to rule of property generally; Floyd v. Harrison, 4 Bibb (Ky.), 78, but clearly not in point.

4 Cr. 421–433, 2 L. 666, POLLARD v. DWIGHT.

Appearance of defendant in foreign attachment waives service of process, p. 428.

Cited and principle applied in Toland v. Sprague, 12 Pet. 331, 9 L. 1105, holding appearance and pleading to merits waives exemption from foreign attachment; Atkins v. Disintegrating Co., 18 Wall. 298, 21 L. 843, as to proceeding in admiralty; St. Louis, etc., Ry. Co. v. McBride, 141 U. S. 132, 35 L. 661, 11 S. Ct. 984, holding that appearance waives objection to jurisdiction; Flanders v. Ætna Ins. Co., 3 Mason, 160, F. C. 4,852, as to general appearance of cor-

poration. Followed in Clarke v. New Jersey, etc., Co., 1 Story, 540, F. C. 2,859. Applied in United States v. Ottman, 1 Hughes, 316, F. C. 15,977, holding further as to effect of imprisonment of defendant; Kelly v. Insurance Co., 3 Hughes, 450, F. C. 7,677, and Kansas, etc., Ry. Co. v. Lumber Co., 37 Fed. 5, holding as to practice on removal; also in Romaine v. Insurance Co., 28 Fed. 638, and Platt v. Manning, 34 Fed. 818, applying rule where service unauthorized; Southern Express Co. v. Todd, 56 Fed. 107, 12 U. S. App. 351, where defendant exempt from service; Wabash, etc., Ry. Co. v. Brow, 65 Fed. 945, 31 U. S. App. 192, holding that filing petition for removal without objecting to jurisdiction of State court constitutes general appearance (but see, S. C., 164 U. S. 280, 41 L. 435, 17 S. Ct. 128, infra); Central Trust Co. v. Railway Co., 68 Fed. 695, holding foreign attachment not maintainable in United States courts without personal service or voluntary appearance; The Willamette, 70 Fed. 878, 44 U. S. App. 26, where right of claimant in libel in rem to have action commenced in district of his residence, held waived by appearance in other district; L'Engle v. Gates, 74 Fed. 514, under Florida statute; Creagh v. Equitable Life Assurance Co., 83 Fed. 850, where filing of petition and bond for removal held waiver of objection to jurisdiction; Wilson v. Pierce, 30 Fed. Cas. 154, as to proceeding in admiralty; Pearce v. Thackeray, 13 Fla. 577, as to irregularity in service of notice; Baars v. Gordon, 21 Fla. 36, holding further as to effect of dissolution of attachment where jurisdiction acquired by general appearance; Wheeler v. Cobb, 75 N. C. 25, as to irregularity in service of summons by publication; Bell v. Bell, 3 W. Va. 193, and Bank of Valley v. Bank of Berkeley, 3 W. Va. 391, where defendants not subject to service of process; Mahany v. Kephart, 15 W. Va. 618, as to defective execution of process, and in Shepherd v. Brown, 30 W. Va. 18, 3 S. E. 189, on same point. The rule has been approved in general discussion in the following cases: Picquet v. Swan, 5 Mason, 571, F. C. 11,135; Woolfolk v. Cage, Walk. (Miss.) 301.

Distinguished in Goldey v. Morning News, 156 U. S. 520, 39 L. 518, 15 S. Ct. 560, and Wabash Ry. Co. v. Brow, 164 U. S. 280, 41 L. 435, 17 S. Ct. 128, where special appearance held not to waive objection to jurisdiction; Picquet v. Swan, 5 Mason, 48, 49, F. C. 11,134, refusing to enter default against defendant not amenable to process; Steele v. Harkness, 9 W. Va. 24, holding that where defendant's objection, that cause has not matured for trial, has been overruled, he does not, by appearing and pleading, waive such objection.

Circuit Court, composition of.—— District judge may alone hold Circuit Court, although there be no judge of Supreme Court allotted to circuit, p. 428.

Cited to this point in In re Kaine, 14 Fed. Cas. 86. Rule applied in State v. Lane, 4 Ired. 460, holding that on death of justice of

State Supreme Court, surviving justices may hold court and exercise all its functions.

Construction of statutes.— United States courts will be guided by construction given by State to its own statute regulating property rights, p. 429.

Cited in dissenting opinion, McArthur v. Porter, 1 Ohio, 108, holding rule to be applicable in territorial Supreme Court where decisions of general court of territory are uniform on the question. Approved also in Vaughan v. Phebe, Mart. & Y. 24, 17 Am. Dec. 779, in general discussion.

Covenant of seisin.—Action will lie for breach of, without averment of ouster, p. 431.

Rule applied in Le Roy v. Beard, 8 How. 465, 12 L. 1158, and Wright v. Phipps, 90 Fed. 567, holding covenant broken at time of conveyance; Mitchell v. Warner, 5 Conn. 503, denying right of assignee of covenant of seisin to recover on covenant, and in Gale v. Frazier, 4 Dak. 202, 30 N. W. 140, to same effect. Approved in Furman v. Elmore, 2 Nott & McC. 195, holding, however, that covenant of seisin cannot be implied from general covenant of warranty, and in Moore v. Lanham, 3 Hill's L. 304, on same point. But see Talbot v. Bedford, Cooke, 458, where covenants of warranty and seisin held to be identical. The rule has also been approved in notes, 2 Wheat. 62, 4 L. 185, and 1 Blackf. 102; also in Brandt v. Foster, 5 Iowa, 295; Robinson v. Coulter, 90 Tenn. 707, 25 Am. St. Rep. 709, 18 S. W. 251; Curtis v. Brannon, 98 Tenn. 157, 38 S. W. 1073, discussing general subject.

Distinguished in Bird v. Smith, 8 Ark. 372, and Fitzhugh v. Croghan, 2 J. J. Marsh. 438, 19 Am. Dec. 148, holding rule inapplicable to covenant of warranty.

Survey by State surveyor is presumed to be correct and cannot be impeached collaterally, p. 431.

Cited to this point in Cragin v. Powell, 128 U. S. 699, 32 L. 569, 9 S. Ct. 206, as to survey by surveyor-general of United States.

Miscellaneous citations.— Cited generally as to practice on removal of causes, in Dinnistoun v. Draper, 5 Blatchf. 339, F. C. 3,804; Ward v. Alexander, 1 Paine, 415, F. C. 17,148, and State v. Circuit Judge, 33 Wis. 132, and in Garland v. Davis, 4 How. 154, 11 L. 918, as instance of practice on reversal of lower court; Insurance Co. v. Francis, 11 Wall. 215, 20 L. 78, on point that where corporation's citizenship is not averred no jurisdiction exists.

4 Cr. 433, 2 L. 670, EX PARTE LEWIS.

Trial.—Jurors entitled to one dollar and twenty-five cents per diem in civil cases in Circuit Court, p. 433.

No citations.

4 Cr. 434-443, 2 L. 670, CROUDSON v. LEONARD.

Admiralty.— Foreign admiralty judgment, rendered by court of competent jurisdiction, condemning vessel for breach of blockade, is conclusive as to that fact in action on policy of insurance, p. 438.

Approved and applied in Cushing v. Laird, 6 Ben. 461, F. C. 3,509; Tompkins v. Tompkins, 1 Story, 553, F. C. 14,091, in matter of foreign probate of will under State laws; Bradstreet v. Insurance Co., 3 Sumn. 605, F. C. 1,793, as to sentence of condemnation in prize court; Blanque v. Peytavin, 4 Mart. (La.) 459, 6 Am. Dec. 706, holding sentence of foreign Court of Admiralty conclusive as to national character of vessel; dissenting opinion, Owings v. Nicholson, 4 Harr. & J. 109, majority holding sentence of condemnation not conclusive of rights of parties in collateral proceeding to recover sum already paid on debt for security of which vessel was condemned; Barney v. Patterson, 6 Harr. & J. 203, holding that judgment of Circuit Court is not foreign judgment for purpose of proof in State; Baxter v. Insurance Co., 6 Mass. 299, 4 Am. Dec. 141, under facts similar to principal case; Farrell v. City of St. Paul, 62 Minn. 274, 54 Am. St. Rep. 643, 64 N. W. 810, as to decree directing sale of property for nonpayment of special assessment; United States v. Maxwell, etc., Co., 5 N. Mex. 307, 21 Pac. 156, holding that decree of Circuit Court, holding patent valid, bars action by United States in territorial court to set aside such patent; Cheriot v. Foussat, 3 Binn. 260, holding sentence of foreign prize court conclusive as to legality of seizure; dissenting opinion, Pinson v. Ivey, 1 Yerg. 350, majority holding condemnation of land by commissioners not to be conclusive as to title; Williams v. Saunders, 5 Cold. 77, as to judgment of Probate Court; Brown v. Brown, 86 Tenn. 319, 7 S. W. 647, holding further as to who are parties; Tilson v. Davis' Admr., 32 Gratt. 104, holding former adjudication in action by creditors estops action for equitable relief, by one who was party to original action. Cited also in note, 75 Am. Dec. 724, on subject of decrees in admiralty.

Distinguished in The Mary, 9 Cr. 142, 145, 3 L. 684, 685, holding judgment against one defendant by default does not preclude other defendant from contesting admission of party in default. Limited in Hilton v. Guyot, 159 U. S. 167, 182, 40 L. 109, 115, 16 S. Ct. 145, 151, holding foreign judgment for sum of money to be prima facie evidence only of merits of suit; dissenting opinion, Fisher v. Fielding, 67 Conn. 128, 34 Atl. 723, majority holding judgment on pecuniary demand conclusive as to merits; Melhop v. Doane, 31 Iowa, 401, 7 Am. Rep. 150, holding unsatisfied judgment of another State, rendered in action in rem of which defendant had no notice, is of no force as judgment in personam; Pelton v. Platner, 13 Ohio, 217, 42 Am. Dec. 199, as to judgment in personam. Criticised in Graning v. Insurance Co., 1 Nott & McC. 540, as applied to sentences of Admiralty Courts. Denied in New York, etc., Ins. Co. v. De

Wolf, 2 Cow. 70, and Ocean Ins. Co. v. Francis, 2 Wend. 68, 19 Am. Dec. 553, holding sentence of condemnation in Admiralty Court to be prima facie evidence only of facts.

Prize — Parties.—Any person having interest in property may interpose claim, or appeal from sentence, p. 437.

Cited to this point in Cushing v. Laird, 107 U. S. 79, 27 L. 395, 2 S. Ct. 204; Beach v. Workman, 20 N. H. 383 [application doubtful].

Maritime contracts.— Policies of marine insurance are, p. 437.

Cited to this point in De Lovis v. Boit, 2 Gall. 475, F. C. 3,776, sustaining admiralty jurisdiction.

Miscellaneous citations.— Cited in The Parkhill, 18 Fed. Cas. 1192, as to jurisdiction and composition of Admiralty Courts generally.

4 Cr. 443–452, 2 L. 673, UNITED STATES v. THE BETSEY AND CHARLOTTE.

Admiralty jurisdiction extends to all seizures made on waters navigable from the sea by vessels of ten or more tons burden, p. 452.

Rule applied in Whelan v. United States, 7 Cr. 112, 3 L. 286, denying trial by jury; The Sarah, 8 Wheat. 394, 5 L. 644, distinguishing between common law and admiralty jurisdiction of District Courts; New Jersey, etc., Co. v. Bank, 6 How. 388, 12 L. 484, as to seizure for violation of navigation laws; The Belfast, 7 Wall. 638, 19 L. 270, as to maritime liens. Referred to in The Eagle, 8 Wall. 26, 19 L. 370, sustaining jurisdiction of admiralty over cases of collision on great lakes; United States v. Winchester, 99 U. S. 374, 25 L. 480, distinguishing between admiralty and common-law jurisdiction of District Courts, and in United States v. Athens Armory, 2 Abb. (U. S.) 138, F. C. 14,473, 35 Ga. 352, on same point; The Lewellen, 4 Biss. 160, F. C. 8,307, as to seizure under navigation laws; The Wave, Blatchf. & H. 240, F. C. 17,297, sustaining jurisdiction over suits for pilotage; United States v. The Reindeer, 2 Cliff. 69, F. C. 16,144, as to seizure for violation of acts prohibiting slave trade; Anonymous, 1 Gall. 24, 25, F. C. 444, holding further that information in rem is civil proceeding; De Lovio v. Boit, 2 Gall. 474, F. C. 3,776, as to jurisdiction over maritime contracts; Roberts v. Skolfield, 3 Ware, 187, F. C. 11,917, as to jurisdiction over torts; The Meteor, 17 Fed. Cas. 180, as to seizure for violation of neutrality laws, and in United States v. Arms and Ammunitions, 24 Fed. Cas. 863, on same point. See also 35 Ga. 352, reprinting United States v. Athens Armory, 2 Abb. (U. S.) 138, F. C. 14,473. Cited generally in notes, 6 Biss. 249, F. C. 9,330; 2 Ware (Dav.), 99, F. C. 6,914, and 5 Wheat. 115, 5 L. 48.

Criticised in dissenting opinion, Waring v. Clarke, 5 How. 485, 486, 12 L. 247, majority sustaining jurisdiction over torts committed within those limits. See also dissenting opinion, Jackson v. The Magnolia, 20 How. 334, 15 L. 926, and in People v. Tyler, 7 Mich. 274, denying constitutionality of acts of congress extending admiralty jurisdiction to great lakes. Distinguished in Slocum v. Wheeler, 1 Conn. 445, holding jurisdiction not to extend to seizures made on land.

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2. If a confiscating act, independent of the treaty, would be construed to destroy the claim of a British mortgagee, the treaty reinstates the lien in its full force; and a subsequent sale could only pass it with its burden.
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3. The promise to pay the debt of another must be in writing, and cannot be explained by parol. *Ib.* 235

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Spiers v. Willison, 398
13. *Quære,* whether 5 years' possession is evidence of a good title for a plaintiff in detinue?
Ramsay v. Lee, 401
14. The evidence of payment which results from lapse of time may be met by circumstances which account for the dalay in bringing the suit.
Higginson v. Mein, 420
15. The official certificate of survey returned by a legal sworn surveyor in Virginia, cannot be invalidated by evidence tending to show an impossibility, that the survey could have been made in the intervening time between the date of the entry, and the date of the certificate of survey.
Pollard v. Dwight, 422
16. Parol testimony is not admissible, in an action on the covenant of seizin, to prove prior claims upon the land. *Ib.*
17. The sentence of a foreign court of admiralty condemning a vessel for breach of blockade is conclusive evidence of that fact, in an action on the policy of insurance. *Croudson v. Leonard,* 434
18. See Admiralty, 21.
19. In treason the overt act must be proved as laid. *Appendix, United States v. Burr,* 490
20. *Quære,* whether, on a motion to commit a person for treason, an affidavit stating the substance of a letter in the possession of the deponent, be admissible evidence.
Ex parte Bollman and Swartwout, 76
21. A person may be committed by one magistrate upon an affidavit made before another, *Ib.*
22. In treason, the presence of the party is part of the overt act, and must be proved by two witnesses. *Appendix,* 500
23. An indictment charging a person with being present at an overt act of treason cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will be sufficient.
Appendix, 500
24. See Treason, 31, 35, 36, 38, 40.
25. If the overt act of treason be not proved by two witnesses so as to be submitted to the jury, all other testimony is irrelevant.
Appendix, United States v. Burr, 505, 506
26. *Quære,* whether a foreign sentence be examinable? *Appendix, Rose v. Himely,* 512

EXCEPTION.

1. A bill of exceptions may be taken to the opinion of the judge in his charge to the jury.
Smith v. Carrington, 63
2. The court is bound to give an opinion to the jury upon a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact. *Ib.* 71
3. See Account, 3. Error, 2, 3.

EXECUTION.

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FOREIGN ATTACHMENT.

1. The appearance of the defendant to a foreign attachment in the circuit court of the United States waives all objection to the non-service of process. *Pollard v. Dwight,* 421
2. Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach of his covenant, is an absent debtor. *Ib.*

FOREIGN COURTS.

See Admiralty, 8, 9, 11, 12, 13, 16. Evidence, 4, 17.

FOREIGN SENTENCE.

See Evidence, 4, 17. Admiralty, 8, 9, 11.

FORFEITURE.

1. Wine and spirits saved from a wreck and landed, are not liable to forfeiture, because unaccompanied with such marks and certificates as are required by law; nor because they were removed without consent of the collector, before the quantity and quality were ascertained, and the duties paid. *Peisch v. Ware,* 347
2. The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed, or trusted by him. *Ib.*

FORGERY.

See Bank of United States, 1.

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GEORGETOWN.

Quære, whether the mayor of Georgetown, in the District of Columbia, be a justice of the peace of the county of Washington?
Mounts v. Hodgson, 324

GEORGIA.

1. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry.
Shearman v. Irvine's Lessee, 367
2. See Collector, 2.
3. See Confiscation, 1.
4. The act of limitations of Georgia does not apply to mortgagees. *Higginson v. Mein,* 415

GIFT.

1. See Equity, 3.
2. By the act of assembly of Virginia, of 1758, no gift of a slave was valid unless in writing and recorded; but parol evidence may be admitted of the existence of a deed of gift to show the nature of the possession which accompanied the deed.
Spiers v. Willison, 398

3. In Virginia, in 1784, no gift of a slave was valid unless in writing and recorded, although possession accompanied the gift. *Ramsay v. Lee,* 401

HABEAS CORPUS.

1. The Supreme Court of the United States has power to issue the writ of *habeas corpus ad subjiciendum. Ex parte Bollman and Swartwout,* 75
2. See Common Law, 2.

INDICTMENT.

1. In treason the indictment must lay an overt act, which must be proved as laid.
Appendix, United States v. Burr, 490
2. See Evidence, 28.
3. *Quære,* whether a person who procures an act, can be indicted as having performed that act. 503

INSURANCE.

1. The capture of a neutral as prize by a belligerent is a total loss, and entitles the insured to abandon. *Rhinelander v. In. Co. Pennsylvania,* 29
2. The state of the loss at the time of the offer to abandon, fixes the rights of the parties. *Ib.*
3. *Quære,* whether the sentence of a foreign court of admiralty, condemning the vessel for breach of blockade, be conclusive evidence of that fact in favor of the underwriters.
Fitzsimmons v. Newport In. Co. 185
4. Persisting in an intention to enter a blockaded port, after warning, is not attempting to enter. *Ib.*
5. The right of the insured to abandon and recover for a total loss, depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received.
Marshall v. Delaware In. Co. 202
6. The technical total loss, arising from capture, ceases with the final decree of restitution, although the decree may not have been executed at the time of the offer to abandon, *Ib.* 203
7. A policy on a ship is an assurance of the ship for the voyage, not an insurance on the ship and the voyage. The underwriters undertake for the ability of the ship to perform the voyage, not that she shall perform it at all events.
Alexander v. Baltimore In. Co. 370
8. The loss of the voyage as to the cargo, is not a loss of the voyage as to the ship. *Ib.* 371
9. If at the time of the offer to abandon, the ship be in possession of the master, in good condition and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover for a total loss of the vessel.
Alexander v. Baltimore In. Co. 370
10. The sentence of a foreign court of admiralty, condemning a vessel for breach of blockade, is conclusive evidence of that fact in an action on the policy of Insurance.
Croudson v. Leonard, 434

INTEREST.

In an action upon a bond conditioned to perform a contract, interest may be recovered in a case not provided for by the contract.
United States v. Gurney, 333

INTERROGATORIES.

See Admiralty, 20.

JUDGES.

See Jurisdiction, 17. Exceptions, 1, 2.

JURISDICTION.

1. The district courts of the United States are courts of prize, and have power to carry into effect the sentences of the old continental courts of appeal in prize causes.
Jennings v. Carson, 2
2. See Admiralty, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 22.
3. When both parties are aliens the courts of the United States have not jurisdiction.
Montalet v. Murray, 46
4. If it does not appear upon the record that a suit might have been maintained in the courts of the United States, between the original parties to a promissory note, no suit can be maintained upon it in those courts by a subsequent holder. *Ib.*
5. The Supreme Court of the U. States has power to issue the writ of *habeas corpus ad subjiciendum.*
Ex parte Bollman and Swartwout, 75
6. The Supreme Court of the U. States has no jurisdiction but what is given by the constitution or laws of the United States. *Ib.* 93
7. Courts which originate in the common law possess a jurisdiction which might be regulated by their common law, until some statute change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.
Ex parte Bollman and Swartwout, 93
8. A court of the United States cannot enjoin proceedings in a state court.
Diggs v. Wolcott, 179
9. It is incumbent upon the plaintiff in error to show that the Supreme Court of the United States has jurisdiction of the case.
United States v. Brigg Union, 216
10. The Supreme Court will hear *vive voce* testimony to show the value of the matter in dispute, upon a question of jurisdiction. *Ib.*
11. The courts of the United States may examine into the jurisdiction of a foreign court, whose sentence is offered in evidence; and if that foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence is to be disregarded. But the courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon municipal laws.
Rose v. Himely, 241
12. If the complainant be a French citizen, and the defendant a citizen of the State of Georgia, the circuit court of the United States for the district of Georgia has jurisdiction, although the complainant and defendant are both executors, and their respective testators were both citizens of the state of Georgia. *Chappedelaine v. Decheneaux,* 306
13. In deciding the question of jurisdiction the court will look to the condition of the bond on which the suit is brought, and not to the penalty.
United States v. M'Dowell, 316
14. An appeal or writ of error lies from the district court of the United States for the territory of Orleans to the Supreme Court of the United States.
Morgan v. Callender, 370
15. If two citizens of the same state, in a suit in a court of their state, claim title under the same act of Congress, the Supreme Court of the United States has an appellate jurisdiction to revise and correct the judgment of that court in such case. *Matthews v. Zane,* 382
16. See Bank of Alexandria, 1.
17. The district judge may alone hold a circuit court, although there be no judge of the Supreme Court allotted to that circuit.
Pollard v. Dwight, 421
18. All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried without a jury.
United States v. Schooners Betsy and Charlotte, 443
19. The question whether a seizure for violation of a law of the United States be of admiralty or common law jurisdiction is to be decided by the place of seizure, not by the place of the offense.
Ib. 452

JURY.

1. See Exception, 2.
2. The jurors attending the circuit court of Pennsylvania district are entitled to 1 dollar and 25 cents per diem for their attendance.
Ex parte Lewis and others, 433
3. See Jurisdiction, 18.

JUSTICE OF PEACE.

1. See Georgetown, 1. Deed, 1.
2. A person may be committed by one magistrate upon an affidavit made before another.
Ex parte Bollman and Swartwout, 76

3. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths. *Ib.*

KENTUCKY.

Loose and vague expressions in an entry of lands in Kentucky may be rendered sufficiently certain by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects.
Marshall v. Currie, 172

LANDS.

See Kentucky, 1. Aliens, 2, 3. Georgia, 1, 4. Collector, 2. Confiscation, 1. Jurisdiction, 15. Covenant, 1, 2, 3. Evidence, 15, 16.

LAW.

See Exception, 2. Municipal Law, 1, 2, 3, 4. Law of Nations, 1, 2, 3, 4. Bank of Alexandria, 1. Virginia, 3.

LAW OF NATIONS.

1. If a foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence will be disregarded.
Rose v. Himely, 241
2. A seizure of a foreign vessel beyond the territorial jurisdiction, for violation of a municipal regulation, is not warranted by the law of nations. *Ib.*
3. *Quære,* whether a French court can, consistently with the law of nations and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States? *Ib.* 243
4. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.
Hudson v. Guestier, 294
5. Every nation is the arbiter and vindicator of its own rights.
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1. An averment of a demise for three years is not supported by proof of a lease for one year certain, and two years' further possession on the same terms, by consent of the landlord.
Alexander v. Harris, 299
2. The plea of no rent arrear admits the demise as laid in the avowry. *Ib.*
3. The court is bound to give judgment for double rent under the statute of Virginia. *Ib.*

LETTER OF CREDIT.

See Evidence, 9.

LEVYING WAR.

See Treason.

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See Admiralty, 5, 7, 22.

LIEN.

See Bottomry, 1, 2, 3.

LIMITATIONS.

1. The act of limitations of Virginia is no bar to a British creditor's demand upon a promissory note dated 21st of August, 1772, although one of the plaintiffs was in the country after the treaty of peace, viz., in 1784, and remained here until his death, in 1785. *Hopkirk v. Bell,* 164
2. The act of limitations of Georgia does not apply to mortgagees. *Higginson v. Mein,* 415
3. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry.
Shearman v. Irvine's Lessee, 367

MAGISTRATE.

See Justice of Peace, 2, 2.

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1. A letter of credit, directed by mistake to John and Joseph, and delivered to John and Jeremiah, will not support an action by John and Jeremiah against the writer of the letter for goods furnished to the bearer upon the faith of such letter of credit. It is not a written contract between the plaintiffs and defendant, and parol proof cannot be admitted to make it such. It is not a case of ambiguity, nor of fraud, nor of mistake on the part of plaintiffs. *Grant v. Naylor,* 224
2. See Award, 1.

MORTGAGE.

1. See Confiscation, 1, 2. Limitations, 2.
2. The possession of the mortgagor is not adverse to the mortgagee.
Higginson v. Mein, 415

MUNICIPAL LAW.

1. The courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon their municipal laws.
Rose v. Himely, 241
2. The prohibition, by France, of all trade with the revolted blacks of St. Domingo, was the exercise of a municipal, not of a belligerent right. *Ib.* 242
3. A seizure of a foreign vessel beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such seizure cannot give jurisdiction to the courts of the offended country. *Ib.*
4. The trial of a municipal seizure must be regulated exclusively by municipal laws.
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NEUTRAL.

See Insurance, 1.

NEW JERSEY.

1. On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof.
M'Ilvaine v. Coxe, 209
2. See Aliens, 2.

NON EST FACTUM.

See Deed, 1, 2.

NO RENT ARREAR.

See Lease, 1, 2, 3.

NOTICE.

1. The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice. *French v. Bank of Columbia,* 141
2. The drawer of a bill of exchange is entitled to strict notice, if at the time of drawing he had a right to expect that his bill would be honored. *Ib.*
3. It is not necessary to give notice to the opposite party of the time and place of executing a commission. *Grant v. Naylor,* 224

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See Jurisdiction, 14.

PAYMENT.

1. If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may, at any time, apply it to which account he pleases.
Mayor and Commonalty of Alexandria v. Patten, 317
2. To an action on a bond conditioned to pay money on a certain day, payment on a subsequent day is not a good plea, without averring it to be the whole sum then due.
United States v. Gurney, 333
3. See Evidence 14. 717

PENNSYLVANIA DISTRICT.

See Jury, 2.

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See Lease, 2. Account, 2. Covenant, 1.

POSSESSION.

See Admiralty, 14. Evidence, 13.

PRACTICE.

1. See Admiralty, 6, 20.
2. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood v. Lide,* 180
3. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Ib.*
4. The Supreme Court of the United States will hear *vva voce* testimony as to the value of the matter in dispute.
United States v. Brig Union, 216
5. After deciding the question of value upon the weight of evidence produced, the court will not continue the cause for the party to produce further evidence of the value. *Ib.*
6. The certificate of commissioners named in a dedimus that they took, in due form of law, the oath annexed to the commission, is sufficient evidence of that fact. *Grant v. Naylor,* 224
7. If the return of the commission be enclosed in an envelope, sealed by the commissioners, no other sealing by the commissioners is necessary.
Ib. 225
8. The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error. *Woods & Bemis v. Young,* 237
9. The appearance of a defendant to a foreign attachment in the circuit court of the United States, waives all objection to the non-service of process. *Pollard v. Dwight,* 421

PRIZE.

See Admiralty, 1, 2.

PROCEEDINGS IN REM.

See Admiralty, 3, 4.

PROMISSORY NOTES.

1. It does not appear upon the record that suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder.
Montalet v. Murray, 46
2. The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice. *French v. Bank of Columbia,* 141

PURCHASER.

1. The purchaser of land from a collector of taxes must show the authority of the collector to sell. *Stead v. Course,* 403

REFUGEE.

See Aliens, 2.

REGISTER.

1. See Duties, 2.
2. If an American registered vessel be sold while at sea to a citizen of the United States, it is not necessary that there should be a bill of sale, or a new register, until the vessel return to some port in the United States.
United States v. Willings & Francis, 48

RENT.

See Lease, 1, 2, 3.

REPLEVIN.

See Lease, 1, 2, 3.

RESTITUTION.

See Admiralty, 1.

REVENUE.

See Collector, 3.

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1. Costs are not given upon reversal of judgment. *Montalet v. Murray,* 47

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1. One half allowed for salvage in Delaware bay.
Peisch v. Ware, 347
2. Goods saved are not liable to the ordinary revenue laws. *Ib.*
3 *Quære,* whether they ought to pay duties. *Ib.* 348

SEAMEN'S WAGES.

1. Seamen's wages are a lien prior to bottomry.
Blaine v. Ship Charles Carter, 348

SEIZIN.

See Covenant, 1, 2, 3.

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1. Seizures under the prohibition by France of all trade with the revolted blacks of St. Domingo, could lawfully be made only within two leagues of the coast of that island. *Rose v. Himely,* 242
2. See Law of Nations, 2. Municipal Law, 3, 4. Admiralty, 15, 19, 23.

SENTENCE.

1. See Evidence, 4, 17. Admiralty, 8, 9, 11, 16.
2. A sentence of condemnation is necessary to devest the property in cases of capture or seizure.
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SLAVE.

See Gift, 2, 3.

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STATE LAWS.

1. The courts of the United States will respect the construction given to the laws of the several states by the courts of such states.
Higginson v. Mein, 419
Pollard v. Dwight, 420

STATUTE OF FRAUDS.

1. The promise to pay the debt of another must be in writing, and cannot be explained by parol.
Grant v. Naylor, 235

ST. DOMINGO.

See Municipal Law, 2.

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See Collector, 1, 2.

TENANTS IN COMMON.

1. In Vermont, tenants in common may maintain a joint action of ejectment.
Hicks v. Rogers, 165

TERRITORIES OF THE UNITED STATES.

See Trial, 2. Jurisdiction, 14. Treason, 3.

TREASON.

1. To constitute a levying of war there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against government is not sufficient.
Ex parte Bollman and Swartwout, 75

2. When war is levied, all those who perform any part, however, minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. *Ib.*
3. Any assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territories, although as a step to, or the means of, executing some greater projects, amounts to levying war. *Ib.*
4. The travelling of individuals to the place of rendezvous in not sufficient, but the meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, is such an assemblage as constitutes a levying of war. *Ib.* 76
5. To levy war, is to raise, create, make or carry on war. *Appendix, United States v. Burr,* 470
6. If an army be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplies that army with provisions, is guilty of an overt act of levying war.
Appendix, United States v. Burr, 470
7. So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him. *Ib.*
8. The term "levying war" is used in the constitution of the United States in the same sense in which it was understood in England and in this country to have been used in the statute of 25 Edward III. from which it was borrowed. *Ib.*
9. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war. *Ib.* 472
10. Those who perform a part in the prosecution of the war, may be correctly said to levy war. *Ib.*
11. But *quære,* whether he who counsels and advises, but performs no act in prosecution of the war; or he who, being engaged in the conspiracy, fails to perform his part, can be said to levy war. *Ib.*
12. If the war be actually levied, if the accused has performed a part, but is not leagued in the conspiracy, and has not appeared in arms against his country, he is not a traitor. *Ib.* 474
13. Constructive treason is where the direct and avowed object is not the destruction of the sovereign power. *Ib.* 475, 476, 477, 478
14. Where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. *Ib.* 475
15. The assemblage of men which will constitute levying war, must be a "warlike assemblage," carrying the appearance of force, and in a situation to practice hostility. *Ib.* 480
16. An assemblage of men with a treasonable design, but not in force, nor in a condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war. *Ib.* 482
17. To assemble an army of 7,000 men is to place those who are assembled in a state of force. *Ib.* 484
18. The travelling of several individuals to the place of rendezvous, either separately or together, but not in military form, would not constitute levying war. The act must be unequivocal, and have a warlike appearance.
Appendix, United States v. Burr, 485
19. War can only be levied by the employment of actual force. Troops must be embodied; men must be openly assembled. *Ib.* 487
20 Arms are not an indispensable requisite to levying war; nor the actual application of force to the object. *Ib.* 488
21. It is not sufficient that an indictment for treason allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying an overt act of levying war, and this overt act must be proved as laid. *Ib.* 490
22. A person may be concerned in a treasonable conspiracy, and yet be legally as well as actually absent while some one act of the treason is perpetrated. *Ib.*
23. Every one concerned in a treasonable conspiracy is not constructively present at every overt act of the treason committed by others not in his presence. *Ib.*
24. A man may be legally absent who has counselled or procured the treasonable act. *Ib.* 491
25. The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *Ib.* 493
26. A person cannot be constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance if necessary. *Ib.* 494
27. If the particular overt act of treason charged be advised, procured or commanded by the accused, he is guilty accessorily and not directly as principal. *Ib.* 494
28. A person in one part of the United States cannot be considered as constructively present at an overt act committed in a remote part of the United States. *Ib.*
29. The presence of a party, where presence is necessary to his guilt, is part of the overt act, and must be proved by two witnesses.
Appendix, United States v. Burr, 500
30. An indictment charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law. *Ib.*
31. The part which a person takes in the war constitutes the overt act, on which alone he can be convicted. *Ib.* 502
32. *Quære,* whether he who procures an act may be indicted as having performed that act? *Ib.*
33. If proof of procurement is admissible in England to establish a charge of actual presence, on an indictment for levying war, it is only by virtue of the operation of the common law upon the statute of Edward III. 503
34. *Quære,* whether there be in this country a similar operation of the common law? *Ib.*
35. If proof of procurement be admissible upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony as would be required to prove actual presence. *Ib.*
36. The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it; and the right of the prisoner to call for the record of conviction is not waived by pleading total indictment. *Ib.* 505
37. *Quære,* whether the crime of advising or procuring a levying of war, be within the constitutional definition of treason? *Ib.*
38. If the overt act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant. *Ib.* 506, 507
39. Levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. *Ib.* 507
40. Appearing at the head of an army would be an overt act of levying war. So also detaching a military corps from it, for military purposes. *Ib.*

TREATY, BRITISH.

See Limitations, 1. Aliens, 2, 8. Confiscation, 1, 2. Insurance, 4.

TRIAL.

1. See Exceptions, 1, 2. Evidence, 3. Jurisdiction, 18, 19.
2. The clause of the 8th section of the act of Congress for the punishment of certain crimes against the United States, respecting the place of trial when crimes are committed out of the jurisdiction of any particular state, applies only to offenses committed in some river, haven, basin or bay not within the jurisdiction of a particular state, and not to the territories of the United States, where regular courts are established, competent to try those offenses. *Ex parte Bollman and Swartwout,* 77
3. See Admiralty, 20, 21.
4. The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it.
Appendix, United States v. Burr, 505

VESSEL.

See Register, 2. Duties, 2.

VERMONT.

See Tenants in Common.

VIRGINIA.

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3. *Quære*, whether private acts of the assembly of Virginia, printed by the public printer of that state, under the authority of law, may be read in evidence without further authentication?
Young v. Bank of Alexandria, 384

4. See Gift, 2, 3. Evidence, 15. Covenant, 2.

WITNESS.

1. A witness interested in certain admitted items of the plaintiff's account, is still a competent witness to prove other items. *Smith v. Carrington*, 62

2. See Treason, 29.

WRIT OF ERROR.

1. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood v. Lide*, 180

2. The service of a writ of error in the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Wood v. Lide*, 180

3. See Appeal, 4.

GENERAL INDEX

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Figures in parentheses refer to marginal paging of the volumes contained in this book respectively while the figures outside the parentheses indicate the page of this book on which the marginal paging referred to is found.

ABANDONMENT—4.

1. The capture of a neutral as prize by a belligerent, is a total loss, and entitles the insured to abandon.
Rhinelander v. In. Co. Pennsylvania, (29) 540

2. The state of the loss at the time of the offer to abandon fixes the rights of the parties.
Id. (*Ib.*) 540

3. The right of the assured to abandon and recover for a total loss, depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received.
Marshall v. Delaware In. Co. (202) 596

4. The technical total loss arising from capture, ceases with the final decree of restitution; although that decree may not have been executed at the time of the offer to abandon. *Ib.* (203) 596

5. If at the time of the offer to abandon, the ship be in possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover for a total loss of the vessel.
Alexander v. Baltimore In. Co. (371) 650

ABATEMENT—3.

Quære, whether a deputy marshal can plead in abatement that the *capias* was not served on him by a distinterested person? *Knox v. Summers,* (496) 510

ABSENT DEBTOR—1.

Upon an attachment in chancery, under the laws of Virginia, if the record states that "I. T. in open court became security that I. H. (the absent debtor) shall perform the decree of this court, if against him," *quære,* whether an action of debt will lie against I. T. for the amount decreed against I. H.? *Thompson v. Jameson,* (282) 109

ACCESSORY—4.

See Treason, 27.

ACCOUNT—4.

1. See Assignee, 1.

2. If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant shall show it to be erroneous.
Chappedelaine v. Dechenaux, (306) 629

3. The court will notice only those errors in the report of auditors which appear upon the face of the report, or those expressly set down in the exceptions; and then the evidence on which the items were allowed must appear on the record. (308) 630

ACKNOWLEDGMENT—1.

A deed of lands in Maryland, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment, on the 14th of June, will not cause it to be such a deed as is contemplated in the bankrupt act, which came into operation on the 2d of June, 1800.
Wood v. Owings, (239) 94

ACT OF GOD—1.

What shall be said to be the act of God, and what inevitable casualty?
Hodgson v. Dexter, (345) 130

ACTION—1.

1. In Virginia it is not always necessary to sue the maker of a promissory note, to entitle the holder to an action against the indorser.
Clarke v. Young, (181) 74

2. If a promissory note of a third person be indorsed by the purchaser of goods, to the vendor, as a conditional payment for the goods, *quære,* whether the vendor is, in any case, obliged to sue the maker of the note before he can resort to the purchaser of the goods on the original contract of sale. *Id.* (193) 78

3. A suit against the defendant as indorser of the note, and a suit against him for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.
Id. (193) 78

4. It is not necessary for the plaintiff to offer to return the note, to entitle him to an action for the goods sold. *Clarke v. Young,* (194) 79

5. In Virginia, an action will not lie by the holder against a remote indorser of a promissory note.
Mandeville v. Riddle, (290) 112

6. *Quære,* whether the holder of a promissory note in Virginia cannot maintain an action for money had and received, against a remote indorser?
Dunlop v. Silver, (Appendix) (367) 139

7. Can he for whose benefit a promise is made to a third person, maintain an action against the promisor? *Id.* (429) 164

8. Letters of administration from the Orphans' Court in the District of Columbia, are necessary to enable an administrator to maintain an action in the courts of the district.
Fenwick v. Sears, (259) 101

ACTION—2.

1. If a man agrees to do certain work, and does it jointly with another, he is still entitled to recover upon the agreement in his own name.
Blakeney v. Evans, (185) 248

2. The act of Congress of 30th April, 1790, limiting prosecutions upon penal statutes, extends to actions of debt for the penalty, as well as to informations and indictments.
Adams, qui tam, v. Woods, (336) 297

3. A creditor upon open account, who has assigned his claim to a third person with the assent of the debtor, is still competent to maintain an action at law in his own name against the debtor for the use of the assignee.
Winchester v. Hackley, (342) 299

ACTION—3.

1. An action for goods sold and delivered cannot be maintained by him who received a note as conditional payment therefor, and has passed away that note. *Harris v. Johnston,* (311) 450

2. If part of the goods were the sole property of D, and the residue the sole property of I, and if I

had authority from D to sell D's part, I may maintain an action for the whole in his own name.
Harris v. Johnston, (311) 450
3. An action for money had and received will not lie for the United States against the assignees of a bankrupt, for the price of a ship sold by them as the property of the bankrupt who had taken a false oath to obtain a register; the ship not having been seized by the United States for the forfeiture before the sale and transfer.
United States v. Grundy & Thornburgh, (337) 459
4. *Quære,* whether an action for money had and received will lie to establish a forfeiture for an act committed by a third person? *Id.* (*Ib.*) 459

ADMINISTRATOR—1.

An administrator, having had letters of administration in Maryland, before the separation of the District of Columbia from the original states, cannot, after that separation, maintain an action in that part of the district ceded by Maryland, by virtue of those letters of administration, but must take out new letters within the district.
Fenwick v. Sears, (259) 101

ADMIRALTY—1.

1. Salvage allowed to a ship of war of the United States for the recapture of a Hamburgh vessel out of the hands of the French (France and Hamburgh being neutral to each other), on the ground that she was in danger of condemnation under the French *arret* of 18th January, 1798.
Talbot v. Seeman, (1) 15
2. To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered. *Id.* (28) 24
3. Probable cause is sufficient to render the recapture lawful. *Id.* (31) 25
4. Where the amount of salvage is not regulated by positive law, it must be determined by principles of general law. *Id.* (44) 29
5. Marine ordinances of foreign countries, promulgated by the executive by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof. *Quære,* whether they may not be read without such promulgation?
Id. (38) 27
6. Municipal laws of foreign countries are generally to be proved as facts. *Id.* (*Ib.*) 27
7. To entitle to salvage, in cases of recapture, it is not necessary that the means used should be with that sole view. *Id.* (36, 41) 26–28
8. The rule that salvage is not due for the recapture of a neutral, is founded on the fact that no benefit has been conferred. *Id.* (37) 27
9. To entitle to salvage, it is not necessary that the destruction of the thing would have been inevitable but for the means used to save it; but the danger must be real and imminent.
Id. (42, 43) 28
10. Salvage does not imply a contract.
Id. (*Ib.*) 28
11. France and the United States were in a state of partial war in the year 1799. *Id.* (31) 25
12. The Supreme Court of the United States, in cases of appeal, and on writs of error, are limited to the statement of facts made in the court below.
Id. (38) 27
13. A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation. within the meaning of the 4th article of the convention with France, signed September 30th, 1800.
United States v. Peggy, (103) 49

ADMIRALTY—2.

1. An American vessel sold in a Danish island to a person who was born in the United States, but who had *bona fide* become a burgher of that island, and sailing from thence to a French island in June, 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure under the non-intercourse law of 27th February, 1800.
Murray v. Charming Betsey, (64) 208
2. If there was no reasonable ground of suspicion that the vessel was trading contrary to law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.
Id. (*Ib.*) 208
3. The report of assessors appointed by the Court of Admiralty to assess damages, ought to state the principles on which it is founded, and not a gross sum without explanation. *Id.* (*Ib.*) 208
4. What degree of arming constitutes an armed vessel. *Id.* (*Ib.*) 208
5. The act of 9th of February, 1799, did not authorize the seizure upon the high seas of any vessel sailing from a French port.
Little v. Barreme, (170) 243
6. The right of a nation to seize vessels attempting an illicit trade, is not confined to their harbors, or to the range of their batteries.
Church v. Hubbart, (187) 249
7. One-third of the gross value of ship and cargo given for salvage.
Mason et al. v. Ship Blaireu, (240) 266
8. One-third of the salvage decreed to the owners of the saving ship and cargo. *Id.* (*Ib.*) 266
9. If a vessel in distress is abandoned at sea by the master and all the crew, except one man who is left by design or accident, he is discharged from his contract as mariner of that vessel, and entitled to salvage. *Id.* (268) 275
10. If apprentices are salvors, their masters are not entitled to their share of the salvage, but it shall be paid to the apprentices themselves.
Id. (240) 266
11. The admiralty courts of the United States have jurisdiction in cases of salvage where all the parties are aliens, if the jurisdiction be not objected to. *Id.* (264) 274
12. The question of forfeiture of a vessel under the act of Congress against the slave trade, is of admiralty and maritime jurisdiction.
United States v. Schooner Sally (406) 320

ADMIRALTY—4.

1. The owner of a privateer, capturing neutral property, is not liable to a decree of restitution, unless the property, or its proceeds, came to his hands. *Jennings v. Carson,* (2) 531
2. The district courts of the United States are courts of prize; and have power to carry into effect the sentences of the old continental courts of appeal in prize causes. (*Ib.*) 531
3. In all proceedings *in rem,* the court has a right to order the thing to be taken into the custody of the law; and it is presumed to be in the custody of the law unless the contrary appears.
Jennings v. Carson, (*Ib.*) 531
4. The thing does not follow the appeal into the superior court; but remains in the court below; which has a right to order it to be sold, if perishable, notwithstanding the appeal. (*Ib.*) 531
5. If the captor fails to libel the captured vessel, the owner may claim her in a court of admiralty.
Id. (23) 538
6. The practice of the district courts of the United States as courts of admiralty, is not regulated by law. *Id.* (24) 538
7. A vessel libeled is always in possession of the law. (*Ib.*) 538
8. If a court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence is to be disregarded.
Rose v. Himely, (241) 608
9. Every sentence of condemnation by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title claimed under it. *Id.* (*Ib.*) 608
10. A seizure of a foreign vessel beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations, and cannot give jurisdiction to the courts of the offended country; especially if the property seized be never carried within its territorial jurisdiction. *Id.* (242) 608
11. *Quære,* whether a French court can, consistently with the law of nations and the treaty, condemn American property, never carried into the dominions of France, and while lying in a port of the United States. *Id.* (243) 609
12. An American vessel seized by the French for breach of a municipal law of France, and carried into a Spanish port, may, while lying there, be lawfully condemned by a French tribunal sitting in a French port. *Hudson v. Guestier,* (293) 625
13. The possession of the sovereign of the captors gives jurisdiction to his courts.
Id. (294) 625
14. The possession of the captors in a neutral port, is the possesssion of their sovereign.
Id. (*Ib.*) 625
15. If the possession be lost by recapture, or escape, or voluntary discharge, the courts of the captor lose the jurisdiction which they had acquired by the seizure.
Hudson v. Guestier, (294) 625
16. No foreign court can question the correctness of the sentence, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.
Id. (*Ib.*) 625

17. See *Bottomry*, 1, 2, 3. *Salvage*, 1, 2, 3.
18. The sentence of a foreign court of admiralty condemning a vessel for breach of blockade is conclusive evidence of that fact, in an action upon the policy of insurance.
Croudson v. Leonard, (434) 670
19. All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried without a jury.
United States v. Schooners Betsy and Charlotte, (443) 673
20. *Quære*, whether the claimant's answer to the libel ought not always to be upon oath, if required; and whether he is not bound to submit to answer interrogatories upon oath, *viva voce*, in open court?
Id. (*Ib.*) 673
21. *Quære*, whether on the trial of a vessel without a jury, according to the course of the admiralty, for trading to St. Domingo contrary to law, evidence may not be heard by the judge, that other vessels belonging to the same owner, were at the same prohibited port, at the same time; as a circumstance tending to discredit the evidence of distress set up as an excuse for going to such prohibited port? *Id.* (444) 673
22. If the libel aver the vessel to be of more than ten tons burden, and to have arrived at a certain port from the West Indies, and that she was seized in such port, the court will consider it as sufficiently averred that such a seizure was made upon waters navigable from the sea by vessels of ten or more tons burden. *Id.* (447) 674
23. The question whether a seizure for violation of a law of the United States is of admiralty or common law jurisdiction, is to be decided by the place of seizure, not by the place of the offense.
United States v. Schooners Betsy and Charlotte, (452) 676
24. A court of admiralty acts wholly *in rem*, *Quære? Appendix*, (513) 705
25. *Quære*, whether the jurisdiction of a court of admiralty depends upon its possession of the thing? *Id.* (513) 705
26. A sentence of condemnation is necessary to devest the property. *Ib.* (514) 706

AGENT—3.

1. See Action, 2.
2. A factor may be justified by the orders of an agent, in deviating from the written orders of the principal. *Manella v. Barry*, (415) 484
3. An agent for collecting of debts merely is not a factor within the 13th section of the act of limitations of Virginia. *Hopkirk v. Bell*, (454) 497
4. A promise by a merchant's factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. Ware, (503) 512

AGENT, PUBLIC—1.

A public agent of government, contracting for the use of government, is not personally liable, although the contract be under his seal.
Hodgson v. Dexter, (345) 130

AFFIDAVIT—4.

See Commitment, 1, 2.

AGREEMENT—2.

If a man agrees to do certain work, and does it jointly with another, he is still entitled to recover upon the agreement, in his own name.
Blakeney v. Evans, (185) 248
See Insurance, 1.

AGREEMENT—3.

1. The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States. *Hannay v. Eve*, (242) 427
2. See Agent, 4.

AGREEMENT—4.

1. If A agree, under seal, to do certain work for B and does part, but is prevented by B from finishing it according to contract, A cannot maintain a *quantum meruit* against B for the work actually performed, but must sue upon the sealed instrument. *Young v. Preston*, (239) 607
2. The promise to pay the debt of another must be in writing and cannot be explained by parol.
Grant v. Naylor, (235) 606

ALIENS—2.

1. An American citizen residing in a foreign country may acquire the commercial privileges attached to his domicile; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the new sovereign to whom he has sworn allegiance.
Murray v. Charming Betsy, (64) 208
2. Whether a citizen of the United States can devest himself of that character otherwise than in such manner as may be prescribed by law?
Id. (*Ib.*) 208
3. Whether by becoming the subject of a foreign power he is rescued from punishment for a crime against his allegiance to the United States?
Murray v. Charming Betsy, (64) 208
4. Whether a person, born, in the colony of New Jersey before the revolution, and who resided there until 1777, when he joined the British army, and went with them to England, where he has resided ever since, claiming always to be a loyal subject of Great Britain, can now take and hold land in New Jersey by descent from a citizen of the United States? Whether he became a subject of New Jersey against his will? Whether he has expatriated himself and become an alien?
M'Ilvaine v. Coxe's Lessee, (280) 279
5. Whether the courts of the United States have jurisdiction where all the parties are aliens?
Mason et al. v. Blaireau, (264) 274
Bailiff v. Tipping, (406) 320

ALIENS—4.

1. When both parties are aliens, the courts of the United States have not jurisdiction.
Montalet v. Murray, (46) 545
2. A person born in the colony of New Jersey before the year 1775, and residing there till the year 1777, but who then joined the British army, and ever since adhered to the British, claiming to be a British subject, and demanding and receiving compensation from that government for his loyalty, and his sufferings as a refugee, is not an alien, but may take lands in New Jersey by descent.
M'Ilvaine v. Coxe, (209) 598
3. A person born in England before 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States.
Dawson's Lessee v. Godfrey, (821) 634

ANSWER—4.

See Admiralty, 19.

APPEAL—1.

See Admiralty, 12, 13.
Practice, 12, 13, 14, 15.
Error, 1, 4, 5, 6, 7.
Jurisdiction, 3, 4, 5.
1. No appeal or writ of error from the courts of the territory northwest of the river Ohio.
Clarke v. Bazadone, (212) 85
2. Upon appeal, in chancery cases, a statement of facts must accompany the transcript of the record. This provision was revived by the repeal of the Judiciary act of February 13th, 1801.
United States v. Hooe, (318) 121

APPEAL—2.

If an appeal is prayed in the court below at the same term in which the decree is rendered, a citation is not necessary.
Reily v. Lamar et al., (349) 302

APPEAL—3.

1. The act of Congress allowing appeals without a statement of facts, applies to decrees made before the date of that act.
United States v. Hooe, (79) 372
No appeal or writ of error lies in a criminal case.
United States v. More, (159) 397
3. A decree for a sale of the mortgaged property on a bill to foreclose, is a final decree, from which an appeal lies. *Ray v. Law*, (179) 404

APPEAL—4.

1. The thing, in proceedings *in rem*, does not follow the cause into the appellate court; but remains in the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal. *Jennings v. Carson*, (2) 531

2. The sentences of the old continental court of appeals in prize causes may be enforced by the district courts of the United States.
Jennings v. Carson, (2) 531
3. An appeal lies from the District Court of the United States for the territory of Orleans, directly to the Supreme Court of the United States.
Morgan v. Callender, (370) 650
4. An appeal, or writ of error, lies from the judgment of the Circuit Court of the District of Columbia to the Supreme Court of the United States in cases where the bank of Alexandria is plaintiff, and the judgment below is in its favor, notwithstanding the clause in its charter to the contrary.
Young v. Bank of Alexandria, (384) 655

APPEARANCE—3.

An appearance of the defendant by attorney cures all antecedent irregularity of process.
Knox v. Summers, (496) 510

APPEARANCE—4.

1. The appearance of the defendant in error waives all objection to the irregularity of the return of the writ of error.
Wood v. Lide, (180) 588
2. The appearance of the defendant, to a foreign attachment in a circuit court of the United States waives all objection to the non-service of process.
Pollard v. Dwight, (421) 666

APPOINTMENT TO OFFICE.

See Mandamus, 5, 6, 7, 9, 11, 12, 13, 14.

APPRAISEMENT—4.

See Evidence, 5.

APPRENTICES—2.

If apprentices are salvors their masters are not entitled to their share of the salvage, but it shall be paid to the apprentices themselves.
Mason et al. v. Blaireau, (240) 266

ARREST—4.

The word "apprehended," in the 8th section of the act of Congress for the punishment of certain crimes, comprehends a military arrest or seizure, as well as a legal arrest.
Ex parte Bollman and Swarthwout, (77) 555

ASSETS—2.

1. The lands of a deceased debtor in Georgia are assets in the hands of the executor, and in a suit in equity following the assets, it is not necessary to make the heir-at-law a party.
Telfair v. Stead, (407) 320
2. A creditor may in equity follow the assets into the hands of devisees, legatees, and distributees.
Id. (*Ib.*) 320
3. It is no error that the decree does not apportion the amount among those defendants who have assets, unless it appears that the whole assets in the hands of all the defendants are more than sufficient to pay the debt. *Telfair v. Stead,* (414) 322

ASSIGNEE—4.

An assignee of an assignee of a co-partner in a joint purchase and sale of lands may sustain a bill in equity against the other co-partners and the agent of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds.
Pendleton v. Wamburzie, (73) 554

ASSIGNMENT—1.

See Chose in Action.

ASSIGNMENT—2.

A creditor upon open account who has assigned his claim to a third person with the assent of the debtor, is still competent to maintain an action at law in his own name against the debtor, for the use of the assignee; but the debtor is allowed to offset his claims against the assignee.
Winchester v. Hackley, (342) 299

ASSUMPSIT—1.

See Bills of Exchange and Promissory Notes, 1, 2, 3, 4, 12, 13, 15, 16, 17, 18, 19, 22, 23.
1. Assumpsit for money had and received will not lie by the holder against a remote indorser of a promissory note, in Virginia.
Mandeville v. Riddle, (290) 112
2. *Quære?*
Dunlap v. Silver, (Appendix.) (367) 189
3. Assumpsit will not lie upon a policy of insurance, under the corporate seal, unless a new consideration be averred.
Insurance Co. of Alexandria v. Young, (332) 128
4. *Quære,* whether an aggregate corporation can make an express assumpsit, unless specially authorized by statute. *Id.* (*Ib.*) 128
5. After verdict, every assumpsit laid in the declaration is to be taken as an express assumpsit.
Id. (341) 129
6. *Quære,* whether he for whose benefit a promise is made, may maintain an action against the promissor? *Appendix,* (429) 164
7. Is privity necessary to support *indebitatus assumpsit* for money had and received?
Appendix, (439) 168
8. A judgment in assumpsit upon a policy under seal, is a bar to a subsequent action of covenant, on the same policy.
Insurance Co. of Alexandria v. Young, (340) 128

ASSUMPSIT—3.

1. See Action, 1, 2, 3, 4.
2. Assumpsit will lie upon a letter of credit, by him who trusts a third person upon the faith of that letter. *Lawrason v. Mason,* (492) 509

ASSUMPSIT—4.

Assumpsit, *quantum meruit,* will not lie for work and labor done in part fulfillment of a sealed contract, although the defendant had prevented the plaintiff from finishing the work according to the contract. *Young v. Preston,* (239) 607

ATTACHMENT—1.

See Absent Debtor.

ATTORNEYS—1.

Requisites to their admission to practice.
Rules of Court, (xvi) 11
Oath to be taken. *Id.* (*Ib.*) 11
Shall not practice as counselors. *Id.* (*Ib.*) 11
Counselors may be admitted to practice as attorneys. *Id.* (xvii) 11

ATTORNEYS—3.

1. Notice of the time and place of taking a deposition, given to an attorney at law, is not sufficient under the law of Virginia.
Buddicum v. Kirk, (293) 444
2. An attorney at law may agree to receive or waive notice, and cannot afterwards allege the want of it. *Id.* (*Ib.*) 444

AUDITOR—4.

See Account, 3.

AUTHORITY—4.

It is incumbent on a purchaser under a sale for taxes to prove the authority of the collector to sell. *Stead v. Course,* (403) 669

AVERMENT—4.

See Admiralty, 22.

AWARD—4.

The award of arbitrators appointed under a mutual mistake of both parties, in supposing themselves bound by law to submit the matter to arbitration is not obligatory.
Peisch v. Ware, (403) 643

BANK OF ALEXANDRIA—4.

1. See Appeal, 4.
2. The act of Virginia incorporating the bank of Alexandria is a public act.
Young v. Bank of Alexandria, (384) 655

BANK OF THE UNITED STATES.—4.

The act of Congress of 27th June, 1798, to punish frauds committed on the bank of the United States is in itself repugnant, and will not support an indictment for knowingly uttering as true, a false, forged and counterfeited paper purporting to be a bank bill of the United States, signed by the president and cashier.
United States v. Cantril, (167) 584

BANKRUPT—1.

See Acknowledgment.

BANKRUPT—2.

In all cases of insolvency or bankruptcy of their debtor, the United States are entitled to priority of payment out of his effects.
United States v. Fisher et al., (358) 304
See *Insolvents.*

BANKRUPT—3.

1. The United States have no lien on the real estate of their debtor, until suit brought, or bankruptcy, &c. *United States v. Hooe,* (73) 370
2. If the defendant plead the bankruptcy of the indorser in bar, the plaintiff may reply that the note was given to the indorser in trust for the plaintiff. *Wilson v. Codman,* (193) 408
3. See Legacy.

BILLS OF EXCHANGE AND PROMISSORY NOTES—1.

1. In Virginia it is not necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser.
Clark v. Young, (181) 74
2. If a promissory note of a third person be indorsed by the purchaser of goods to the vendor, as a conditional payment for the goods, *quære,* whether the vendor is, in any case, obliged to sue the maker of the note before he can resort to the purchaser of the goods on the original contract of sale.
Id. (*Ib.*) 74
3. A suit against the defendant as indorser of the note, and a suit against the defendant for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second. *Id.* (*Ib.*) 74
4. It is not necessary for the plaintiff to offer to return the note, to entitle him to bring suit for the goods sold. *Id.* (*Ib.*) 74
5. A declaration in debt, upon a foreign protested bill of exchange, for the principal, interest, damages and costs of protest, under the act of assembly of Virginia, must aver the amount of those costs of protest. *Wilson v. Lenox,* (195) 79
6. *Quære,* whether the indorser is discharged, if, after the notice to such indorser of non-payment by the drawee, the holder charge the bill in account current against the drawer, and upon the whole of that account, the balance due is less than the amount of the bill. *Id.* (*Ib.*) 79
7. Whether the indorser, after due notice, is discharged by the holder's receipt of part of the money from the drawer? *Id.* (*Ib.*) 79
8. Whether it is necessary to aver a protest for non-acceptance, in an action on protest for non-payment. *Id.* (*Ib.*) 79
9. Whether the drawer is a competent witness for the indorser, in an action against the latter.
Id. (*Ib.*) 79
10. Whether protest for non-payment of a foreign bill of exchange must be made on the last day of grace. *Fenwick v. Sears,* (260) 101
11. Whether the reasonableness of notice be matter of fact, or matter of law. *Id.* (*Ib.*) 101
12. Whether, on the count for money had and received, notice of non-acceptance, and of non-payment, be necessary to charge an indorser who knew, at the time of indorsing, that the drawer had no right to draw. *Id.* (*Ib.*) 101
13. In Virginia, an indorsee of a promissory note cannot maintain an action against a remote indorser for want of privity.
Mandeville v. Riddle, (290) 112
14. In Maryland, debt will not lie on a promissory note. *Lindo v. Gardner,* (343) 130
15. Whether an action for money had and received will lie by the holder against a remote indorser of a promissory note in Virginia?
Dunlop v. Silver, (Appendix.) (367) 139
16. What was the law in England respecting promissory notes, before the statute of Anne?
Appendix, (368) 139
17. At what time were inland bills of exchange considered as governed by the custom of merchants? *Appendix,* (380) 144
18. When were inland bills, and promissory notes first introduced into England? *Id.* (*Ib.*) 144
19. Did the statute of Anne introduce a new law respecting promissory notes, or did it only affirm the old? *Id.* (383) 145
20. Goldsmith's notes. *Id.* (384) 146
21. Form of declarations upon promissory notes before the statute of Anne. *Id.* (405) 154
22. Is the contract of the indorser of a promissory note an express or an implied contract?
Id. (422) 161
23. Are actions upon promissory notes in Pennsylvania founded on the custom of merchants, or on the statute of Anne? *Id.* (459) 176
24. Will an action of debt lie upon a promissory note? *Id.* (464) 178

BILL OF EXCHANGE—4.

If the drawer of a bill of exchange, at the time of drawing, has a right to expect that his bill will be honored, he is entitled to strict notice, although he had no funds in the hands of the drawee.
French v. Bank of Columbia, (141) 576

BILL OF EXCEPTIONS—1.

The Court is not bound to give an opinion on an abstract point of law, unless it be so stated as to show its connection with the cause.
Hamilton v. Russell, (309) 118

BILL OF SALE—1.

1. An absolute bill of sale of goods is fraudulent as to creditors, unless possession accompanies and follows the deed.
Hamilton v. Russell, (309) 118
2. The want of possession is not merely evidence of fraud, but is a circumstance *per se,* which makes the transaction fraudulent in point of law.
Id. (*Ib.*) 118

BLOCKADE—4.

1. Persisting in an intention to enter a blockaded port after warning, is not attempting to enter.
Fitzsimmons v .Newport In. Co., (185) 591
2. The sentence of a foreign court of admiralty condemning a vessel for breach of blockade is conclusive evidence of that fact, in an action upon the policy of insurance.
Croudson v. Leonard, (434) 670

BOND—2.

To induce a presumption of payment from the age of a bond, 20 years must have elapsed, exclusive of the period of the plaintiff's disability.
Dunlop & Co. v. Ball, (180) 246

BOND—3.

1. A variance in date between the bond declared upon, and that produced on oyer, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.
Cooke v. Graham, (229) 420
2. The court may depart from the letter of the condition of a bond to carry into effect the intention of the parties. *Id.* (*Ib.*) 420
3. See Collector, 2.
4. A discharge from the prison rules under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law; and upon such discharge no action can be maintained upon the prison bounds bond.
Simms v. Slacum, (300) 446

BOND—4.

1. See Deed, 1.
2. A bond may be delivered by a surety to the principal obligor as an *escrow.*
Pawling v. United States, (219) 601
3. See Escrow, 2.
4. In a suit upon a bond to perform certain articles of agreement, interest may be recovered in a case not provided for by the agreement.
United States v. Gurney, (333) 638
5. To an action upon a bond conditioned to pay money on the 1st of March, it is not a good plea to say that the defendant paid it on the 13th of May, without averring it to be the whole sum then due. *Id.* (*Ib.*) 638

BOND, FORTHCOMING—1.

In Virginia, a forthcoming bond is an appendage to the original suit, and is a component part of the proceedings. *Stuart v. Laird,* (309) 118

BOND, FORTHCOMING—2.

In Virginia a forthcoming bond which misrecites the costs upon the execution, is not thereby vitiated, if the aggregate of debts and costs be truly stated; but will support a judgment on motion.
Williams et al. v. Lyles, (9) 191

BOTTOMRY—4.

1. The claim of bottomry is to be preferred to all others, except seamen's wages, for the voyage on which the bottomry is founded; but it can extend no further.
Blaine v. Ship Charles Carter, (332) 638

2. If the obligee of a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien upon the ship. *Blaine v. Ship Charles Carter,* (328) 636
3. *Quære,* whether a bottomry bond executed by the owner at home, creates a lien on the ship which can be enforced in a court of admiralty?
Id. (332) 638

BRITISH CREDITORS—2.

1. Legal impediments to the recovery of British debts existed in Virginia until the year 1793.
Dunlop & Co. v. Ball, (180) 246
2. The act of limitations of North Carolina was suspended as to British creditors during the war.
Ogden v. Blackledge, (272) 276

BRITISH CREDITORS—4.

1. See Limitations. Confiscation, 1, 2.
2. If a confiscating act, independent of the British treaty, would be construed to destroy the claim of a British mortgagee, the treaty reinstates the lien in its full force, and a subsequent sale could only pass it *cum onere.*
Higginson v. Mein, (415) 664

BRITISH SUBJECTS—3.

1. *Quære,* whether a British subject, born in England in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia by descent or devise?
Lambert v. Paine, (97) 377
2. The treaty of peace between Great Britain and the United States prevents the operation of the act of limitations of Virginia upon British debts contracted before that treaty.
Hopkirk v. Bell, (454) 497

BRITISH SUBJECTS—4.

See Aliens, 2, 3.

BRITISH TREATY—2.

See Aliens, 4.

BRITISH TREATY—4.

See Limitations, 1. Aliens, 2, 3. Confiscation, 1, 2.

CAPTURE—3.

The commander of a United States ship of war, if he seizes a vessel on the high seas, without probable cause, is liable to make restitution in value with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss.
Maley v. Shattuck, (458) 498

CAPTURE—4.

See Admiralty, 1, 2, 3, 4, 5, 10, 12, 13. Abandonment.

CAVEAT—1.

See Kentucky, 2.

CAVEAT—3.

A general dismissal of the plaintiff's caveat, in Kentucky, does not purport to be a judgment upon the merits. *Wilson v. Speed,* (283) 441

CERTIORARI—3.

A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.
Field v. Milton, (514) 516

CHANCERY—1.

See Absent Debtor. Equity.

CHANCERY—3.

1. A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree, and may be appealed from. *Ray v. Law,* (179) 404
2. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.
Milligan v. Milledge, (220) 417
3. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Id.* (*Ib.*) 417
4. The want of proper parties is not a sufficient ground for dismissing the bill. *Id.* (*Ib.*) 417
5. If the executor has no assets you may proceed in equity against the devisees or legatees.
Id. (228) 419

CHOSE IN ACTION—1.

1. What is the meaning, extent, and effect of the rule that a chose in action is not assignable?
Appendix, (423) 161
2. Can a chose in action be made assignable, or negotiable in its original creation, by the contract and intention of the parties, independent of the custom of merchants, and of statute law?
Id. (428) 164

CITATION—1.

A citation must accompany the writ of error.
A writ of error not accompanied by a citation, must be quashed, unless the defendant in error should appear. *Lloyd v. Alexander,* (365) 137

CITATION—2.

1. If an appeal is prayed in the court below at the same term in which the decree is rendered, a citation is not necessary.
Reily v. Lamar et al., (349) 302
2. A citation must accompany the writ of error, or it will be dismissed.
Bailiff v. Tipping, (406) 320

CITATION—3.

See *Certiorari.*

CITIZEN—1.

To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien. It is not sufficient to say that they reside in different states.
Abercrombie v. Dupuis, (343) 129

CITIZENS—2.

See Jurisdiction, 1. Aliens, 1, 2, 3, 4. Expatriation. Columbia, 1, 2, 3, 4. Courts, 1.

CLERK—1.

The clerk of this court must reside and keep his office at the seat of government. He cannot practice as attorney or counsel in this court.
Rules of Court, (xvi) 11
How to make return of a writ of error.
Id. (xvii) 11
Not to suffer any record to go out of his office.
Id. (xviii) 11

COLLECTOR—3.

1. See Mortgage, 1. Petersburgh.
2. To support a judgment on a collector's bond at the return term, it must appear by the record that the writ was executed 14 days before the return day. *Dobynes v. United States,* (241) 427

COLLECTOR—4.

1. A collector selling land for taxes must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is incumbent on the vendee to prove the authority to sell.
Stead v. Course, (403) 660
2. By the tax laws of Georgia for the years 1790 and 1791, the collector was authorized to sell land only on the deficiency of personal estate; and then to sell only so much as was necessaray to pay the taxes in arrear. Under those laws the sale of a whole tract, when a small part would have been sufficient to pay the taxes, was void. *Id.* (*Ib.*) 660
3. A collector of the revenue of the United States, after his removal from office, has no authority to collect duties outstanding at the time of his removal; but this power and duty devolves upon his successor.
Sthreshley v. United States, (169) 584

COLUMBIA DISTRICT—1.

1. A justice of peace in the District of Columbia is not removable at the will of the President.
Marbury v. Madison, (160) 69

2. The acts of Congress of 27th February, and 3d March, 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by Congress as the laws of that district, any further than the change of jurisdiction rendered a change of those laws necessary.
United States v. Simms, (252) 98
3. Fines, forfeitures and penalties, arising from a breach of those laws, are to be sued for, and recovered, in the same manner as before the change of jurisdiction, *mutatis mutandis. Id.* (*Ib.*) 98
See Administrator.

COLUMBIA—2.

1. The inhabitants of the District of Columbia, by its separation from the states of Virginia and Maryland, ceased to be citizens of those states respectively. *Reily v. Lamar et al.,* (344) 300
2. By the insolvent law of Maryland of 3d of January, 1800, the Chancellor of Maryland could not discharge a citizen of Maryland who resided in the District of Columbia at the time of its separation from Maryland, unless the insolvent had complied with all the requisites of the law, so as to entitle himself to a discharge before that separation.
Id. (*Ib.*) 300
3. A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia in the circuit court of the United States for the district of Virginia; but a citizen of the district of Virginia may maintain an action against a citizen of the District of Columbia, in the circuit court of the United States for the District of Columbia.
Hepburn et al. v. Ellzey, (445) 332
4. A citizen of the District of Columbia is not a citizen of a state, within the meaning of the constitution of the United States. *Id.* (*Ib.*) 332

COLUMBIA—4.

1. The right of Virginia to legislate for that part of the District of Columbia which was ceded by her to the United States continued until the 27th of February, 1801.
Young v. Bank of Alexandria, (384) 655
See Appeal, 4.

COMMISSION—4.

1. The certificate of commissioners named in a *dedimus,* that they took, in due form of law, the oath annexed to the commission, is sufficient evidence of that fact.
Grant v. Naylor, (224) 603
2. It is not necessary to give notice to the opposite party of the time and place of executing the commission.
Grant v. Naylor, (224) 603
3. If the return of the commission be inclosed in an envelope which is sealed, no other sealing by the commissioners is necessary. *Ib.* (225) 603
4. If, after a commission has issued, the parties have leave to amend, and a new issue be made up, similar in substance to the former issue, the depositions taken under such commission may be used at the trial of the new issue. *Ib.* (232) 605

COMMITMENT—4.

1. A person may be committed for a crime by one magistrate upon an affidavit made before another.
Ex parte Bollman and Swartwout, (76) 555
2. *Quære,* whether upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the deponent be admissible evidence? *Id.* (*Ib.*) 555

COMMON LAW—4.

1. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute change their established principles; but courts which are created by written law, cannot transcend that jurisdiction. *Ex parte Bollman and Swartwout,* (93) 560
2. For the meaning of the term habeas corpus resort may be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law.
Id. (93, 94) 561
3. *Quære,* whether, upon an indictment for treason, proof of procurement can, in this country, by force of the common law, be admitted in evidence to establish a charge of personal presence.
United States v. Burr, Appendix, (502) 700

COMMISSION—1.

See Mandamus, 5, 6, 9, 10, 11, 12, 13, 14, 15.
Cranch 1, 2, 3, 4.

CONFISCATION—4.

1. The act of Georgia confiscating the estate of the mortgageor is no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war. The estate of the mortgageor only was confiscated, not that of the mortgagee.
Higginson v. Mein, (416) 664
2. If a confiscating act, independent of the treaty, would be construed to destroy the claim of a British mortgagee, the treaty reinstates the lien in its full force; and a subsequent sale could only pass it with its burden.
Higginson v. Mein, (419) 665

CONNECTICUT—4.

1. See Foreign Attachment, 2. Covenant, 2.

CONGRESS—1.

1. Congress have not the power to give original jurisdiction to the Supreme Court of the United States, in other cases than those described in the constitution.
Marbury v. Madison, (176) 73
2. An act of Congress repugnant to the constitution, cannot become a law. *Id.* (*Ib.*) 73
3. A cause may, by act of Congress, be transferred from one inferior tribunal to another.
Stuart v. Laird, (299) 115
4. Congress may constitutionally impose upon the judges of the Supreme Court of the United States, the burden of holding circuit courts.
Id. (*Ib.*) 115

CONSTITUTION—1.

1. The Supreme Court of the United States has not the power to issue a mandamus to a Secretary of State of the United States, it being an exercise of original jurisdiction, not warranted by the constitution, notwithstanding the act of Congress.
Marbury v. Madison, (137) 60
2. An act of Congress repugnant to the constitution cannot become a law. *Id.* (176) 73
3. The courts of the United States are bound to take notice of the constitution. *Id.* (178) 73
4. A contemporary exposition of the constitution, practiced and acquiesced under, for a period of years, fixes its construction.
Stuart v. Laird, (299) 115
5. Congress may constitutionally impose upon the judges of the Supreme Court of the United States the burden of holding circuit courts.
Id. (*Ib.*) 115

CONSTITUTION—2.

A citizen of the District of Columbia is not a citizen of a state, within the meaning of the constitution of the United States.
Hepburn et al. v. Ellzey, (445) 332

CONSTRUCTION—1.

See Constitution, 4. Act of God.

CONSULS—2.

The certificate of a consul of the United States under his seal, is not evidence of a foreign law.
Church v. Hubbart, (236) 265

CONTINUANCE—4.

1. The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error. *Woods & Bemis v. Young,* (237) 607

CONTRACT—1.

See Agent. Public. Admiralty, 10. Bills of Exchange, 22. Chose in action.

CONTRACT—3.

1. The court has the exclusive power of deciding whether a written contract be usurious.
Levy v. Gadsby, (181) 405
2. He who sells property on a description given by himself, is bound in equity to make good that description. *M'Ferran v. Taylor,* (270) 436
3. On a contract to deliver flour, its value is to be ascertained on the day when it ought to have been delivered. *Douglas v. M'Allister,* (298) 445

CONTRACT—4.

1. A court of equity will annul a contract which the defendant has failed to perform, and cannot perform on his part.
Skillern v. May, (137) 574

2. A letter of credit, directed by mistake to John and Joseph, instead of John and Jeremiah, and delivered to John and Jeremiah, who furnished goods upon the faith of it, does not constitute a contract between the writer of the letter and John and Jeremiah, to whom it was delivered, and parol proof cannot be admitted to make it such.
Grant v. Naylor, (224) 603
3. The promise to pay the debt of another must be in writing, and cannot be explained by parol.
Id. (235) 606
4. B in Philadelphia, agreed to pay to A's agent in Amsterdam, 170,000 guilders on the first of March, and if he should fail so to do, then to repay to A the value of the guilders at the rate of exchange current in Philadelphia at the time demand of payment should be made, together with damages at 20 per cent. in the same manner as if bills of exchange had been drawn for that sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment which might take place after the demand. B paid the 170,000 guilders in Amsterdam to the agent of A on the 13th of May, instead of the 1st of March. A is not entitled to the 20 per cent. damages, but may, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders from the 1st of March to the 13th of May.
United States v. Gurney, (333) 638

CONVENTION WITH FRANCE—1.
See Admiralty, 13.

COPARTNERS—4.
See Assignee, 1.

COPPER—4.
1. Round copper bars, round copper plates, and round copper plates turned up at the edges, are not subject to duty upon exportation.
United States v. Kyd & Watson, (1) 531

COPY—1.
The keeper of a public record cannot refuse a copy to a person demanding it in the terms prescribed by law. *Marbury v. Madison,* (161) 68

COPY—4.
See Evidence, 2.

CORPORATION—1.
See Assumpsit, 3, 4.
Quære, whether an action on a policy of insurance will lie against the Marine Insurance Company of Alexandria, in their corporate name, or whether the declaration must be against the President alone?
Insurance Company of Alexandria v. Young, (332) 126

CORPORATION—2.
A corporate body can act only in the manner prescribed by the act of incorporation, which gives it existence. It is the mere creature of law, and derives all its powers from the act of incorporation.
Head et al. v. Providence Insurance Company, (127) 229

COSTS—1.
Quære, whether costs can be awarded against the United States? *United States v. Simms,* (259) 100
United States v. Hooe, (318) 121

COSTS—3.
1. Costs are not to be awarded against the United States. *United States v. Hooe,* (73) 370
2. In Virginia, if the first *ca sa.* be returned *non est,* the second may include the costs of issuing both. *Peyton v. Brooke,* (92) 376
3. Costs will be allowed on the dismissal of a writ of error for want of jurisdiction, if the original defendant be also defendant in error.
Winchester v. Jackson, (515) 516
4. If errors are not assigned, according to the rule of court, the writ of error may be dismissed with costs. *General Rule,* (239) 425
5. If the plaintiff in error does not appear, the defendant may have the writ of error dismissed with costs. *Montalet v. Murray,* (249) 429

COSTS—4.
1. Costs are not given upon a reversal of judgment.
Montalet v. Murray, (47) 545

COURTS—2.
1. The courts of the United States have not jurisdiction between citizens of the United States, unless the record expressly states them to be citizens of different states.
Wood v. Wagnon, (9) 191
Capron v. Van Noorden, (126) 229
2. A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Id.* (126) 229
3. A party may take advantage of an error in his favor, if it be an error of the court.
Id. (*Ib.*) 229
4. The courts of admiralty of the United States have jurisdiction in cases of salvage, where all the parties are aliens, if the jurisdiction be not objected to. *Mason v. Blaireau,* (240) 266
5. *Quære,* whether the United States courts of common law have jurisdiction where all the parties are aliens? *Bailiff v. Tipping,* (406) 320
6. The question of forfeiture of a vessel under the act of Congress against the slave trade is of admiralty and maritime jurisdiction.
United States v. Schooner Sally, (406) 320
7. The circuit court of the United States for the District of Virginia, has not jurisdiction in cases between citizens of Virginia and citizens of the District of Columbia.
Hepburn et al. v. Ellzey, (445) 332

COURT—3.
1. The court has the exclusive power to decide whether a written contract be usurious.
Levy v. Gadsby, (181) 405
2. The court, upon a jury trial, is bound to give an opinion if required, upon any point relevant to the issue. *Douglass v. M'Allister,* (298) 445

COURT MARTIAL—3.
1. The court martial of the District of Columbia has not exclusive cognizance of the question who are subject to militia duty, and its sentence is not conclusive upon that point.
Wise v. Withers, (331) 457
2. The court martial who impose a fine upon a man, not liable to militia duty, are equally trespassers with the officer who distrains for such fine. *Id.* (*Ib.*) 457

COURTS OF UNITED STATES—4.
1. The district courts of the United States are courts of prize, and have power to carry into effect the sentences of the old continental courts of appeal in prize causes.
Jennings v. Carson, (2) 531
2. The practice of the district courts of the United States as courts of admiralty is not regulated by law. *Ib.* (24) 538
3. When both parties are aliens the courts of the United States have not jurisdiction.
Montalet v. Murray, (46) 545
4. If it does not appear upon the record that the suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by a subsequent holder. *Id.* (*Ib.*) 545
5. The court is bound to give an opinion to the jury on a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact. *Smith v. Carrington,* (71) 553
6. If the complainant be a citizen of France, and the defendant a citizen of the state of Georgia, the circuit court of the United States for the district of Georgia has jurisdiction, although the complainant and defendant are executors, and their testators respectively were citizens of the state of Georgia.
Chappedelaine v. Dechenaux, (308) 630
7. See Appeal, 3, 4. Habeas Corpus, 1. Jurisdiction, 5, 6.
8. If two citizens of the same state, in a suit in a court of their state, claim title under the same act of Congress, the Supreme Court of the United States has appellate jurisdiction from the highest state court to which the question can be carried.
Matthews v. Zane, (382) 654
9. The district judge may alone hold a circuit court, although there be no judge of the Supreme Court allotted to that circuit.
Pollard v. Dwight, (421) 666

COUNSELORS—1.
Counselors shall not practice as attorneys.
Rules of Court, (xvi) 11
Their oath and qualifications. *Id.* (*Ib.*) 11
May be admitted as attorneys. *Id.* (xvii) 11

COVENANT—1.
See Assumpsit, 8.

COVENANT—4.
1. An action may be supported upon a covenant of seizin, although the plaintiff has never been evicted, and the declaration need not aver an eviction. *Pollard v. Dwight,* (421) 666
2. On the trial of an action in Connecticut for breach of a covenant of seizin of lands in Virginia, the question whether a patent from the state of Virginia for the lands be voidable, is not examinable. *Id.* (422) 666
3. Parol testimony is not admissible in an action on the covenant of seizin, to prove prior claims to the land. *Id.* (*Ib.*) 666

CREDIT, LETTER OF—4.
See Contract, 2, 3.

CRIMES—4.
See Trial, 2. Arrest, 1.

CUSTODY OF THE LAW—4.
See Admiralty, 3, 4, 7, 12, 13, 14, 25.

DAMAGES—2.
1. If there was no reasonable ground of suspicion that the vessel was trading contrary to law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.
Murray v. Charming Betsy, (64) 208
2. The report of the assessors ought to state the principles on which it is founded; and not a gross sum without explanation. *Id.* (*Ib.*) 208
3. A commander of a ship of war of the United States, in obeying the instructions of the President of the United States, acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. *Little v. Barreme,* (170) 243
4. *Quære,* whether probable cause will excuse from damages? *Id.* (176) 245

DAMAGES—3.
In estimating damages for breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose. *Douglass v. M'Allister,* (298) 445

DAMAGES—4.
See Contract, 4.

DEBT—1.
See Bills of Exchange, 5.
1. An action of debt for 860*l.* 12*s.* 1*d.* founded on a decree in chancery, is not supported by a decree for 860*l.* 12*s.* 1*d.* with interest from a certain day to the day of rendering the decree. But the variance is fatal.
Thompson v. Jameson, (282) 109
2. *Quære,* whether *nil debit* is a good plea to an action of debt founded on judgment of a court of one of the co-states? *Id.* (285, 286) 110 111
3. The declaration must be for the whole debt. Or if you declare for part you must show that the residue is satisfied. *Id.* (*Ib.*) 110 111
4. Debt will not lie upon a promissory note in Maryland. *Lindo v. Gardner,* (343) 130
5. Will debt lie upon a promissory note?
Appendix, (464) 178

DEBTOR—1.
See Absent Debtor. Insolvent Debtor. Fraud.
A debtor may prefer one creditor to another, and convey goods to him in discharge of his debt.
Wood v. Owings, (244) 96

DEBTOR—3.
See Lien.

DECLARATION—1.
See Bills of Exchange, 1, 2, 3, 4, 5, 8, 15, 21. Corporation. Debt, 3, 4. Citizen.

DECLARATION—3.
1. In a declaration, the averment that the assignment of a promissory note was for value received, is an immaterial averment and need not be proved. *Wilson v. Codman,* (193) 408
Cranch 1, 2, 3, 4.
2. A replication stating that the note was given to the indorser in trust for the plaintiff is not a departure from the declaration which avers the note to have been given for value received.
Id. (*Ib.*) 408

DECLARATION—4.
See Covenant, 1.

DECREE—3.
A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree, and may be appealed from. *Ray v. Law,* (179) 404

DECREE—4.
See Admiralty, 1, 2, 4, 8, 9, 11, 12, 15, 16, 18.

DEED—1.
1. Delivery is not necessary to the validity of letters patent, as it is to that of a deed.
Marbury v. Madison, (178) 73
2. See Acknowledgement.

DEED—4.
1. If a bond be executed by O as a surety for S, to obtain an appeal from the judgment of a justice of peace in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O, the name of W be interlined as an obligor who executes the bond, and the justice then accepts it, it is void as to O.
Oneale v. Long, (60) 550
2. A bond may be delivered by the surety to the principal obligor as an escrow.
Pawling v. United States, (219) 601
3. See Evidence, 12. Escrow, 1, 2.
4. See Assumpsit, 1.
5. Parol evidence may be given of the existence of a deed of gift of a slave in Virginia, to show the nature of the possession which accompanied the deed. *Spiers v. Willison,* (398) 659

DEMISE—4.
See Lease, 1, 2.

DEMURRER—2.
1. In a bill in equity by executors it is not cause of demurrer that they have not set forth their letters testamentary. *Telfair v. Stead,* (408) 320
2. It is no cause of demurrer to a bill in equity against an executor seeking a discovery of assets, that the complainant had a right of action at law.
Telfair v. Stead, (409) 321

DEMURRER—4.
1. Upon a demurrer to evidence the testimony is to be taken most strongly against him who demurs; and such conclusions as a jury might justifiably draw, the court ought to draw.
Pawling v. United States, (219) 601

DEMURRER—3.
See Pleading.

DEPARTURE—3
See Pleading, 6.

DEPOSITION—1.
1. Evidence on motion to discharge bail, must be by deposition and not viva voce.
Rules of Court, (xvii) 11
2. The plaintiff in error may show by affidavits that the matter in dispute exceeds the value of 2,000 dollars. *Id.* (xviii) 11

DEPOSITION—3.
See Attorney, 1, 2. Notice, 1, 2, 3.

DEPRECIATION—2.
On a deed made in 1799, of land in Virginia, rendering an annual rent of 26*l.* current money for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land at the date of the contract, in specie, or other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller,* (10) 191

DESCENT—4.
See Aliens, 2, 3.

DETINUE—4.

Quære, whether 5 years' possession, in Virginia, is alone a good title to enable a plaintiff to recover in detinue? *Ramsay v. Lee,* (401) 660

DEVIATION—2.

A detention at sea to save a vessel in distress, is such a deviation as discharges the underwriters, and the owner stands his own insurer.
Mason v. Blaireau, (268, 269) 275

DEVIATION—3.

See Insurance, 4.

DEVISE—3.

1. A devise of "All the estate called Marrowbone, in the county of H. containing by estimation 2,585 acres of land," carries the fee.
Lambert v. Paine, (97) 377
2. *Quære,* whether a British subject born in England, in 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia by descent or devise? *Id.* (*Ib.*) 377
3. See Chancery, 5.

DEVISE—4.

See Equity, 3.

DISCHARGE—3.

A discharge from prison by a competent tribunal, obtained by fraud, is a discharge in due course of law. *Simms v. Slacum,* (300) 446

DISTRICT COURT—4.

See Courts of United States, 1, 2, 9.

DISTRICT OF COLUMBIA—1.

See Columbia District.

DISTRICT OF COLUMBIA—3.

1. No appeal or writ of error, in a criminal case, lies from the judgment of the circuit court of the District of Columbia.
United States v. More, (159) 397
2. *Quære,* whether the act of Congress, abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission when that act was passed?
Id. (*Ib.*) 397
3. The plaintiff in error must file a transcript of the record with the clerk of the Supreme Court of the United States, within the first six days of the term. *General Rule,* (239) 425
4. An executor cannot maintain a suit in the District of Columbia, upon letters testamentary granted in a foreign country.
Dixon v. Ramsay, (319) 453
5. A justice of the peace in the District of Columbia is an officer of the government of the United States, and is exempt from militia duty.
Wise v. Withers, (331) 457
6. See Court Martial, 1, 2.

DOMICILE—2.

See Aliens, 1.

DUTIES—2.

Sugar refined, but not sold and sent out of the manufactory before the first of July, 1802, was not liable to any duty, upon being sent out after that day. *Pennington v. Coxe,* (33) 199

DUTIES—4.

1. See Copper. 1.
2. An American registered vessel, in part transferred by parol while at sea to an American citizen, and re-sold to her original owners on her return into port and before her entry, does not, by that operation, lose her privileges as an American bottom, nor become subject to foreign duties.
United States v. Willings and Francis, (48) 546
3. A collector of the revenue of the United States after his removal from office, has no authority to collect the duties outstanding at the time of his removal, and which accrued while he remained in office; but this power and duty devolve on his successor.
Sthreshley v. United States, (169) 584
4. *Quære,* whether goods saved are liable for duties? *Peisch v. Ware,* (348) 643
5. See Forfeiture, 1.

EJECTMENT—4.

1. In Vermont, tenants in common may maintain a joint action of ejectment.
Hicks v. Rogers, (165) 583

ENTRY OF LANDS—1.

See Kentucky, 1, 3.

EMIGRATION—2.

Distinguished from Expatriation.
M'Ilvaine v. Coxe's Lessee, (302) 286

EQUITY—1.

Subpœna in equity must be served 60 days before the return day.
If the defendant, upon such service, shall not appear, the complainant may proceed ex parte.
Rules of Court, (xvii) 11

EQUITY—2.

1. *Quære,* whether a person who has neglected a law to plead his discharge under an insolvent act can avail himself of it in equity.
Reily v. Lamar et al., (344) 300
2. In a bill in equity it is not necessary for the executors to set forth their letters testamentary.
Telfair v. Stead, (408) 320
3. That property of the debtor has come to the hands of the defendant, is a ground of equity.
Id. (*Ib.*) 320
4. It is not a good plea in bar to a bill in equity, for a discovery of assets, that a judgment at law has been recovered against the executor of the debtor. *Id.* (*Ib.*) 320
5. It is no cause of demurrer to a bill in equity against an executor seeking a discovery of assets, that the complainant has a right of action at law.
Id. (409) 321
6. A creditor may in equity follow the assets of his debtor into the hands of his devisees, legatees, and distributees. *Id.* (410) 321
7. The evidence of the knowledge of the underwriters of the intention of the insured at the time of making the policy, ought to be very clear to justify a court of equity, in conforming the policy to that intention.
Graves et al. v. Boston Marine Insurance Company, (419) 324

EQUITY—3.

1. See Appeals, 1; Chancery, 1, 5; Contract, 2.
2. The holder of a promissory note in Virginia, payable to order, may, in equity, sue a remote indorser, but not at law.
Harris v. Johnston, (311) 450

EQUITY—4.

1. See Assignee.
2. If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.
Skillern v. May, (137) 574
3. A court of equity will not interfere between a donee of land by deed and a devisee under the will of the donor, in a case where there is no fraud.
Viers v. Montgomery, (177) 587
4. A court of the United States cannot enjoin proceedings in a state court.
Diggs v. Wolcott, (179) 587
5. See Account, 2, 3.
6. A court of equity will annul a contract which the defendant has failed to perform, and which he cannot perform on his part.
Skillern v. May, (137) 574

ERROR—1.

See Citation.

1. A writ of error lies upon a caveat from the district court of Kentucky district to the Supreme Court of the United States.
Wilson v. Mason, (45) 29
2. It is not error to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before the court.
Turner v. Fendall, (117, 132) 53, 58
3. *Quære,* whether, in a case where there is no jury, a judgment ought to be reversed for the rejection of testimony which was admissible in law. Or, whether the cause, in the appellate court, should be considered as if the testimony had been received? *Id.* (132) 58

4. Writ of error, how to be returned by the clerk below. *Rules of Court,* (xvii) 11
5. If the writ of error issues within 30 days before the meeting of the court, the defendant in error may enter his appearance, and proceed to trial, otherwise the cause must be continued.
Id. (xviii) 11
6. Where the writ of error appears to be brought for delay only, the judgment shall carry interest at 10 per cent. per annum, by way of damages. In other cases 6 per cent. *Id.* (*Ib.*) 11
7. A writ of error does not lie from the Supreme Court of the United States to the general court for the Territory N. W. of the Ohio.
Clark v. Bazadone, (212) 58

ERROR—2.

1. A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort.
Capron v. Van Noorden, (126) 229
2. A party may take advantage of an error in his favor, if it be an error of the court.
Id. (*Ib.*) 229
3. The citation must accompany the writ of error, or it will be dismissed.
Bailiff v. Tipping, (406) 320
4. It is no error that the decree is for pounds, shillings and pence sterling.
Telfair v. Stead, (414) 322
5. It is no error that the decree does not apportion the amount among those defendants who have assets, unless it appears that the whole assets in the hands of all the defendants are more than sufficient to pay the plaintiff's debt.
Id. (*Ib.*) 322

ERROR—3.

If errors are not assigned according to the rule of court, the writ of error will be dismissed with costs. *General Rule,* (239) 425

ERROR—4.

1. See Writ of Error, 1, 2. Appeal, 4.
2. The refusal of the court below to continue a cause, after it is at issue, cannot be assigned for error. *Woods & Bemis v. Young,* (237) 607
3. *Quære,* whether a writ of error will lie to the refusal of the court below to quash an execution upon motion? *Mounts v. Hodgson,* (324) 635

ESCROW—4.

1. A bond may be delivered by a surety to the principal obligor, as an escrow.
Pawling v. United States, (219) 601
2. If one of the obligors, at the time of executing the bond, says in the presence of some of the other obligors, "we acknowledge this instrument, but others are to sign it;" this is evidence from which the jury may infer a delivery as an escrow, by all the obligors who were then present.
(*Ib.*) 601

EVIDENCE—1.

See Admiralty, 5, 6, 12.
1. Proceedings before magistrates in cases of insolvent debtors, under the laws of Virginia, are matters *in pais,* and may be proved by parol testimony. *Turner v. Fendall,* (132) 58
2. See Error, 2, 3.
3. A commission is only evidence of an appointment. *Marbury v. Madison,* (178) 73
4. *Quære,* whether the drawer is a competent witness for the indorser in an action against the latter? *Wilson v. Lennox,* (195) 79
5. The want of possession of goods by the vendee, under an absolute bill of sale, is not merely evidence of fraud, but is a circumstance per se which makes the transaction fraudulent in point of law.
Hamilton v. Russell, (309) 118
6. Evidence on motion to discharge bail, must be by deposition, and not viva voce.
Rules of Court, xvii

EVIDENCE—2.

1. To induce a presumption of payment from the age of a bond, 20 years must have elapsed exclusive of the period of the plaintiff's disability.
Dunlop & Co. v. Ball, (180) 246
2. Foreign laws must be proved as facts. They must be verified by oath, or by some other high authority which the law respects not less than an oath. *Church v. Hubbart,* (187, 236) 249, 265
3. The certificate of a consul of the United States under his seal is not evidence of a foreign law. *Id.* (*Ib.*) 249, 265
4. The proceedings of a Portuguese court, under the seal of a person who states himself to be Secretary of Foreign Affairs in Portugal, is not evidence.
Id. (*Ib.*) 249, 265
5. If the decrees of the courts in the Portuguese colonies are transmitted to the seat of the Portuguese government, and registered in the department of state of that government a certificate of that fact under the great seal of Portugal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence.
Id. (*Ib.*) 249, 265

EVIDENCE—3.

1. If usury be specially pleaded, and the court reject the evidence offered upon the special plea, it may be admitted upon the general issue.
Levy v. Gadsby, (180) 404
2. The court has exclusive power to decide whether a written contract be evidence of usury.
Id. (*Ib.*) 404
3. A report of surveyors that a vessel is unsound, is not evidence that she was not seaworthy when she commenced the voyage.
Marine Ins. Co. v. Wilson, (187) 406
4. *Quære,* whether such report, even if it related to the commencement of the voyage, is conclusive evidence? *Id.* (*Ib.*) 406
5. The assignee of a pre-emption warrant is a competent witness if his testimony does not tend to support the title of the party producing him.
Wilson v. Speed, (283) 441
6. Notice to an attorney at law of the time and place of taking a deposition, is not sufficient under the law of Virginia.
Buddicum v. Kirk, (293) 444
7. The deposition must be taken at the time notified; an adjournment from the 12th to the 19th is not an adjournment from day to day.
Buddicum v. Kirk, (293) 444
8. Evidence of wheat delivered is good on the plea of payment. *Id.* (*Ib.*) 444
9. An assignment of debts cannot be given in evidence under the plea of accord and satisfaction.
Id. (*Ib.*) 444
10. A bill of parcels stating the goods as bought of D. & I. is not conclusive evidence that D. & I. were joint owners of the goods.
Harris v. Johnston, (311) 450
11. The sentence of a court martial is not conclusive evidence that a man is liable to militia duty.
Wise v. Withers, (331) 457
12. A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation. *Malay v. Shattuck,* (458) 498

EVIDENCE—4.

1. A witness interested in certain admitted items of the plaintiff's account, is still a competent witness to prove other items.
Smith v. Carrington, (62) 550
2. The defendant having read a letter from the plaintiff's agent in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy by a witness.
Id. (*Ib.*) 550
3. If improper evidence be admitted by the judge, it is error, and this court cannot inquire into its importance, or operation. *Id.* (70) 553
4. *Quære,* whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters?
Fitzsimmons v. Newport Ins. Co. (185) 591
5. The appraisement made under the order of the district judge by three sworn appraisers, is not conclusive evidence of the value, in a question of jurisdiction, but is better evidence than the opinion of a single witness examined *viva voce* in open court. *United States v. Brig Union,* (216) 600
6. After deciding the question of value upon the weight of the evidence, the court will not continue the cause for the party to produce further evidence as to the value. *Id.* (*Ib.*) 600
7. Upon a demurrer to evidence, the testimony is to be taken most strongly against him who demurs; and such conclusions as a jury might justifiably draw, the court ought to draw.
Pawling v. United States, (219) 601
8. See Escrow, 2.
9. A letter of credit, addressed by mistake to John and Joseph, instead of John and Jeremiah, and delivered to John and Jeremiah is not evidence of a contract between the writer of that letter and John and Jeremiah.
Grant v. Naylor, (224) 603

10. See Commission, 1, 2, 3, 4.
11. An averment of a demise for 3 years is not supported by proof of a lease for one year certain, and two years' further possession on the same terms by the consent of the landlord.
Alexander v. Harris, (299) 627
12. Parol evidence may be given of the existence of a deed of gift to show the nature of the possession which accompanied the deed.
Spiers v. Willison, (398) 659
13. *Quære,* whether 5 years' possession is evidence of a good title for a plaintiff in detinue?
Ramsay v. Lee, (401) 660
14. The evidence of payment which results from lapse of time may be met by circumstances which account for the delay in bringing the suit.
Higginson v. Mein, (420) 665
15. The official certificate of survey returned by a legal sworn surveyor in Virginia, cannot be invalidated by evidence tending to show an impossibility, that the survey could have been made in the intervening time between the date of the entry, and the date of the certificate of survey.
Pollard v. Dwight, (422) 666
16. Parol testimony is not admissible, in an action on the covenant of seizin, to prove prior claims upon the land. *Id.* (*Ib.*) 666
17. The sentence of a foreign court of admiralty condemning a vessel for breach of blockade is conclusive evidence of that fact, in an action on the policy of insurance.
Croudson v. Leonard, (434) 670
18. See Admiralty, 21.
19. In treason the overt act must be proved as laid. *Appendix, United States v. Burr,* (490) 694
20. *Quære,* whether, on a motion to commit a person for treason, an affidavit stating the substance of a letter in the possession of the deponent, be admissible evidence.
Ex parte Bollman and Swartwout, (76) 555
21. A person may be committed by one magistrate upon an affidavit made before another.
(*Ib.*) 555
22. In treason, the presence of the party is part of the overt act, and must be proved by two witnesses. *Appendix,* (500) 699
23. An indictment charging a person with being present at an overt act of treason cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will be sufficient.
Appendix, (500) 699
24. See Treason, 31, 35, 36, 38, 40.
25. If the overt act of treason be not proved by two witnesses so as to be submitted to the jury, all other testimony is irrelevant.
Appendix, United States v. Burr,
(505, 506) 701
26. *Quære,* whether a foreign sentence be examinable? *Appendix, Rose v. Himely,* (512) 705

EXCEPTION—4.

1. A bill of exceptions may be taken to the opinion of the judge in his charge to the jury.
Smith v. Carrington, (63) 551
2. The court is bound to give an opinion to the jury upon a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact. *Ib.* (71) 553
3. See Account, 3. Error, 2, 3.

EXCEPTIONS, BILL OF—1.

See Bill of Exceptions.

EXECUTION—1.

1. Money made on a *fieri facias* does not become the goods and chattels of the plaintiff until it has been paid over to him; while it remains in the hands of the officer he cannot apply it to the satisfaction of another *fieri facias* against the former plaintiff. *Turner v. Fendall,* (117, 136) 53, 60
2. By the command of the writ, the officer is to bring the money into court, there to be paid to the plaintiff. *Id.* (*Ib.*) 53, 60
3. In Virginia, on a motion against a sheriff for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the next term succeeding that to which the execution has been returned. *Id.* (*Ib.*) 53, 60
4. Money may be taken in execution, if in possession of the defendant. *Id.* (134) 59
5. Although the creditor should have been discharged under the insolvent act of Virginia, yet the motion against the sheriff for not paying over moneys made on a *fieri facias,* must be in the name of such creditor. *Id.* (132) 58

EXCHANGE, BILLS OF—1.

See Bills of Exchange.

EXECUTORS—2.

It is not necessary in a bill in equity by executors, that they should set forth their letters testamentary. *Telfair v. Stead,* (408) 320

EXECUTOR—3.

1. Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary before the executor shall be permitted to prosecute.
Wilson v. Codman, (193) 408
2. See Legacy, 1.
3. An executor cannot maintain a suit in the District of Columbia upon letters testamentary granted in a foreign country.
Dixon v. Ramsay, (319) 453

EXPATRIATION—2.

1. An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicile, and by making himself the subject of a foreign power, he places himself out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance.
Murray v. Charming Betsy, (64) 206
2. *Quære,* whether a citizen of the United States can devest himself of that character otherwise than in such manner as may be prescribed by law.
Id. (*Ib.*) 206
M'Ilvaine v. Coxe's Lessee, (280) 279
3. Whether by becoming the subject of a foreign power, he is rescued from punishment for a crime against the United States? *Id.* (*Ib.*) 279
4. Whether by expatriation he becomes an alien, so that he cannot take and hold lands by descent from a citizen of the United States.
M'Ilvaine v. Coxe's Lessee, (280) 279

EXECUTION—4.

See Error, 3.

FACTOR—2.

The defendant cannot offset bad debts made by the misconduct of the plaintiff, in selling the defendant's goods as factor; the plaintiff not having guaranteed those debts; but such misconduct is properly to be inquired into in a suit for that purpose. *Winchester v. Hackley,* (342) 299

FACTOR—3.

1. A factor may be justified by the orders of a general agent in departing from the written instructions of the principal.
Manella v. Barry, (415) 484
2. An agent for collecting debts merely, is not a factor within the 13th section of the act of limitations of Virginia.
Hopkirk v. Bell, (454) 497
3. A promise by a factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. Ware, (503) 512

FACTS, STATEMENT OF—1.

See Appeal, 2. Admiralty, 11.

FIERI FACIAS—1.

See Execution, 1, 2, 3, 4, 5.

FINES AND FORFEITURES—1.

See Columbia District, 3.

FOREIGN ATTACHMENT—4.

1. The appearance of the defendant to a foreign attachment in the circuit court of the United States waives all objection to the non-service of process. *Pollard v. Dwight,* (421) 666
2. Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach of his covenant, is an absent debtor.
(*Ib.*) 666

FOREIGN COURTS—4.

See Admiralty, 8, 9, 11, 12, 13, 16. Evidence, 4, 17. Branch 1, 2, 3, 4.

FOREIGN LAWS—2.

1. Foreign laws must be proved as facts.
Church v. Hubbart, (187,236) 249, 265
2. The certificate of a consul of the United States under his seal, is not evidence of foreign laws. *Id.* (*Ib.*) 265

FOREIGN SENTENCE—3.

A foreign sentence as good prize is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation.

FOREIGN SENTENCE—4.

See Evidence, 4, 17. Admiralty, 8, 9, 11.
Maley v. Shattuck, (458) 498

FORFEITURE—3.

If a false oath be taken to procure a register for a vessel, the United States have an election to proceed against the vessel as forfeited, or against the person who took the false oath for its value. But, until that election is made, the title to the vessel does not vest in the United States under the forfeiture; and the United States cannot maintain an action for money had and received against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel and received the purchase money before the seizure of the vessel.
United States v. Grundy et al., (337) 459

FORFEITURE—4.

1. Wine and spirits saved from a wreck and landed, are not liable to forfeiture, because unaccompanied with such marks and certificates as are required by law; nor because they were removed without consent of the collector, before the quantity and quality were ascertained, and the duties paid. *Poisch v. Ware,* (347) 643
2. The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed, or trusted by him. *Id.* (*Ib.*) 643

FORGERY—4.

See Bank of United States, 1.

FORTHCOMING BONDS—1.

See Bond Forthcoming.

FORTHCOMING BOND—2.

See Bond, Forthcoming.

FRANCE—1.

See Admiralty, 11, 13.

FRENCH TREATY—4.

See Admiralty, 11.

FRAUD—1.

See Debtor.

1. An absolute bill of sale of goods, is fraudulent as to creditors, unless possession accompanies and follows the deed.
Hamilton v. Russell, (309) 118
2. The want of possession, in such case, is not merely evidence of fraud, but is a circumstance per se, which makes the transaction fraudulent in point of law. *Id.* (*Ib.*) 118

FRAUD—3.

1. The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war.
Hannay v. Eve, (242) 427
2. A discharge under an insolvent act, obtained by fraud, is a discharge in due course of law.
Simms v. Slacum, (300) 446

FREIGHT—3.

Quære, whether the mortgagee of a ship is entitled to the freight?
Hodgson v. Butts, (140) 391

GENERAL RULE—3.

1. If the transcript be not filed by the 6th day of the term, either party may have a continuance. (239) 425

Cranch 1, 2, 3, 4.

2. If judgment below be 30 days before the sitting of this court, the record must be filed within the first 6 days of the term. (*Ib.*) 425
3. In all cases from the District of Columbia, the record must be filed within the first six days of the term. (*Ib.*) 425
4. If errors are not assigned according to the general rule, the writ of error will be dismissed with costs. (*Ib.*) 425
5. If the defendant refuses to plead, the court will proceed *ex parte.* (*Ib.*) 425

GEORGETOWN—4.

Quære, whether the mayor of Georgetown, in the District of Columbia, be a justice of the peace of the county of Washington?
Mounts v. Hodgson, (324) 635

GEORGIA—2.

Lands of a deceased debtor in Georgia are liable in equity for his debts, without making the heir a party. *Telfair v. Stead,* (407) 329

GEORGIA—4.

1. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry.
Sheaarman v. Irvine's Lessee, (367) 649
2. See Collector, 2.
3. See Confiscation, 1.
4. The act of limitations of Georgia does not apply to mortgagees.
Higginson v. Mein, (415) 664

GIFT—4.

1. See Equity, 3.
2. By the act of assembly of Virginia, of 1758, no gift of a slave was valid unless in writing and recorded; but parol evidence may be admitted of the existence of a deed of gift to show the nature of the possession which accompanied the deed.
Spiers v. Willison, (398) 659
3. In Virginia, in 1784, no gift of a slave was valid unless in writing and recorded, although possession accompanied the gift.
Ramsay v. Lee, (401) 660

HABEAS CORPUS—3.

A warrant of commitment by justices of the peace must state a good cause certain, supported by oath. *Ex parte Burford,* (448) 495

HABEAS CORPUS—4.

1. The Supreme Court of the United States has power to issue the writ of *habeas corpus ad subjiciendum.*
Ex parte Bollman and Swartwout, (75) 554
2. See Common Law, 2.

HEADS OF DEPARTMENTS—1.

See Mandamus, 7, 9, 10, 16, 17, 18, 19, 20.

ILLICIT TRADE—2.

The right of a nation to seize vessels attempting an illicit trade is not confined to their harbors, or to the range of their batteries.
Church v. Hubbart, (187) 249

INDICTMENT—4.

1. In treason the indictment must lay an overt act, which must be proved as laid.
Appendix, United States v. Burr, (490) 694
2. See Evidence, 23.
3. *Quære,* whether a person who procures an act, can be indicted as having performed that act.
Id. (503) 700

INSOLVENT DEBTOR—1.

See Evidence, 1. Execution, 5. Debtor.

INSOLVENCY—2.

1. By the insolvent law of Maryland of 3d January, 1800, the Chancellor of Maryland could not discharge an insolvent citizen of Maryland named in that law, and who resided in the District of Columbia at the time of its separation from Maryland, unless the insolvent had complied with all the requisites of the insolvent law, so as to entitle himself to a discharge before the separation.
Reily v. Lamar et al., (344) 300
2. *Quære,* whether an insolvent who has neglected at law to plead his discharge, can avail himself of it in equity? *Reily v. Lamar et al.,* (344) 300

3. A certificate of discharge under the insolvent act of Maryland of 3d January, 1800, relates back to the date of the deed of trust, and the applicant must show himself to be a citizen of Maryland on that day. *Id.* (349) 302
4. In all cases of insolvency of their debtor, the United States are entitled to priority of payment out of his effects.
United States v. Fisher et al., (358) 304

INSOLVENT—3.

1. The United States have no lien on the real estate of their debtor, until suit brought, or bankruptcy, or a notorious insolvency has taken place; or being unable to pay all his debts he has made a voluntary assignment of all his property; or having absconded, his property has been attached by process of law. *United States v. Hooe,* (73) 370
2. A discharge under an insolvent law, obtained by fraud, is a discharge in due course of law.
Simms v. Slacum, (300) 446

INSTRUCTIONS—2.

The instructions of the President of the United States to a commanding officer of a United States ship of war, if not warranted by law, will not justify the officer. *Little v. Barreme,* (170) 243

INSURANCE COMPANY OF ALEXANDRIA—1.

See Corporation.

INSURANCE, POLICY OF—1.

See Assumpsit, 3.

INSURANCE—2.

1. If the insured make a proposition to the underwriters to cancel a policy, which they reject, and afterwards assent to; but before information of such assent reaches the insured, they hear of the loss of their vessel, such proposition and assent do not in law amount to an agreement to cancel the policy. *Head et al. v. Providence Insurance Company,* (127) 229
2. If it be inserted in a policy that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned by the Portuguese for an attempt to trade illicitly, the underwriters are not liable for the loss.
Church v. Hubbart, (187) 249
3. An exclusion of the risk of seizure for illicit trade, means, of a lawful seizure.
Church v. Hubbart, (236) 265
4. A detention at sea to save a vessel in distress is such a deviation as discharges the underwriters.
Mason v. Blaireau, (268, 269) 275
5. A policy in the name of one joint owner "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint owner.
Graves et al. v. Boston Marine Insurance Company, (419) 324
6. The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual.
Graves et al. v. Boston Marine Insurance Company, (419) 324
7. The evidence of the knowledge the underwriters had of the intention of the insured at the time of making the policy, ought to be very clear to justify a court of equity in conforming the policy to that intention. *Id.* (*Ib.*) 324

INSURANCE—3.

1. If a policy upon a vessel has a clause "that if the vessel after a regular survey should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters.
Marine Ins. Co. v. Wilson, (187) 406
2. *Quære,* whether such report, even if it relate to the commencement of the voyage, would be conclusive evidence? *Id.* (*Ib.*) 406
3. See Non-Intercourse, 1.
4. If a vessel be insured at and from K to A, and take a cargo for B and A, and sail with intent to go first to B and then to A, and is captured before she arrives at the dividing point between A and B, this is a case of intended deviation only, and not of non-inception of the voyage insured.
Marine Ins. Co. v. Tucker, (357) 466
5. It depends upon the particular circumstances of the case, whether, if the vessel be captured and recaptured, the loss shall be deemed total or partial. *Id.* (*Ib.*) 466
6. A promise by a factor that he would write to his principal to get insurance, does not bind the principal to insure.
Randolph v. Ware, (503) 512

INSURANCE—4.

1. The capture of a neutral as prize by a belligerent is a total loss, and entitles the insured to abandon.
Rhinelander v. In. Co. Pennsylvania, (29) 540
2. The state of the loss at the time of the offer to abandon, fixes the rights of the parties.
Id. (*Ib.*) 540
3. *Quære,* whether the sentence of a foreign court of admiralty, condemning the vessel for breach of blockade, be conclusive evidence of that fact in favor of the underwriters.
Fitzsimmons v. Newport In. Co. (185) 591
4. Persisting in an intention to enter a blockaded port, after warning, is not attempting to enter.
Id. (*Ib.*) 591
5. The right of the insured to abandon and recover for a total loss, depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received.
Marshall v. Delaware In. Co. (202) 596
6. The technical total loss, arising from capture, ceases with the final decree of restitution, although the decree may not have been executed at the time of the offer to abandon. *Id.* (203) 596
7. A policy on a ship is an assurance of the ship for the voyage, not an insurance on the ship and the voyage. The underwriters undertake for the ability of the ship to perform the voyage, not that she shall perform it at all events.
Alexander v. Baltimore In. Co. (370) 650
8. The loss of the voyage as to the cargo, is not a loss of the voyage as to the ship. *Id.* (371) 650
9. If at the time of the offer to abandon, the ship be in possession of the master, in good condition and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover for a total loss of the vessel.
Alexander v. Baltimore In. Co. (371) 650
10. The sentence of a foreign court of admiralty, condemning a vessel for breach of blockade, is conclusive evidence of that fact in an action on the policy of insurance.
Croudson v. Leonard, (434) 670

INTEREST—4.

In an action upon a bond conditioned to perform a contract, interest may be recovered in a case not provided for by the contract.
United States v. Gurney, (333) 633

INTERROGATORIES—4.

See Admiralty, 20.

JEOFAILS—1.

A verdict will not cure a mistake in the nature of the action. *Insurance Co. of Alexandria v. Young,* (332) 126

See Assumpsit, 5.

JOINT OWNER—2.

See Insurance, 5, 6. Partners, 1, 2.

JUDGE—3.

See Court, 2.

JUDGES—4

See Jurisdiction, 17. Exceptions, 1, 2.

JUDGMENT—1.

See Assumpsit, 8. Office Judgment.

JUDGMENT—3.

See Collector, 2. Caveat, 1.

JUDICIARY—1.

1. A cause may by act of Congress be transferred from one inferior tribunal to another.
Stuart v. Laird, (299) 115

2. Congress may constitutionally impose upon the judges of the Supreme Court of the United States the burden of holding circuit courts.
Stuart v. Laird, (299) 115
3. The courts of the United States may declare an act of Congress to be unconstitutional.
Marbury v. Madison, (137) 60

JURISDICTION—1.

See Error, 1, 7.

1. The Supreme Court of the United States has not power to issue a mandamus to a Secretary of State, it being an exercise of original jurisdiction not warranted by the constitution.
Marbury v. Madison (137) 90
2. Congress have not power to give original jurisdiction to the Supreme Court, in other cases than those described in the constitution. *Id.* (*Ib.*) 60
3. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Id.* (175) 72
4. To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien. It is not sufficient to say that they reside in different states.
Abercrombie v. Dupuis, (343) 129
5. The plaintiff in error may show by affidavit that the matter in dispute exceeds 2,000 dollars in value. *Rules of Court,* (xviii) 11

JURISDICTION—3.

1. The want of proper parties is not a good plea to a bill in chancery which suggests that such parties are out of the jurisdiction of the court.
Milligan v. Milledge, (220) 417
2. If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction.
Strawbridge v. Curtiss, (267) 435
3. This court has not jurisdiction upon a writ of error to a state court, if the decision of the state court be in favor of the privilege claimed under an act of Congress.
Gordon v. Caldcleugh, (268) 436
4. All the rights to a testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.
Dixon v. Ramsay, (319) 453
5. If the court has not jurisdiction, the officer executing its process is a trespasser.
Wise v. Withers, (331) 457

JURISDICTION—2.

1. The courts of the United States have no jurisdiction between citizens of the United States unless the record expressly states them to be citizens of different states.
Wood v. Wagnon, (9) 191
Capron v. Van Noorden, (126) 299
2. A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort.
Capron v. Van Noorden, (126) 229
3. The courts of admiralty of the United States have jurisdiction in cases of salvage where all the parties are aliens, if the jurisdiction is not objected to. *Mason v. Blaireau,* (240) 266
4. *Quære,* whether the common law courts of the United States have jurisdiction where all the parties are aliens? *Bailiff v. Tipping,* (406) 320
5. The question of forfeiture of a vessel under the act of Congress against the slave trade, is a question of admiralty and maritime jurisdiction.
United States v. Schooner Sally, (406) 320
6. A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia in the circuit court of the United States for the Virginia District. *Hepburn v. Ellzey,* (445) 332

JURISDICTION—4.

1. The district courts of the United States are courts of prize, and have power to carry into effect the sentences of the old continental courts of appeal in prize causes.
Jennings v. Carson, (2) 531
2. See Admiralty, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 22.
3. When both parties are aliens, the courts of the United States have not jurisdiction.
Montalet v. Murray, (46) 545
4. If it does not appear upon the record that a suit might have been maintained in the courts of the United States, between the original parties to a promissory note, no suit can be maintained upon it in those courts by a subsequent holder.
Id. (*Ib.*) 545
5. The Supreme Court of the U. States has power to issue the writ of *habeas corpus ad subjiciendum.*
Ex parte Bollman and Swartwout, (75) 554
6. The Supreme Court of the U. States has no jurisdiction but what is given by the constitution or laws of the United States. *Id.* (93) 560
7. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.
Id. (93) 560
8. A court of the United States cannot enjoin proceedings in a state court.
Diggs v. Wolcott, (179) 587
9. It is incumbent upon the plaintiff in error to show that the Supreme Court of the United States has jurisdiction of the case.
United States v. Brig Union, (216) 600
10. The Supreme Court will hear *viva voce* testimony to show the value of the matter in dispute, upon a question of jurisdiction. *Id.* (*Ib.*) 600
11. The courts of the United States may examine into the jurisdiction of a foreign court whose sentence is offered in evidence; and if that foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence is to be disregarded. But the courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon municipal laws.
Rose v. Himely, (241) 608
12. If the complainant be a French citizen, and the defendant a citizen of the State of Georgia, the circuit court of the United States for the district of Georgia has jurisdiction, although the complainant and defendant are both executors, and their respective testators were both citizens of the state of Georgia.
Chappedelaine v. Decheneaux, (308) 630
13. In deciding the question of jurisdiction the court will look to the condition of the bond on which the suit is brought, and not to the penalty.
United States v. M'Dowell, (316) 632
14. An appeal or writ of error lies from the district court of the United States for the territory of Orleans to the Supreme Court of the United States.
Morgan v. Callender, (370) 630
15. If two citizens of the same state, in a suit in a court of their state, claim title under the same act of Congress, the Supreme Court of the United States has an appellate jurisdiction to revise and correct the judgment of that court in such case.
Matthews v. Zane, (382) 654
16. See Bank of Alexandria, 1.
17. The district judge may alone hold a circuit court, although there be no judge of the Supreme Court allotted to that circuit.
Pollard v. Dwight, (421) 666
18. All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried without a jury. *United States v. Schooners Betsy and Charlotte,* (443) 673
19. The question whether a seizure for violation of a law of the United States be of admiralty or common law jurisdiction is to be decided by the place of seizure, not by the place of the offense.
Id. (452) 676

JURY—3.

See Damages, 1.

1. See Exception, 2.
2. The jurors attending the circuit court of Pennsylvania district are entitled to 1 dollar and 25 cents per diem for their attendance.
Ex parte Lewis and others, (433) 670
3. See Jurisdiction, 18.

JUSTICES OF PEACE—1.

See Columbia District, 1.

JUSTICES OF PEACE—3.

1. *Quære,* whether the act of Congress abolishing the fees of the justices of peace of the District of

Columbia, can affect those justices who were in commission when the act was passed?
United States v. More, (159) 397
2. A justice of peace of the District of Columbia is an officer of the government of the United States, and exempt from militia duty.
Wise v. Withers, (331) 457
3. See Habeas Corpus, 1. Warrant, 1.

JUSTICE OF PEACE—4.

1. See Georgetown, 1. Deed, 1.
2. A person may be committed by one magistrate upon an affidavit made before another.
Ex parte Bollman and Swartwout (76) 555
3. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths. *Id.* (*Ib.*) 555

KENTUCKY—1.

1. Waste and unappropriated land in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries.
Wilson v. Mason, (45) 29
2. A writ of error upon a caveat lies from the district court of Kentucky district to the Supreme Court of the United States. *Id.* (*Ib.*) 29
3. A survey in Kentucky, not founded on an entry, is a void act, and constitutes no title whatever; and land so surveyed remains vacant and liable to be appropriated by any person holding a land warrant. *Id.* (*Ib.*) 29

KENTUCKY—3.

See Caveat, 1.

KENTUCKY—4.

Loose and vague expressions in an entry of lands in Kentucky may be rendered sufficiently certain by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects.
Marshall v. Currie, (172) 585

LANDS—1.

See Kentucky.

LANDS—2.

See Georgia. New Jersey.

LANDS—3.

1. Under the act of Pennsylvania of 3d April, 1792, for the sale of the vacant lands, &c., the grantee, by a warrant, of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who by force of arms of the enemies of the United States was prevented from settling and improving the said land for the space of two years from the date of his warrant, but during that time persisted in his endeavors to make such settlement and improvement, is excused from making such settlement as is described in the 9th section of the act, and the warrant vests in such grantee a fee-simple.
Huidekoper v. Douglass, (1) 347
2. *Quære,* whether a British subject, born in England in 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia by descent or devise? *Lambert v. Paine,* (97) 377
3. See Lien, 1.

LANDS—4.

See Kentucky, 1. Aliens, 2, 3. Georgia, 1, 4. Collector, 2. Confiscation, 1. Jurisdiction, 15. Covenant, 1, 2, 3. Evidence, 15, 16.

LAW—2.

See Legislative power.

LAW—4.

See Exception, 2. Municipal Law, 1, 2, 3, 4. Law of Nations, 1, 2, 3, 4. Bank of Alexandria, 1. Virginia, 3.

LAWS, FOREIGN—1.

See Admiralty, 5, 6.

LAWS, FOREIGN—2.

See Foreign Laws.

LAW OF NATIONS—4.

1. If a foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence will be disregarded.
Rose v. Himely, (241) 608
2. A seizure of a foreign vessel beyond the territorial jurisdiction, for violation of a municipal regulation, is not warranted by the law of nations.
Id. (*Ib.*) 608
3. *Quære,* whether a French court can, consistently with the law of nations and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States? *Id.* (243) 609
4. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.
Hudson v. Guestier, (294) 625
5. Every nation is the arbiter and vindicator of its own rights.
Appendix, (514) 706

LEASE—4.

1. An averment of a demise for three years is not supported by proof of a lease for one year certain, and two years' further possession on the same terms, by consent of the landlord.
Alexander v. Harris, (299) 627
2. The plea of no rent arrear admits the demise as laid in the avowry. *Id.* (*Ib.*) 627
3. The court is bound to give judgment for double rent under the statute of Virginia.
Id. (*Ib.*) 627

LEGACY—3.

If a testator declares that a certain legacy shall abate, if the personal and real estate of which he shall die seized and possessed shall not be sufficient to pay all his debts and legacies, and if the estate be more than sufficient at the time of the testator's death, but afterwards become insufficient by means of the bankruptcy of the executor, such legacy shall abate for the benefit of the other legacies. *Silsby v. Young,* (249) 429

LEGISLATIVE POWER—2.

The legislature cannot declare what the law was, or is, but what it shall be.
Ogden v. Blackledge, (272) 276

LETTER OF CREDIT—3.

See Assumpsit, 2.

LETTER OF CREDIT—4.

See Evidence, 9.

LETTERS PATENT—1.

Delivery is not necessary to the validity of letters patent. *Marbury v. Madison,* (178) 73

LETTERS TESTAMENTARY—3.

See Executors, 1 & 3.

LEVYING WAR—4.

See Treason.

LEX LOCI—3.

See Jurisdiction, 4.

LIBEL—4.

See Admiralty, 5, 7, 22.

LIEN—3.

The United States have no lien on the real estate of their debtor until suit brought, or a notorious insolvency, or bankruptcy; or being unable to pay all his debts, he has made a voluntary assignment of all his property, or having absconded, &c., his property has been attached by process of law.
United States v. Hooe, (73) 370

LIEN—4.

See Bottomry, 1, 2, 3.

LIMITATIONS—1.

Quære, whether the state of limitations can be given in evidence on the plea of *nil debet.*
Lindo v. Gardner, (343) 130
Appendix, (465) 179

LIMITATIONS—2.

1. The 9th section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claims within 7 years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary.
Ogden v. Blackledge, (272) 276
2. The act of limitations of North Carolina was suspended as to British creditors during the war
Id. (*Ib.*) 276
3. The act of Congress of 30th of April, 1790, limiting the prosecutions upon penal statutes, extends as well to penalties created after, as before that act, and to actions of debt for penalties as well as to informations and indictments.
Adams, q. t., v. Woods, (336) 297

LIMITATIONS—3.

1. The act of limitations of Virginia begins to run against a creditor residing out of the state, if he comes into the state for temporary purposes, provided the debtor be in the state at that time.
Faw v. Roberdeau, (174) 402
2. The treaty of peace prevents the operation of the act of limitations of Virginia upon British debts contracted before the treaty.
Hopkirk v. Bell, (454) 497
3. An agent for collecting debts merely, is not a factor within the 13th section of the act of limitations of Virginia. *Id.* (*Ib.*) 497

LIMITATIONS—4.

1. The act of limitations of Virginia is no bar to a British creditor's demand upon a promissory note dated 21st of August, 1772, although one of the plaintiffs was in the country after the treaty of peace, viz. in 1784, and remained here until his death, in 1785. *Hopkirk v. Bell,* (164) 583
2. The act of limitations of Georgia does not apply to mortgagees. Higginson v. Mein,
(415) 664
3. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry.
Shearman v. Irvine's Lessee, (867) 649

MAGISTRATE—4.

See Justice of Peace, 2, 3.

MANDAMUS—1.

1. The Supreme Court of the United States has not power to issue a mandamus to a Secretary of State of the United States, (notwithstanding the act of Congress), it being an exercise of original jurisdiction, not warranted by the constitution.
Marbury v. Madison, (137) 60
2. Congress has not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution. *Id.* (*Ib.*) 60
3. An act of Congress, repugnant to the constitution, cannot become a law. *Id.* (176) 73
4. The courts of the United States are bound to take notice of the constitution. *Id.* (178) 73
5. A commission is not necessary to the appointment of an officer by the executive.
Quære? Id. (*Ib.*) 73
5. A commission is only evidence of an appointment. *Id.* (*Ib.*) 73
6. Delivery is not necessary to the validity of letters patent. *Id.* (*Ib.*) 73
7. The President of the United States cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law.
Id. (160) 68
8. A justice of peace in the District of Columbia is not removable at the will of the President.
Id. (*Ib.*) 68
9. When a commission, for an officer not holding his office at the will of the President, is by him signed and transmitted to the Secretary of State to be sealed and recorded, it is irrevocable; the appointment is complete. *Id.* (*Ib.*) 68
10. A mandamus is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled. *Id.* (137) 60
11. When a commission for an officer is signed by the President, the appointment is complete.
Id. (157, 162) 67-8
12. Neither the delivery of the commission, nor its transmission to, nor actual receipt by, the officer, is necessary to the appointment.
Id. (159, 160) 67
13. Nor is the acceptance of the office necessary to the validity of the appointment.
Marbury v. Madison, (161) 68
14. The possession of the commission is not necessary to authorize the officer to perform the duties of the office. *Id.* (160) 68
15. When all the requisites have been performed which authorize a recording officer to record an instrument, and an order for that purpose has been given, the instrument, is in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. *Id.* (*Ib.*) 68
16. The keeper of a public record cannot erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law. *Id.* (*Ib.*) 68
17. There are certain acts of a Secretary of State which are not examinable in the courts of justice.
Id. (166) 70
18. He acts in two capacities; 1st. As the mere agent of the President; 2d. As a public ministerial officer of the United States. *Id.* (*Ib.*) 70
19. When the heads of departments are the political, confidential agents of the executive, merely to execute a will, in cases where he possesses a constitutional or legal discretion, their acts are only politically examinable. *Id.* (166, 170, 171) 70-1
20. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, an injured individual has a right to resort to the laws of his country for a remedy.
Id. (166) 70
21. The propriety, or impropriety of issuing a mandamus is to be determined, not by the office of the person to whom the writ is directed, but by the nature of the thing to be done. *Id.* (170) 71
22. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Id.* (175) 72
23. A mandamus may be directed to interior courts. *Id.* (*Ib.*) 72

MARINE ORDINANCES—1.

See Admiralty, 5.

MARINER—2.

1. If a vessel in distress is abandoned at sea by the master and all the crew, except one man, who is left either by design or accident, he is discharged from his contract as mariner of that vessel and entitled to salvage.
Mason v. Blaireau, (240) 266
2. If a mariner embezzles a part of the goods saved, he forfeits his salvage. *Id.* (*Ib.*) 266

MARYLAND—1.

See Bills of Exchange, 14. Acknowledgment.

MARYLAND—2.

See Insolvent, 1, 3.

MILITIA—3.

See Justices of Peace, 2. Court Martial, 1, 2.

MISTAKE—3.

1. He who sells property on a description given by himself, by mistake, is bound, in equity, to make good that description.
M'Ferran v. Taylor, (270) 436
2. *Quære,* if the mistake be of a matter deemed perfectly immaterial by both parties at the time of the contract, and which would not have varied the bargain if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?
M'Ferran v. Taylor, (270) 436

MISTAKE—4.

1. A letter of credit, directed by mistake to John and Joseph, and delivered to John and Jeremiah, will not support an action by John and Jeremiah against the writer of the letter for goods furnished to the bearer upon the faith of such letter of credit. It is not a written contract between the plaintiffs and defendant, and parol proof cannot be admitted to make it such. It is not a case of ambiguity, nor of fraud, nor of mistake on the part of plaintiffs.
Grant v. Naylor, (224) 603
2. See Award, 1.

MONEY—1.

See Execution, 1, 2, 3, 4.

MONEY—2.

1. It is no error that a decree is for pounds, shillings and pence sterling.
Telfair v. Stead, (414) 322

2. On a deed made in 1779, of land in Virginia, rendering an annual rent of 26*l.* current money for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land at the date of the contract, in specie, or other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller,* (10) 191

MONEY HAD AND RECEIVED—1.

See Bills of Exchange, 12, 15. Privity.

MORTGAGE—3.

1. A mortgage of part of the property, of a collector of the revenue to his surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgageor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortagee knew, at the time of taking the mortgage, that the mortgageor was largely indebted to the United States.
United States v. Hooe, (73) 370

2. A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged, or proved, and recorded.
Hodgson v. Butts, (140) 392

3. *Quære,* whether the mortgagee of a ship is entitled to the freight? *Id.* (*Ib.*) 392

4. A decree for the sale of mortgaged property, on a bill to foreclose is a final decree and may be appealed from. *Ray v. Law,* (179) 404

MORTGAGE—4.

1. See Confiscation, 1, 2. Limitations, 2.

2. The possession of the mortgageor is not adverse to the mortgagee.
Higginson v. Mein, (415) 664

MOTION—1.

See Execution, 1, 2, 3, 4, 5.

MUNICIPAL LAW—4.

1. The courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon their municipal laws.
Rose v. Himely, (241) 608

2. The prohibition, by France, of all trade with the revolted blacks of St. Domingo, was the exercise of a municipal, not of a belligerent right.
Id. (242) 608

3. A seizure of a foreign vessel beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such seizure cannot give jurisdiction to the courts of the offended country.
Id. (*Ib.*) 608

4. The trial of a municipal seizure must be regulated exclusively by municipal laws.
Hudson v. Guestier, (293) 625

NAVY OF UNITED STATES—2.

1. If there was no reasonable ground of suspicion that the vessel was trading contrary to law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.
Murray v. Charming Betsy, (64) 208

2. *Quære,* what degree of arming constitutes an armed vessel? *Id.* (*Ib.*) 208

3. A commanding officer of a ship of war of the United States is not justified by the instructions of the President of the United States, if those instructions are not warranted by law; but is answerable in damages to any person injured by his execution of those instructions.
Little v. Barreme, (170) 243

NAVY—3.

The commander of a United States ship of war, if he seizes a vessel on the high seas, without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss.
Maley v. Shattuck, (458) 498

NEUTRAL—1.

See Admiralty, 1, 8.

NEUTRAL—4.

See Insurance, 1.

NEW JERSEY—2.

Quære, whether a person born in the colony of New Jersey before the revolution, and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he has ever since resided, and who has always claimed to be a British subject, can now take and hold lands in the state of New Jersey by descent from a citizen of the United States? Whether by the act of the state of New Jersey, of October 4, 1776, he became a member of the new government against his will? Whether he could expatriate himself after the peace? And, if expatriated, whether he became thereby completely an alien to all intents and purposes?
M'Ilvaine v. Coxe's Lessee, (280) 279

NEW JERSEY—4.

1. On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof.
M'Ilvaine v. Coxe, (209) 598

2. See Aliens, 2.

NIL DEBET—1.

Quære, whether the statute of limitations can be given in evidence, on *nil debet?*
Lindo v. Gardiner, (343, 465) 130, 179

NON EST FACTUM—4.

See Deed, 1, 2.

NO RENT ARREAR—4.

See Lease, 1, 2, 3.

NON-INTERCOURSE—2.

See Admiralty, 1, 5.

NON-INTERCOURSE—3.

1. A vessel belonging to citizens of the United States in the year 1799, driven by distress into a French port and obliged to land her cargo in order to make repairs, and prevented by the officers of the French government from relading her original cargo, and from taking away, in exchange, any thing but produce or bills, might lawfully purchase and take away such produce, and such voyage was not illegal, so as to avoid the insurance.
Halleit v. Jenks, (210) 414

2. The act of June 13th, 1798, did not impose any disability upon vessels of the United States *bona fide* sold to foreigners residing out of the United States during the existence of that act.
Sands v. Knox, (499) 511

NORTH CAROLINA—2.

See Limitations, 1, 2.

NORTHWESTERN TERRITORY—1.

See Error, 7.

NOTARY PUBLIC—1.

1. *Quære,* whether the acts of a notary public, who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not actually sworn in due form?
Fenwick v. Sears, (260) 101

2. Whether, between contending parties, the certificate of a notary public that he is duly commissioned and sworn, can be contradicted?
Id. (*Ib.*) 101

NOTICE—1.

See Bills of Exchange, 11, 12.

Notice of an illegal act will not make it valid.
Wilson v. Mason, (45) 29

NOTICE—3.

1. Notice of the time and place of taking a deposition given to the attorney at law, is not sufficient under the law of Virginia.
Buddicum v. Kirk, (293) 444

2. An attorney at law may agree to receive, or to waive notice, and shall not afterwards be permitted to allege want of it.
Buddicum v. Kirk, (293) 444
3. If notice be given that a deposition will be taken on a certain day, and if not finished on that day, that the commissioners will adjourn from day to day until it be finished, and the commissioners adjourn over several intermediate days, such deposition is not taken agreeably to notice.
Id. (*Ib.*) 444

NOTICE—4.

1. The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice. *French v. Bank of Columbia,* (141) 576
2. The drawer of a bill of exchange is entitled to strict notice, if at the time of drawing he had a right to expect that his bill would be honored. *Ib.*
3. It is not necessary to give notice to the opposite party of the time and place of executing a commission. *Grant v. Naylor,* (224) 603

NUDUM PACTUM—1.

Can there be a *nudum pactum* in writing?
Appendix, (443) 169

OATHS—4.

See Justice of Peace, 3.

OFFICE JUDGMENT—1.

After the first term next following an office judgment in Virginia, it is a matter of mere discretion in the court, whether they will admit a special plea to be filed to set aside that judgment.
Resler v. Shehee, (110) 51

OFFICER—1.

See Mandamus, 5, 9, 11, 12, 13, 14, 15, 21.

OFFICER—3.

See Justice of Peace, 2. Navy, 1. Court Martial, 2. Trespass, 1.

OHIO—1.

See Error, 7.

OPINION—3.

See Court, 2.

ORLEANS—4.

See Jurisdiction, 14.

PARTNERS—2.

1. A policy in the name of one joint owner, "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner.
Graves et al. v. Boston Marine Insurance Company, (419) 324
2. The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual. *Id.* (*Ib.*) 324

PAYMENT—1.

See Bills of Exchange, 2, 4.

PAYMENT—2.

See Evidence, 1.
The principle upon which the presumption of payment arises from the lapse of time is a reasonable principle, and the presumption may be rebutted by any facts which destroy the reason of the rule.
Dunlop & Co. v. Ball, (180) 246

PAYMENT—3.

See Evidence, 8. Action, 1.

PAYMENT—4.

1. If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may, at any time, apply it to which account he pleases.
Mayor and Commonalty of *Alexandria v. Patten,* (317) 633
2. To an action on a bond conditioned to pay money on a certain day, payment on a subsequent day is not a good plea, without averring it to be the whole sum then due.
United States v. Gurney, (333) 639
3. See Evidence 14.
Cranch 1. 2. 3. 4.

PENAL STATUTES—2.

See Limitations, 3.

PENNSYLVANIA—1.

See Bills of Exchange, 23.

PENNSYLVANIA—3.

See Lands, 1.

PENNSYLVANIA DISTRICT—4.

See Jury, 2.

PERSONAL GOODS—3.

All rights to the testator's personal property are to be regulated by the laws of the country where the testator lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed. *Dixon v. Ramsay,* (319) 453

PETERSBURGH—3.

By the act of Congress of 10th of May, 1800, the collector of the District of Petersburgh was not restricted to a commission of 2½ per cent, on the moneys by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States. *United States v. Heth,* (399) 479

PLEADINGS—1.

See Bills of Exchange, 1, 2, 3, 4, 5, 8, 15, 21. Corporation. Debt, 2, 3, 4. Assumpsit, 8. Citizen. *Nil Debet.*

PLEADINGS—2.

1. It is not a good plea in bar to a bill in equity that the complainant has recovered a judgment at law against the executor of the debtor.
Telfair v. Stead, (408) 320
2. It is no cause of demurrer to a bill in equity against an executor, seeking a discovery of assets, that the complainant had a right of action at law.
Id. (409) 321

PLEADING—3.

1. See Evidence, 1.
2. In a declaration, the averment that the assignment of a promissory note was for value received, is an immaterial averment, and need not be proved. *Wilson v. Coëlman,* (193) 408
3. If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration which avers the note to have been given for value received.
Id. (*Ib.*) 408
4. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.
Milligan v. Milledge, (220) 417
5. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Id.* (*Ib.*) 417
6. A variance in date between the bond declared upon, and that produced on oyer, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.
Cooke v. Graham, (229) 420
7. A finding by a jury which contradicts a fact admitted by the pleadings, is to be disregarded.
M'Ferran v. Taylor, (270) 436
8. Upon the plea of payment to debt on bond, the defendant may give in evidence wheat delivered, on account of the bond, at a certain price; and also an assignment of debts to the plaintiff, part of which he collected, and part were lost by his negligence or indulgence. *Buddicum v. Kirk,* (293) 444
9. An assignment of debts cannot be pleaded as an accord and satisfaction to debt on bond.
Id. (*Ib.*) 444
10. *Quære,* whether a deputy marshal can plead in abatement that the *capias* was not served an him by a disinterested person?
Know v. Summers, (496) 510

PLEADING—4.

See Lease, 2. Account, 2. Covenant, 1.

POLICY OF INSURANCE—1.

See Assumpsit, 3.

POLICY—2.

See Insurance, 1, 2, 3, 5, 7.

POSSESSION—1.

See Bill of Sale.

POSSESSION—4.

See Admiralty, 14. Evidence, 13.

PRACTICE—1.

See Bills of Exchange, 1, 2, 3, 4, 5, 8, 9, 10, 12, 13, 14, 15, 21, 23, 24. Bill of Exceptions. Citation. Citizen. Evidence, 1. Error, 2, 3.

1. In Virginia, after the first term next following an office judgment, it is a matter of mere discretion in the court whether they will admit a special plea to be filed to set aside that judgment.
Besler v. Shehee, (110) 51

2. Money made on *fi. fa.* does not become the goods and chattels of the plaintiff, until it has been paid over to him; while it remains in the hands of the officer he cannot apply it to the satisfaction of another *fi. fa.* against the former plaintiff. *Turner v. Fendall,* (117, 136) 53-60

3. By the command of the writ the officer is to bring the money into court, there to be paid to the plaintiff. *Id.* (*Ib.*) 53-60

4. On a motion, in Virginia, against a sheriff, for not paying over money by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the next term succeeding that to which the execution has been returned. *Id.* (*Ib.*) 53-60

5. Money may be taken in execution if in the possession of the defendant. *Id.* (134) 59

6. Although the creditor should have been discharged under the insolvent law of Virginia, yet the motion against the sheriff for not paying over money made on a *fi. fa.* must be in the name of such creditor. *Id.* (132) 58

7. *Quære,* whether the statute of limitations can be given in evidence on the plea of *nil debet?*
Lindo v. Gardiner, (343, 465) 130, 179

8. The practice in the Supreme Court of the United States is to be conformable to that of the king's bench and chancery in England.
Rules of Court, (xvi) 11

9. A statement of the case must be furnished to the court by the counsel on each side of a cause.
Rules of Court, (xvii) 11

10. Evidence on motion to discharge bail, must be by deposition and not *viva voce. Id.* (*Ib.*) 11

11. Subpœna in equity must be served 60 days before the return day. If the defendant upon such service, shall not appear, the complainant may proceed *ex parte. Id.* (*Ib.*) 11

12. The plaintiff in error may show by affidavit, that the matter in dispute exceeds the value of 2,000 dollars. *Id.* (xviii) 11

13. When the defendant in error fails to appear, the plaintiff may proceed *ex parte. Id.* (*Ib.*) 11

14. If the writ of error issues within 30 days before the meeting of the court, the defendant in error may enter his appearance and proceed to trial; otherwise the cause must be continued.
Id. (*Ib.*) 11

15. Where the writ of error appears to be brought for delay only, the judgment shall carry interest at 10 per cent. per annum, by way of damages. In other cases 6 per cent. *Id.* (*Ib.*) 11

PRACTICE—2.

1. In Virginia a forthcoming bond which misrecites the amount of costs on the execution, is not thereby vitiated, if the aggregate of debt and costs be truly stated; but will support a judgment on motion. *Williams et al. v. Lyles,* (9) 191

2. The court will require a statement of the points of a case before argument.
Faw v. Marsteller, (10) 191
Reily v. Lamar et al., (349) 302

3. If a question upon which the judges below differ in opinion be certified to this court, and be here decided, the parties are not precluded from a writ of error where the whole cause is before the court.
Ogle v. Lee, (33) 198

4. Upon a case certified, this court can only consider the point upon which the judges below differed. *Id.* (*Ib.*) 198

5. The report of the assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum without explanation.
Murray v. Charming Betsy, (64) 209

6. If an appeal is prayed in the court below at the same term in which the decree is rendered, a citation is not necessary.
Reily v. Lamar, (349) 302

7. A citation must accompany the writ of error, or it will be dismissed.
Bailiff v. Tipping, (406) 320

8. In a bill in equity by executors it is not necessary to set forth their letters testamentary.
Telfair v. Stead, (408) 320

PRACTICE—3.

1. See Appeal, 1, 2, 3. Costs, 1, 2, 3, 4, 5.

2. If statements of the case are not furnished according to the rule of the court on that subject, the cause will be dismissed or continued.
Peyton v. Brooke, (93) 376

3. A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.
Field v. Milton, (514) 516

4. If usury be specially pleaded, and the court reject the evidence offered upon such a special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea. *Levy v. Gadsby,* (180) 404

5. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved.
Wilson v. Codman, (193) 408

6. Upon the death of the plaintiff and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.
Id. (*Ib.*) 408

7. See Pleading, 4, 5.

8. The want of proper parties is not a proper ground for dismissing the bill. *Id.* (*Ib.*) 408

9. If the executor has no assets, you may proceed in equity against the devisees and legatees.
Id. (*Ib.*) 408

10. See Pleading, 6. Variance, 1.

11. See General Rule.

12. To support a judgment on a collector's bond at the return term, it must appear by the record that the writ was executed 14 days before the return day. *Dobynes v. United States,* (241) 427

13. If the plaintiff in error does not appear, the defendant may either have the plaintiff called and dismiss the writ of error with costs, or he may open the record and go for an affirmance.
Montalet v. Murray, (249) 429

14. See Jurisdiction, 2, 3.

15. A general dismissal of the plaintiff's *caveat,* in Kentucky, does not purport to be a judgment upon the merits. *Wilson v. Speed,* (283) 441

16. See notice, 1, 2, 3.

17. The court upon a trial by jury is bound to give an opinion, if required, upon any point relevant to the issue. *Douglass v. M'Allister,* (298) 445

18. An appearance of the defendant, by attorney, cures all irregularity of process.
Knox v. Summers, (496) 510

PRACTICE—4.

1. See Admiralty, 6, 20.

2. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood v. Lide,* (180) 588

3. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. (*Ib.*) 588

4. The Supreme Court of the United States will hear *viva voce* testimony as to the value of the matter in dispute.
United States v. Brig Union, (216) 600

5. After deciding the question of value upon the weight of evidence produced, the court will not continue the cause for the party to produce further evidence of the value. (*Ib.*) 600

6. The certificate of commissioners named in a *dedimus* that they took, in due form of law, the oath annexed to the commission, is sufficient evidence of that fact. *Grant v. Naylor,* (224) 603

7. If the return of the commission be enclosed in an envelope, sealed by the commissioners, no other sealing by the commissioners is necessary.
Id. (225) 603

8. The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error. *Woods & Bemis v. Young,* (237) 607

9. The appearance of a defendant to a foreign attachment in the circuit court of the United States, waives all objection to the non-service of process. *Pollard v. Dwight,* (421) 666

PRESIDENT OF THE UNITED STATES—1.

1. A commission is not necessary to the appointment of an officer by the executive.
Marbury v. Madison, (178) 73
2. The President cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law. *Id.* (160) 68
3. A justice of peace in the District of Columbia is not removable at the will of the President.
Id. (*Ib.*)

See Mandamus.

PRESIDENT OF UNITED STATES—2.

The instructions of the President of the United States, if not warranted by law, will not justify the commander of a ship of war of the United States in executing them. *Little v. Barreme,* (170) 243

PRESUMPTION—2.

See Evidence, 1. Payment, 1.

PRIORITY—2.

In all cases of insolvency or bankruptcy of their debtor, the United States are entitled to priority of payment out of his effects.
United States v. Fisher et al., (358) 304

PROMISSORY NOTE—3.

1. An indorser may avail himself of usury between the maker and the indorsee.
Levy v. Gadsby, (180) 404
2. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved.
Wilson v. Codman, (193) 408
3. If the defendant plead the bankruptcy of the indorser in bar, a replication that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration which avers the note to have been given for value received.
Wilson v. Codman, (193) 408
4. If a promissory note be received as conditional payment for goods sold and delivered, and be passed away, the vendor of the goods cannot maintain an action for the goods sold and delivered.
Harris v. Johnston, (311) 450
5. An indorsee of a promissory note payable to order, cannot in Virginia, maintain an action at law, against a remote indorser; but he may in equity. *Id.* (*Ib.*) 450

PRIVITY—1.

See Bills of Exchange, 13, 15.
Is privity necessary to support *indebitatus assumpsit* for money had and received?
Appendix, (439) 168

PRIZE—4.

See Admiralty, 1, 2.

PROBABLE CAUSE—1.

See Admiralty, 3.

PROBABLE CAUSE—2.

See Admiralty, 2.
Quære, whether probable cause will excuse from damages? *Little v. Barreme,* (176) 245

PROCEEDINGS IN REM—4.

See Admiralty, 3, 4.

PROCESS—1.

1. Process shall be in the name of the President of the United States. *Rules of Court,* (xvi) 11
2. Subpœna in equity must be served 60 days before the return day. *Id.* (xvii) 11

PROMISSORY NOTES—1.

See Bills of Exchange, 1, 2, 3, 4, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

PROMISSORY NOTES—4.

1. It does not appear upon the record that suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder.
Montalet v. Murray, (46) 545
2. The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice. *French v. Bank of Columbia,* (141) 576

PROSECUTIONS—2.

See Limitations, 3.

PROTEST—1.

See Bills of Exchange, 5, 7, 10.

PUBLIC AGENT—1.

See Agent Public.

PURCHASER—4.

1. The purchaser of land from a collector of taxes must show the authority of the collector to sell.
Stead v. Course, (403) 660

RECORD—1.

1. When all the requisites have been performed which authorize a recording officer to record any instrument, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. *Marbury v. Madison,* (160) 68
2. The keeper of a public record cannot erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law. *Id.* (*Ib.*) 68

REFUGEE—4.

See Aliens, 2.

REGISTER—3.

See Forfeiture, 1.

REGISTER—4.

1. See Duties, 2.
2. If an American registered vessel be sold while at sea to a citizen of the United States, it is not necessary that there should be a bill of sale, or a new register, until the vessel return to some port in the United States.
United States v. Willings & Francis, (48) 546

RENTS—2.

See Money, 2. Depreciation, 1.

RENT—4.

See Lease, 1, 2, 3.

REPLEVIN—4.

See Lease, 1, 2, 3.

RESTITUTION—4.

See Admiralty, 1.

REVENUE—3.

See Lien, 1. Mortgage, 1. Non-Intercourse, 1, 2. Collector, 2. Petersburgh, 1. Forfeiture, 1.

REVENUE—4.

See Collector, 3.

REVERSAL—4.

1. Costs are not given upon reversal of judgment.
Montalet v. Murray, (47) 545

RULES OF COURT—1.

See Page xvi.

RULE OF COURT—3.

See General Rule, 239.

SALE, BILL OF—1.

See Bill of Sale.

SALE—4.

See Duties, 2. Register, 2. Collector, 1, 2.

SALVAGE—1.

See Admiralty, 1, 2, 3, 4, 7, 8, 9, 10.

SALVAGE—2.

See Admiralty, 7, 8, 9, 10, 11.

SALVAGE—4.

1. One half allowed for salvage in Delaware Bay.
Peisch v. Ware, (347) 643
2. Goods saved are not liable to the ordinary revenue laws. *Id.* (*Ib.*) 643

3. *Quære*, whether they ought to pay duties.
Persch v. Ware, (348) 643

SEAMEN'S WAGES—4.

1. Seamen's wages are a lien prior to bottomry.
Blaine v. Ship Charles Carter, (328) 336

SECRETARY OF STATE—1.

See Mandamus, 1, 7, 9, 10, 16, 17, 18 19, 20.

SEIZIN—4.

See Covenant, 1, 2, 3.

SEIZURE—2.

See Admiralty, 1, 2, 5, 6. Insurance, 3.

SEIZURE—3.

See Forfeiture, 1. Navy, 1.

SEIZURE—4.

1. Seizures under the prohibition by France of all trade with the revolted blacks of St. Domingo, could lawfully be made only within two leagues of the coast of that island.
Rose v. Himely, (242) 608
2. See Law of Nations, 2. Municipal Law, 3, 4. Admiralty, 15, 19, 23.

SENTENCE—4.

1. See Evidence, 4, 17. Admiralty, 8, 9, 11, 16.
2. A sentence of condemnation is necessary to devest the property in cases of capture or seizure.
Appendix, (514) 706

SET-OFF—2.

1. If a suit be brought by the assignor of an open account in his own name for the use of the assignee, the defendant may offset his claims against the assignee. *Winchester v. Hackley*, (342) 299
2. The defendant cannot offset bad debts made by the misconduct of the plaintiff in selling the defendant's goods as factor. *Id.* (*Ib.*) 299

SHERIFF—1.

See Execution, 1, 3, 5.

SHIP—3.

See Forfeiture, 1. Navy, 1.

SLAVE—3.

If the owner of a slave, removing into Virginia, shall take the oath required by the act of the Assembly, within 60 days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought into Virginia by a person claiming and exercising the right of ownership over him, eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than one year; and although the true owner never brought him in.
Scott v. Negro London, (324) 455

SLAVE—4.

See Gift, 2, 3.

SLAVE TRADE—2.

1. Prosecutions under the act of Congress against the slave trade must be commenced within two years after the offense committed.
Adams q. t., v. Woods, (336) 297
2. The question of forfeiture of the vessel under the act of Congress against the slave trade, is a question of admiralty and maritime jurisdiction.
United States v. Schooner Sally, (406) 320

SOVEREIGNTY—4.

See New Jersey.

STATE—2.

See Columbia, 3, 4.

STATE LAWS—4.

1. The courts of the United States will respect the construction given to the laws of the several states by the courts of such states.
Higginson v. Mein (419) 665
Pollard v. Dwight, (429) 668

STATEMENT OF FACTS—1.

See Admiralty, 11. Appeal, 2.

STATUTE OF FRAUDS—4.

1. The promise to pay the debt of another must be in writing, and cannot be explained by parol.
Grant v. Naylor, (235) 606

STATUTE—3.

The words of a statute, if dubious, ought to be taken most strongly against the law makers.
United States v. Heth, (413) 483

SUGAR—2.

See Duties.

SURVEY—4.

See Evidence, 15.

SURVEY OF LANDS—1.

See Kentucky, 1, 3.

TAXES—4.

See Collector, 1, 2.

TENANTS IN COMMON—4.

1. In Vermont, tenants in common may maintain a joint action of ejectment.
Hicks v. Rogers, (165) 583

TERRITORIES OF THE UNITED STATES—4.

See Trial, 2. Jurisdiction, 14. Treason, 3.

TREASON—4.

1. To constitute a levying of war there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against government is not sufficient.
Ex parte Bollman and Swartwout, (75) 554
3. See Admiralty, 20, 21.
2. When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. *Id.* (*Ib.*) 554
3. Any assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territories, although as a step to, or the means of, executing some greater projects, amounts to levying war.
Id. (*Ib.*) 554
4. The travelling of individuals to the place of rendezvous is not sufficient, but the meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, is such an assemblage as constitutes a levying of war. *Id.* (76) 555
5. To levy war, is to raise, create, make or carry on war.
Appendix, United States v. Burr, (470) 684
6. If an army be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplies that army with provisions, is guilty of an overt act of levying war.
Appendix, United States v. Burr, (470) 684
7. So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him. *Id.* (*Ib.*) 684
8. The term "levying war," is used in the constitution of the United States in the same sense in which it was understood in England and in this country to have been used in the statute of 25 Edward III. from which it was borrowed. (*Ib.*) 684
9. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war. *Id.* (472) 685
10. Those who perform a part in the prosecution of the war, may be correctly said to levy war.
Id. (*Ib.*) 685
11. But *quære*, whether he who counsels and advises, but performs no act in prosecution of the war; or he who, being engaged in the conspiracy, fails to perform his part, can be said to levy war.
Id. (*Ib.*) 685
12. If the war be actually levied, if the accused has performed a part, but is not leagued in the conspiracy, and has not appeared in arms against his country, he is not a traitor. *Id.* (474) 686
13. Constructive treason is where the direct and avowed object is not the destruction of the sovereign power. *Id.* (475, 476, 477, 478) 686–687

14. Where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. *Id.* (475) 686
15. The assemblage of men which will constitute levying war, must be a "warlike assemblage," carrying the appearance of force, and in a situation to practice hostility. *Id.* (480) 689
16. An assemblage of men with a treasonable design, but not in force, nor in condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war. *Id.* (482) 689
17. To assemble an army of 7,000 men is to place those who are assembled in a state of force. *Id.* (484) 691
18. The travelling of several individuals to the place of rendezvous, either separately or together, but not in military form, would not constitute levying war. The act must be unequivocal, and have a warlike appearance. *Appendix, United States v. Burr,* (485) 691
19. War can only be levied by the employment of actual force. Troops must be embodied; men must be openly assembled. *Id.* (487) 692
20. Arms are not an indispensable requisite to levying war; nor the actual application of force to the object. *Id.* (488) 693
21. It is not sufficient that an indictment for treason allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying an overt act of levying war, and this overt act must be proved as laid. *Id.* (490) 694
22. A person may be concerned in a treasonable conspiracy, and yet be legally as well as actually absent while some one act of the treason is perpetrated. (*Ib.*) 694
23. Every one concerned in a treasonable conspiracy is not constructively present at every overt act of the treason committed by others not in his presence. (*Ib.*) 694
24. A man may be legally absent who has counselled or procured the treasonable act. *Id.* (491) 694
25. The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *Id.* (493) 695
26. A person cannot be constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance if necessary. *Id.* (494) 696
27. If the particular overt act of treason charged be advised, procured or commanded by the accused, he is guilty accessorily and not directly as principal. *Id.* (494) 696
28. A person in one part of the United States cannot be considered as constructively present at an overt act committed in a remote part of the United States. *Id.* (*Ib.*) 696
29. The presence of a party, where presence is necessary to his guilt, is part of the overt act, and must be proved by two witnesses. *Appendix, United States v. Burr,* (500) 699
30. An indictment charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law. *Id.* (*Ib.*) 699
31. The part which a person takes in the war constitutes the overt act, on which alone he can be convicted. *Id.* (502) 700
32. *Quære,* whether he who procures an act may be indicted as having performed that act? *Id.* (*Ib.*) 700
33. If proof of procurement is admissible in England to establish a charge of actual presence, on an indictment for levying war, it is only by virtue of the operation of the common law upon the statute of Edward III. *Id.* (503) 700
34. *Quære,* whether there be in this country a similar operation of the common law? *Id.* (*Ib.*) 700
35. If proof of procurement be admissible upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony as would be required to prove actual presence. *Id.* (*Ib.*) 700
36. The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it; and the right of the prisoner to call for the record of conviction is not waived by pleading to the indictment. *Id.* (505) 701
Cranch 1, 2, 3, 4.
37. *Quære,* whether the crime of advising or procuring a levying of war, be within the constitutional definition of treason? *Id.* (*Ib.*) 701
38. If the overt act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant. *Id.* (506, 507) 702
39. Levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. *Id.* (507) 702
40. Appearing at the head of an army would be an overt act of levying war. So also detaching a military corps from it, for military purposes. *Id.* (*Ib.*) 702

TRESPASS—3.

Trespass lies against the officer who executes the process of a court not having jurisdiction. *Wise v. Withers,* (331) 457

TREATY, BRITISH—4.

See Limitations, 1. Aliens, 2, 8. Confiscation, 1, 2. Insurance, 4.

TRIAL—4.

1. See Exceptions, 1, 2. Evidence, 3. Jurisdiction, 18, 19
2. The clause of the 8th section of the act of Congress for the punishment of certain crimes against the United States, respecting the place of trial when crimes are committed out of the jurisdiction of any particular state, applies only to offenses committed in some river, haven, basin or bay not within the jurisdiction of a particular state, and not to the territories of the United States, where regular courts are established, competent to try those offenses. *Ex parte Bollman and Swartwout,* (77) 555
4. The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. *Appendix, United States v. Burr,* (505) 701

TRUST—3.

If the payee of a note hold it in trust, his bankruptcy will not take away his power to indorse it over to *cestui que trust,* *Wilson v. Codman,* (193) 408

UNITED STATES.

In all cases of insolvency of their debtor, the United States are entitled to a priority of payment out of his effects. *United States v. Fisher et al.,* (358) 304

USURY—3.

If A lend money to B, who puts it out at usurious interest, and agrees to pay A the same rate of interest which he is receiving upon A's money, this is usury between A and B, and an indorser of B's note to A may avail himself of the plea of usury. *Levy v Gadsby,* (180) 404

VARIANCE—1.

See Debt, 1.

VARIANCE—3.

A variance between the date of the bond as stated in the declaration, and as it appears on oyer, is a matter of substance, and fatal on the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke v. Graham,* (229) 420

VERDICT—1.

1. A verdict will not cure a mistake in the nature of the action. *Insurance Co. of Alexandria v. Young,* (332) 126
2. After verdict, every assumpsit in the declaration is to be taken as an express assumpsit. *Id.* (341) 129

VERDICT—3.

A finding by the jury which contradicts a fact admitted by the pleadings is to be disregarded. *M'Ferran v. Taylor,* (270) 436

VERMONT—4.

See Tenants in Common.

VESSEL—4.

See Register, 2. Duties, 2.